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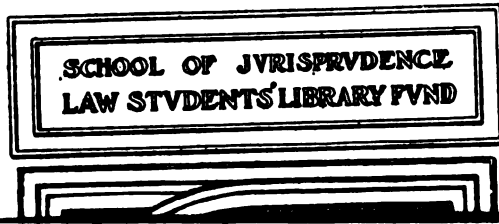
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VOL. 11

JOHN W. COLLIER, Admr., etc., of H. J. Collier, Deceased, Plff. in Err.,
v.
ORA LEE CARTER et al.

Georgia Supreme Court—February 15, 1917.

(146 Ga. 476, 91 S. E. 551.)

Deed — to take effect at death — effect.

1. Where an instrument in the form of and attested as a deed contains a clause that it is "to go into effect at the" signer's death, and where there is no other indication as to the intention of the signer, and the paper is duly delivered, it will be construed to be a deed postponing possession.

[See note on this question beginning on page 23.]

Appeal — denial of continuance.

2. In view of the circumstances attending the trial and the character of the case, the court did not abuse his

discretion in overruling the motion for a continuance.

[See 6 R. C. L. 549.]

Headnotes by GILBERT, J.

ERROR to the Superior Court for Echols County (Thomas, J.) to review a judgment in favor of plaintiffs, and overruling a motion for new trial, in an action brought to recover possession of certain land. *Affirmed.*

Statement by Gilbert, J.:

Ora Lee Carter and Mrs. Jennie Bell Carter brought an action of ejectment against John W. Collier, individually, and as administrator of the estate of H. J. Collier, deceased. The verdict was for the

plaintiffs. The defendant moved for a new trial, which was refused, and he excepted.

Upon the trial the plaintiffs introduced in evidence a warranty deed from H. J. Collier to Ora Lee Carter and Mrs. Jennie Bell Carter,

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dated March 9, 1911, conveying the land in dispute. Among other things, the deed stipulated that it was "to go into effect at the said H. J. Collier's death." Two of the attesting witnesses swore that they witnessed the deed at the request of the grantor, and that the justice of the peace who witnessed the instrument died afterward. It appeared that about March 9, 1911, H. J. Collier went to the home of the husband of one of the plaintiffs, and while there delivered the deed to Mrs. Jennie Bell Carter, one of the plaintiffs, telling her, at the time of delivery, to take the deed; that he did not know when he would die; and he said: "Here is the deed; this is yours; take it and take care of it, and at my death the property will be yours."

She retained possession of this deed continuously to the time of the trial. The defendant, John W. Collier, testified as follows: "I do not recognize that as H. J. Collier's signature; it is not his signature, to the best of my knowledge."

This was the entire evidence for the defendant.

Messrs. J. W. Haygood and Eldridge Cutts, for plaintiff in error:

Where the evidence is not contradicted as to the illness of counsel and his inability to attend, and as to his being the leading counsel, it is an abuse of discretion, or rather the court has no discretion, but must grant a continuance.

Bagwell v. State, 56 Ga. 406; Thompson v. Hays, 119 Ga. 167, 45 S. E. 970; Waxelbaum Co. v. Atlantic Coast Line R. Co. 3 Ga. App. 396, 59 S. E. 1129.

Mr. J. Munroe Bussell also for plaintiff in error.

Messrs. J. G. Cranford and E. K. Wilcox, for defendants in error:

The instrument in question is a deed conveying title in *præsentî*, with the right of possession postponed till after the death of the grantor.

West v. Wright, 115 Ga. 277, 41 S. E. 602; Isler v. Griffin, 134 Ga. 192, 67 S. E. 854; Brice v. Sheffield, 118 Ga. 128, 44 S. E. 843; Griffith v. Douglas, 120 Ga. 582, 48 S. E. 129.

The continuance of cases because of the absence of counsel is not favored.

Cotton States L. Ins. Co. v. Edwards, 74 Ga. 220; Poppell v. State, 71 Ga. 276; Wright v. State, 18 Ga. 383.

A continuance on account of the absence of counsel is largely discretionary.

Loyd v. State, 45 Ga. 72; Whitley v. Clegg, 120 Ga. 1040, 48 S. E. 406; Cooper v. Jones, 24 Ga. 474.

Gilbert, J., delivered the opinion of the court:

The decisive question in this case is whether the instrument quoted in the statement of facts shall be construed as a deed or as a will. Was it intended to pass title to the property in *præsentî*, with the right of possession postponed, or was it to be purely posthumous in its operation?

Under, the previous rulings of this court, as well as the great weight of modern authority in other jurisdictions, we think it clear that the instrument is a deed, with the right of possession postponed until the death of the grantor. The tendency of the earlier decision was to construe instruments as testamentary where the maker's intent appeared in any way to vest title after his death, without regard to the form of the instrument. Later a more liberal rule was followed toward giving to the instrument a construction which would accord with the intention of the signer, and which would uphold its validity. Seals v. Pierce, 83 Ga. 787, 20 Am. St. Rep. 344, 10 S. E. 589; Wynn v. Wynn, 112 Ga. 214, 37 S. E. 378; West v. Wright, 115 Ga. 277, 41 S. E. 602; Brice v. Sheffield, 118 Ga. 128, 44 S. E. 843; Griffith v. Douglas, 120 Ga. 582, 48 S. E. 129; Isler v. Griffin, 134 Ga. 192, 67 S. E. 854; Hughes v. Hughes, 135 Ga. 468, 69 S. E. 818; Pruett v. Cowsart, 136 Ga. 756, 72 S. E. 30; Mays v. Fletcher, 137 Ga. 27, 72 S. E. 408. The instruments in no two of the cases just cited are identical, nor is the instrument in any one of them identical with the instrument in the present case. They are all sufficiently similar to establish the principle already enunciated as the rul-

ing on the instrument construed herein. That in the case of *West v. Wright*, 115 Ga. 277, 41 S. E. 602, is a substantial duplicate of the one now under consideration. At least, it presents no material point of difference in the clause under differentiation. In the case of *Isler v. Griffin*, 134 Ga. 192, 67 S. E. 854, the writing recited that it was to take effect not only after the death of the maker, but also "from and after the death of my father and mother, and not until then." This was held to be a deed although possession was postponed to the contingency of the maker's death, and also to the death of the father and mother.

In *Phillips v. Phillips*, 186 Ala. 545, 65 So. 49, Ann. Cas. 1916D, 994, the instrument construed contained the language, "This deed not to take effect until after my death," and it was held to be a deed. *Somerville, J.*, said: "Courts have undertaken in innumerable cases to prescribe the general tests by which the character of an instrument in this regard is to be determined; but, while there seems to be a substantial uniformity of opinion as to the general principles to be applied, the cases themselves exhibit the utmost contrariety in the particular conclusion reached, even in the same jurisdictions."

In the opinion many cases are cited to sustain the rule, and in the notes appended thereto in Ann. Cas. 1916D, 994, recent cases in many states are cited and discussed, dealing with the rules of law applicable to the construction of an instrument which has the form of a deed, but which is limited to take effect at the death of the grantor, either by its express terms or by the mode of delivery. The early cases on this question are collated in the notes to *Hunt v. Hunt*, 7 Ann. Cas. 788, and *Ferris v. Neville*, 89 Am. St. Rep. 480. From the great wealth of authorities thus gathered and analyzed, the general agreement of courts may be stated: (1)

An instrument which is in the form of a deed, to take effect on the death of a maker, where there are no other indicia to prove the intention of the grantor, and the instrument can be held valid either as a deed or as a will, the court will construe the instrument so as to prevent its becoming inoperative. (2) Whether such an instrument is to be construed as a deed or a will depends upon the intention of the grantor as to the passing of a present irrevocable interest, or whether no interest should pass until after the death of the grantor, and whether the grantor, until then, should have the right to revoke the instrument. (3) The intention of the maker of the instrument is to be ascertained from the whole, construed together. (4) Looking to extraneous facts, the delivery of the instrument is some evidence that the same shall operate as a deed, although its terms provide that possession is postponed until after the death of the maker.

The instrument in the present case is in the form of a warranty deed. It is attested by two witnesses and by an officer authorized in express terms of the law to witness deeds. A will, to be valid, need not be witnessed by such an officer. This instrument was delivered on or about the date of its execution, and has remained thereafter in the possession of one of the grantees. Looking further to extraneous evidence, one of the witnesses swore that the grantor made the delivery in person, and accompanied the delivery with the statement that the grantee should "take the deed; that he did not know when he would die;" and he said: "Here is the deed; this is yours; take it and take care of it, and at my death the property will be yours."

The construction announced is in harmony with the above-stated adjudication, as well as with equity and justice.

Deed—to take effect at death—effect.

In view of the circumstances attending the trial and the character of the case, the court did not abuse his discretion in overruling the motion for a continuance.

Judgment affirmed.

All the Justices concur.

NOTE.

The effect on the validity and character of an instrument in form of a

deed, of provisions therein indicating an intention to postpone or limit the rights of the grantee until after the death of the grantor, is the subject of the annotation following *SHAULL v. SHAULL*, post, 23; specifically, as to cases construing the instrument to pass a present interest notwithstanding the provision that it is to take effect or operate at maker's death, see subd. III. c, 2 (g) of that annotation; and as to cases where instruments employing such language have been construed as a will, see subd. III. c, 2 (e).

JULIA SIMPSON et al., Appts.,
v.

MONK HOUSTON MCGEE et al.

Mississippi Supreme Court—October, 1916.

(112 Miss. 344, 73 So. 55.)

Deed — to take effect after death — effect.

A deed reciting that it is to take effect only after the death of grantor is testamentary in character and will not prevail against a subsequent deed by grantor, to take effect in present.

[See note on this question beginning on page 23.]

APPEAL by defendants and cross complainants from a decree of the Chancery Court for Newton County (Tann, Ch.) in favor of plaintiffs in a suit for the cancelation of a deed. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Byrd & Byrd, for appellants:

The clause in the instrument, "This to take effect only after the death of the said Harriet Houston," is testamentary in character, and the instrument therefore cannot be upheld as a deed.

Devlin, Deeds, 2d ed. § 855c; Wall v. Wall, 30 Miss. 91, 64 Am. Dec. 147; Sartor v. Sartor, 39 Miss. 760; Cunningham v. Davis, 62 Miss. 366; McDaniel v. Johns, 45 Miss. 632.

Mr. W. I. Munn for appellees.

Smith, Ch. J., delivered the opinion of the court:

On the 5th day of March, 1894, Harriet Houston executed and delivered to Babe, Monk, and Lutie Houston an instrument in writing, in form a deed, conveying certain

property, and containing the following provision: "This to take effect only after the death of said Harriet Houston." On the 17th day of October, 1904, Harriet executed and delivered to Julia Simpson a regular deed to the same property. Both of these instruments were properly acknowledged, and the first was filed for record in the office of the chancery clerk of Newton county on the 9th day of April, 1895, and the second on the 22d day of November, 1904. After the death of Harriet, which occurred in 1905, Babe, Monk, and Lutie Houston, appellees herein, filed a bill in the court below, praying for the cancelation of the deed executed by Har-

riety to Julia, and also of two deeds of trust which Julia had given on the property. Julia, the trustee, and beneficiaries in the deeds of trust given by her, who were made parties defendant to this bill, filed an answer and cross bill, praying for the cancellation of appellees' claim to the property. The decree was in accordance with the prayer of the original bill.

If the instrument executed by Harriet, under which appellants claim title to the land, is a deed, the decree of the court below is correct; if it is not a deed, but is testamentary in character, the decree is erroneous. It is clear from the language hereinbefore quoted from this instrument that it was the donor's intention that the instrument itself should not take effect, for any purpose, until after her death; consequently, under the rule announced in *Wall v. Wall*, 30 Miss. 91, 64 Am. Dec. 147, and

Deed—to take
effect after
death—effect.

ment itself should
not take effect, for
any purpose, until

applied in *Sartor v. Sartor*, 39 Miss. 760, and *Cunningham v. Davis*, 62 Miss. 366, it must be held to be testamentary in character, and therefore not a deed.

Reversed, and decree here in accordance with the prayer of appellants' cross bill.

NOTE.

The effect on the validity and character of an instrument in form of a deed, of provisions therein indicating an intention to postpone or limit the rights of the grantee until after the death of the grantor, is the subject of the annotation following *SHAULL v. SHAULL*, post, 23; specifically, as to cases holding that a provision that an instrument is to take effect or operate at maker's death characterizes the instrument as testamentary, see subd. III. c. 3 (e); as to cases construing instruments employing such language to pass a present interest, see subd. III. c. 2 (g).

MRS. NANNIE COX, Appt.,
v.
CHARLES M. REED.

Mississippi Supreme Court (Division A)—March 12, 1917.

(118 Miss. 488, 74 So. 330.)

Deed — to take effect at death — effect.

1. A deed is made testamentary by a provision that it "shall take and be in effect on and after the death" of the grantor. •

[See note on this question beginning on page 23.]

Evidence — to explain writing.

2. Parol evidence is not admissible to show the intention of grantor as to the character of an instrument which

is plain and unambiguous, so that its meaning can be ascertained from reading it.

[See 10 R. C. L. 1063, 1064.]

APPEAL by complainant from a decree of the Chancery Court for Tippah County (McGowen, Ch.) in favor of defendant in a suit to have certain land sold for a division of the proceeds between the parties. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Spight & Street, for appellant:

Whatever may be the form of the instrument or the circumstances of its execution and delivery, if, upon the

whole, the intention was that it should only have a future operation after death, it must be held to be a will.

Wall v. Wall, 30 Miss. 96, 64 Am. Dec. 147; 18 Cyc. 521, subd. c; 8 R. C. L.

933, 992; Sartor v. Sartor, 39 Miss. 771; Cunningham v. Davis, 62 Miss. 368; Turner v. Scott, 51 Pa. 126; Sperber v. Balster, 66 Ga. 317; Donald v. Nesbit, 89 Ga. 290, 15 S. E. 367; Pinkham v. Pinkham, 55 Neb. 729, 76 N. W. 411.

Mr. Thomas E. Pegram, for appellee:

The written instrument in controversy was a deed, and not testamentary in its character.

Wall v. Wall, 30 Miss. 91, 64 Am. Dec. 147; Myers v. Viverett, 110 Miss. 334, 70 So. 449; Rogers v. Rogers, — Miss. —, 43 So. 434; McDaniel v. Johns, 45 Miss. 632.

Sykes, J., delivered the opinion of the court:

The appellant, Mrs. Nannie Cox, filed her bill in the chancery court of Tippah county against Charles Reed, the appellee, in substance alleging that appellant and appellee are sister and brother, and that their father, Allen Reed, died seised and possessed of the lands involved in this controversy. The bill further alleges that Allen Reed and his wife in 1901 executed an instrument in writing which was intended as a will, devising the land in controversy to appellee; that this instrument was not properly witnessed as a will, and is therefore void; that the deceased, Allen Reed, left surviving him as heirs and distributees the appellant and the appellee. It then prays that the lands involved in this controversy be sold for a division of the proceeds. The answer of appellee denied that the instrument executed by Allen Reed was intended to be a will, but that it was in fact a deed. Appellee attempted by parol testimony to prove that Allen Reed intended the instrument to be a deed, and not a will. The chancellor sustained the contention of the appellee, and held that the instrument was a deed, and dismissed the bill of appellant, from which decree this appeal is prosecuted.

The sole question presented to this court for decision is whether or not this instrument is a deed or whether it is testamentary in char-

acter. The instrument reads as follows:

State of Mississippi, Tippah County:

Be it known that for and in consideration of the natural love and affection I have for and do bear toward Charley M. Reed, my son, and for \$1 cash in hand paid to us the receipt of which is hereby acknowledged, I hereby grant bargain sell and convey and warrant to him and to his heirs and assigns forever the following described property in said county of Tippah, Mississippi: All that portion of the northeast quarter of section 16 in township 3 of range 3 east except what has heretofore been sold off. This deed shall take and be in effect on and after the death of myself and wife.

Witness our signatures the 29th day of November, 1901.

his
A. X Reed.
mark

her
Mary An X Reed.
mark

State of Mississippi, Tippah County:

Personally appeared before me, E. C. McElwain, a justice of the peace of said county and state, the within named A. Reed and his wife, Mary An Reed, who acknowledged that they signed and delivered the foregoing instrument on the day and year therein mentioned.

Given under my hand this 29th day of November, 1901.

E. C. McElwain, J. P.

State of Mississippi, Tippah County:

I, J. W. Street, clerk of the chancery court, do hereby certify that the foregoing deed was filed for record the 6th day of May, A. D. 1913, at 9 A. M., and was recorded the same day.

This the 6th day of May, 1913.

J. W. Street, Clerk.

We think the intention of Allen Reed and his wife, who executed this instrument, can be ascertained

from a reading of the instrument, which is plain and unambiguous. It therefore follows that it was error of the lower court in admitting parol testimony relating thereto. 3 Jones, Ev. §§ 454 et seq.

In *Wall v. Wall*, 30 Miss. 91, 64 Am. Dec. 147, the court, in discussing the difference between a deed and a will, summarizes the rule as follows: "In the one case [a deed] the conveyance takes effect in presenti, to a certain extent; in the other it has no effect whatever until the death of the testator." See also *Sartor v. Sartor*, 39 Miss. 772.

In the case of *Cunningham v. Davis*, 62 Miss. 366, this court says: "If by it any present interest was vested, it should be held to be a deed. If it was not to have any operation or effect until the death of the maker, it could not be treated as a deed, although it was so named, and is in form a deed."

This court, in the case of *Simpson v. McGee*, 112 Miss. 344, ante 4, 73 So. 55, a case in which the instrument construed, in legal effect, is similar to the one above quoted, had the following to say: "It is clear from the language hereinbefore quoted from this instrument that it was the donor's intention that the instrument itself should not take effect for any purpose until after her

death; consequently, under the rule announced in [citing authorities], it must be held to be testamentary in character, and therefore not a deed." See also *Thomas v. Byrd*, 112 Miss. 692, 73 So. 725.

The clause in this instrument, "This deed shall take and be in effect on and after the death of myself and wife," clearly shows the intention of the signers of this instrument that it was not to be in any way operative or effective until after their death. No interest whatever was vested in presenti in the grantee, "Charley M. Reed." It therefore follows that the instrument was not a deed.

Reversed and remanded.

NOTE.

The effect on the validity and character of an instrument in form of a deed, of provisions therein indicating an intention to postpone or limit the rights of the grantee until after the death of the grantor, is the subject of the annotation following *SHAULL v. SHAULL*, post, 23; specifically, as to cases holding that a provision that an instrument is to take effect or operate at maker's death characterizes it as testamentary, see subd. III. c, 3 (e); as to cases construing instruments employing such language to pass a present interest, see subd. III. c, 2 (g).

RELA ANN WIMPEY et al., Appts.,

v.

MARY E. LEDFORD et al., Respts.

Missouri Supreme Court (Division No. 2) — May 25, 1915.

(— Mo. —, 177 S. W. 302.)

Deed — to take effect after death — effect.

1. A deed is not made testamentary in character by a provision that this deed is made with the understanding that the grantors shall have all controlling power over the property during their lifetime, and at their death then the title is to pass, the word "title" meaning "right to possession."

[See note on this question beginning on page 23.]

Appeal — meager abstract — sufficiency.

2. Although an abstract presents the entries from the record proper in a

confused and meager manner, it will be sufficient to authorize a review on the merits if the court is able from it to secure an understanding of the points for decision.

APPEAL by plaintiffs from a judgment of the Circuit Court for McDonald County (McNatt, J.) in their favor in part only in an action brought to ascertain and determine the title and interest of the parties in certain land. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. M. E. Benton and Horace Ruark for appellants.

Mr. O. L. Cravens for respondents.

Walker, J., delivered the opinion of the court:

This is an action under § 2535, Rev. Stat. 1909, to ascertain, define, and adjudge the title and interest of the parties thereto in certain lands in McDonald county, described below found for the plaintiffs as to part of the lands and for the defendants as to the remainder. From this judgment plaintiffs appeal.

Samuel Ledford is the common source of title under whom all the parties claim. In March, 1909, he died intestate, leaving his widow, Nancy, and ten children surviving him. The widow died before the institution of this suit. The parties plaintiff and defendant constitute eight of these children, two of the same not having been made parties hereto. The plaintiffs each claim title by inheritance to one undivided one tenth of the lands in question. The defendants claim to own the fee in the lands by virtue of a deed executed and delivered to them by Samuel Ledford and his wife in April, 1904. This instrument is in the ordinary form of a warranty deed. Samuel Ledford and wife, Nancy, are the grantors, Mary and Ester Ledford (the defendants) are the grantees, and the consideration is \$1. This limitation in the deed follows the description of the lands: "This deed is made with the understanding that the aforesaid Samuel Ledford and Nancy Ledford shall have all

controlling power of the above-described premises during their lifetime, and at their death then the title is to pass to parties of the second part."

Plaintiffs contend that these words render the instrument testamentary in character, and hence ineffectual to convey title as a deed. Defendants claim that the instrument passed title, and that they are the owners in fee of the lands. The controversy, therefore, demands a determination as to the character, and, as a consequence, the effect, of the said instrument.

For a complete understanding of the ruling of the trial court it is pertinent to say that it found for the defendants as to all the lands in the deed in question sufficiently described to enable it to be located. As to the remainder, the fee not having passed, on account of the imperfect description, the finding was for plaintiffs.

I. Preliminary to a consideration of the foregoing sole material issue herein, we advert, in passing, to respondents' complaint, not unfounded, as to the insufficiency of appellants' abstract. While it presents the entries from the record proper in a somewhat confused and meager manner, enough appears to enable the appellate court, after much labor which might have been obviated by a compliance with our rule 13 (105 Mo. iv., 169 S. W. ix.), to secure an understanding of the points presented for decision. This will suffice to authorize a review of the case upon the merits.

Appeal—meager abstract—sufficiency.

II. The instrument in question, omitting the words of limitation, possesses all the essentials of a conveyance of real estate; viz., competent parties, sufficient subject-matter or property conveyed, a valid consideration, which, though nominal, will not of itself invalidate the transfer (*Weissenfels v. Cable*, 208 Mo. 515, 106 S. W. 1028; *Wood v. Broadley*, 76 Mo. 23, 43 Am. Rep. 754; *Morriso v. Philliber*, 30 Mo. 145), the use of printed or written form, apt and proper words of conveyance necessary to show an intention to convey, followed by a formal signing, execution, and delivery to the grantees (2 Bl. Com. pp. 296-308; 13 Cyc. 526-573). In the presence of these requisites of a deed, in order to give the instrument a testamentary character, it will be necessary for the words of limitation to clearly indicate an intention on the part of the grantors not to pass a present irrevocable interest in the property upon the execution and delivery by them of the writing to the grantees.

While the added words may not of themselves prove infallible guides to determine the purpose of the instrument, if in ordinary use and of well-known meaning, although, as in this case, the grantors may be illiterate, and the words used those of the draftsman, they may well serve, when taken in connection with all other parts of the writing, to indicate the meaning and purpose of the grantors in using same. The use, therefore, of the words, "This deed is made," etc., in the limitation, authorizes the conclusion that the word "deed" is used in its plain, ordinary sense as a writing executed and delivered by which real estate is conveyed. *Lockridge v. McCommon*, 90 Tex. 238, 38 S. W. 33. If it meant other than this, the words following should so indicate. They are: "That the aforesaid (grantors named) shall have all controlling power of the above-described premises during their lifetime." In the

absence of any reservation, implied or expressed, against the vesting of the interest in the grantees upon the execution and delivery of the instrument, the words last quoted may reasonably be held to preserve in the grantors the right to use and enjoy the property during their lives. The language employed does not admit of a more extended meaning. The closing phrase of the limitation provides that "at their (grantors') death the title is to pass to the parties of the second part (the grantees)." The word "title" may be used synonymously with ownership or the right to possession, dependent upon the context. Lord Coke, who expounded the law with lucidity and learning, but administered it, especially in state cases, with a spirit of tyranny and oppression savoring of the Code of Draco, said that "a title was that means whereby the owner of lands hath the right to the possession of his property." 2 Co. Litt. 345. Down the long line of later judicial rulings we find like precedents authorizing the use of the word to indicate the right to possession (*Chapman v. Dougherty*, 87 Mo. loc. cit. 620, 56 Am. Rep. 469; *Dunster v. Kelly*, 110 N. Y. 558, 18 N. E. 361; *Campfield v. Johnson*, 21 N. J. L. 83), or an interest which is the evidence of a right (*Pratt v. Fountain*, 73 Ga. 261). Under these authorities, and impelled by reason, when all of the instrument is construed together, we are constrained to hold that the word "title," as employed in the limitation, means the right to possession; any other construction would render the word meaningless, because, the ownership having become vested in the grantees upon the execution and delivery of the instrument to them, the only purpose of the words of limitation was to fix the time when their right to the possession of the property would begin. Thus construed, the words of limitation are in harmony with the remainder of

Deed—to take
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death—effect.

the instrument, and indicate the intention of the grantors to create a present interest or estate in the grantees, but to defer the enjoyment of same by the latter until the death of the grantors. This construction does not militate against, but accords in principle with, the rulings of this court upon this subject (*Sims v. Brown*, 252 Mo. 58, 158 S. W. 624; *O'Day v. Meadows*, 194 Mo. loc. cit. 615, 112 Am. St. Rep. 542, 92 S. W. 637; *Dozier v. Toalson*, 180 Mo. 546, 103 Am. St. Rep. 586, 79 S. W. 420; *Christ v. Kuehne*, 172 Mo. 118, 72 S. W. 537) to the effect that, in determining whether an instrument is a deed or a will, the distinction should be preserved that, in the former, the grantor irrevocably passes the title at the time of the execution and delivery of the instrument, while in the latter the title is reserved in the maker, and the instrument may be revoked at his will, and become operative only upon his death. Other cases announce the same general rule, but dissimilarity in the facts and in the language employed from that in the instant case authorized the court to hold the instruments there under review testamentary in character. For example: In *Terry v. Glover*, 235 Mo. 545, 139 S. W. 337, the instrument provided that it was not to take effect until after the death of the grantor, and there was no delivery. The same provision as that in the *Terry Case* is contained in *Givens v. Ott*, 222 Mo. 395, 121 S. W. 23, in which there was likewise no delivery. In *Aldridge v. Aldridge*,

202 Mo. 565, 101 S. W. 42, the language employed was held to constitute a gift, and not a present transfer of the grantor's interest, and hence not a deed. In *Griffin v. McIntosh*, 176 Mo. 392, 75 S. W. 677, there was no delivery, and it was held that the words employed indicated that the instrument was not to become operative until after the death of the grantors. In *Murphy v. Gabbert*, 166 Mo. 596, 89 Am. St. Rep. 733, 66 S. W. 536, the instrument expressly recited that the deed was not to become effective to transfer the interest of the grantor until her death. These cases are readily distinguishable from the case at bar, and hence do not sustain appellants' contention.

The judgment of the trial court is affirmed.

Brown, J., concurs.

Faris, P. J., dubitante.

NOTE.

The effect on the validity and character of an instrument in form of a deed, of provisions therein indicating an intention to postpone or limit the rights of the grantee until after the death of the grantor, is the subject of the annotation following *SHAULL v. SHAULL*, post, 23; specifically, as to cases holding that an instrument is not given a testamentary character by a provision to the effect that the title is to vest or pass upon the maker's death, see subd. III. c, 2 (o); as to cases holding that such a provision impresses a testamentary character on the instrument, see III. c, 3 (n).

EMMA JOSEPHINE TRUMBAUER et al., Appts.,

v.

WALLACE RUST, Respt.

South Dakota Supreme Court—November 16, 1915.

(36 S. D. 301, 154 N. W. 801.)

Deed — to take effect after death — effect.

An instrument in the form of a deed, which is not executed so as to be valid as a will, which is delivered prior to the maker's death, and with

which he never attempts to interfere, is not made testamentary in character by a recital that it is to go into effect only after the death of the grantor, who is to have full possession of the land during life, and that grantee is to pay certain money to grantor's children within six months after grantor's death.

[See note on this question beginning on page 23.]

APPEAL by plaintiffs from a judgment of the District Court for Union County (Jones, J.) in favor of defendant in an action brought to cancel an alleged deed, and establish title to the land attempted to be conveyed. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Charles H. Bartelt, Edwin R. Winans, and Ellwood & Tourgee, for appellants:

The instrument in question remained subject to revocation during the lifetime of the grantors; and subject to rejection by the grantee after their death. It was therefore a testament, and not a deed, and as a will it is inoperative.

McGarrigle v. Roman Catholic Orphan Asylum, 145 Cal. 695, 1 L.R.A. (N.S.) 315, 104 Am. St. Rep. 84, 79 Pac. 447; Donald v. Nesbit, 89 Ga. 290, 15 S. E. 367; Sperber v. Balster, 66 Ga. 317; Barnes v. Stephens, 107 Ga. 441, 33 S. E. 399; Tuttle v. Raish, 116 Iowa, 831, 90 N. W. 66; Reed v. Hazleton, 37 Kan. 321, 15 Pac. 177; Pinkham v. Pinkham, 55 Neb. 729, 76 N. W. 411; Murphy v. Gabbert, 166 Mo. 596, 89 Am. St. Rep. 736, 66 S. W. 536; Turner v. Scott, 51 Pa. 126; Leaver v. Gauss, 62 Iowa, 314, 17 N. W. 522; Cunningham v. Davis, 62 Miss. 366; Carlton v. Cameron, 54 Tex. 72, 38 Am. Rep. 620; Ferris v. Neville, 127 Mich. 444, 54 L.R.A. 464, 89 Am. St. Rep. 494, 86 N. W. 960; Hester v. Young, 2 Ga. 31; Ragsdale v. Bowker, cited in 2 Bail. L. 590; Frederick's Appeal, 52 Pa. 338, 91 Am. Dec. 159.

Messrs. French & Orvis for respondent.

Whiting, J., delivered the opinion of the court:

The only question before us, upon this appeal, is the sufficiency of the facts, both those admitted by the pleadings and those found by the trial court, to sustain the judgment of such court. Such facts are as follows: On August 4, 1908, a purported deed to certain land was executed and acknowledged by the owner and his wife. The grantee therein was the son of the makers of such writing. The writing was

left with the party who took the acknowledgment, under instructions to such party that he deliver the same to the grantee; and he did deliver it to such grantee prior to the death of either of the makers. Both makers died before this action was brought. The writing was in form a full warranty deed, purporting to be given for a large money consideration; its granting clause reading, "do hereby grant, bargain, sell and convey unto said party of the second part, his heirs and assigns forever;" its habendum clause being in usual words, among its covenants being one that the makers "have good right to sell and convey the same in manner and form aforesaid," its closing words being those usually found in a deed. But it recited that it was subject to two conditions: "This deed is to go into effect, only after the death of both . . . grantors, the survivor to have full possession of the land during his or her natural life only;" and "the grantee herein agrees to pay" certain sums of money to the other children of the grantors, "within six months after the death of the survivor." The covenant against encumbrances was: "That the same are free from all encumbrances except that the payment of the above sums as stated shall be a legal lien against said real estate until paid."

The trial court held the writing to be a deed.

Cases almost without number have been before the courts of other jurisdictions, wherein such courts

have been called upon to determine whether a writing purporting to convey real property was a deed or a testamentary conveyance. There is no conflict of authority as to what distinguishes a deed from a testamentary conveyance. If it pass a present interest or right, even though the enjoyment thereof be postponed until the death of the grantor, it is a deed; if it pass no present interest or right, but is dependent upon the death of the maker to consummate it, it is testamentary in its nature, notwithstanding it be denominated a deed and is a deed in form and in some essential characteristics. If testamentary in character, its validity will depend upon whether it was executed in the manner prescribed by the Statute of Wills; and, if not valid, it will not even create a trust in favor of the grantee. *O'Gorman v. Jolley*, 34 S. D. 26, 147 N. W. 78.

In determining whether or not a writing is a deed, the controlling question and the ultimate object of inquiry should, in every case, be: What was the intent of the maker? If it was to postpone title and enjoyment until after his death, the writing is not a deed; if it was to confer title, but to postpone the enjoyment thereof, it is a deed. *Stroup v. Stroup*, 140 Ind. 179, 27 L.R.A. 523, 39 N. E. 864. Recognizing the above as the settled law, we find respondent contending that the writing before us was "a present conveyance of a future estate in fee, . . . reserving to the grantors a life estate and right of possession;" while appellants contend that it was "a testamentary instrument—an attempt to arrange the affairs of the grantors, prior to their death, in such a manner as would save to them both the title and right of possession during their lives."

An examination of the numerous cases wherein other courts have been called upon to determine whether a writing was a deed or a testamentary conveyance shows that, while in every case the court has sought to determine the intent

of the makers, and has held the writing to be either a deed or a testamentary conveyance, according as the ascertained intent of the grantor was to convey a present interest with enjoyment thereof postponed, or was to postpone both the vesting of the interest and the enjoyment thereof, each case stood upon its own peculiar facts,—the wording of the particular writing, the declarations of the maker at the time of executing the writing,—in fact, all surrounding circumstances tending to reveal the intent of the maker. As different minds will naturally reach different conclusions, though the evidence may be the same, it is not strange that we find, as we do, opinions from different tribunals which cannot be harmonized; yet a careful reading of each opinion generally reveals some fact that clearly justifies the conclusion reached by the court. After a careful review of the many cases, we are convinced that there is, in fact, but little conflict among the authorities.

Certain rules that should guide the court in arriving at the intention of the maker seem to be generally accepted. The intention of the maker is to be gathered, primarily, from the language of the writing itself. *Sharp v. Hall*, 86 Ala. 110, 11 Am. St. Rep. 28, 5 So. 497. The above rule is declared by §§ 928 and 1248, Civ. Code. This rule does not preclude the court, in doubtful cases, from a consideration of the facts and circumstances under which the writing was made, and which existed up to the death of the maker; and it is to be regretted, that, in the case at bar, the facts and circumstances under which this writing was made were not disclosed. Among those things which may appear in the writing itself, and which the courts hold tend to show an intent to make a deed, are designation of it as a deed, recitation of consideration, particular description of the land, covenants of title, the sealing and acknowledging of the writing. The delivering and recording of the writ-

ing are also matters to be considered. *Saunders v. Saunders*, 115 Iowa, 275, 88 N. W. 329.

There is one question that should always be borne in mind when interpreting a doubtful writing: How must it be interpreted to make of it a valid instrument? Section 1252, Civ. Code, provides: "A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable and capable of being carried into effect, if it can be done without violating the intention of the parties."

It stands conceded that, if the writing before us is not a deed, it has no validity whatever, as it was not executed and attested in accordance with the statutes relating to wills. There are peculiar reasons why the above rule should be most liberally applied under facts such as those before us. Actions wherein the courts are called upon to interpret writings such as the one now before us are almost always brought after the death of the makers thereof. Whatever may have been the full intent of the maker at the time he executed the writing, whether to vest a present interest with enjoyment thereof postponed, or to postpone both the vesting of the title as well as the enjoyment of the interest sought to be conveyed, one thing is beyond dispute: The maker intended that, at least after his death, title should vest in the grantee named. And another fact beyond dispute is that the maker died without undoing whatever he attempted to accomplish, thus leaving unequivocal evidence that he died, intending and expecting his grantee to have full title of the property. To declare such a writing to be invalid prevents the carrying out of such clear intent, and vests the property otherwise than as intended by the maker thereof, a thing no court should do unless driven thereto by some express provision of law. To avoid such result, the intent of the maker to do that which the law does not sanction should be clearly and

satisfactorily established. As said in *Jones on Real Property*, § 527, quoting from *Spencer v. Robbins*, 106 Ind. 580, 5 N. E. 726: "Unless an instrument which has been fully executed from every point of view seems to be a nullity, it will not be intended that the parties meant that it should be invalid, and some effect will, if possible, be given to it."

Unless the clear intent of the maker is to the contrary, a writing, not so executed as to be good as a will, should be given effect as a deed, if good as a deed, and a writing not so executed as to be good as a deed should be given effect as a will, if good as a will. *Saunders v. Saunders*, supra; *West v. Wright*, 115 Ga. 277, 41 S. E. 602; *Abney v. Moore*, 106 Ala. 131, 18 So. 60; *Hunt v. Hunt*, 119 Ky. 39, 68 L.R.A. 180, 82 S. W. 998, 7 Ann. Cas. 788.

Is it clear that the makers of the writing before us did not intend to convey a present interest in the property? We think not. They made use of that form of instrument by means of which a present interest is usually conveyed; they used words of present conveyance; they described the land with particularity; the habendum clause is in ordinary form, the makers covenanted that they were seised in fee, and that they had good right to sell and convey; they executed and acknowledged the writing in accordance with the law governing the execution and acknowledgment of deeds, and not in accordance with the law prescribing the manner of executing and attesting wills; in the very clause which, appellants contend, renders this writing not a deed, the makers designate it as a deed. If, as contended by appellants, the makers were attempting to arrange their affairs "in such a manner as would save to them both the title and right of possession during their lives." Why did they not use the method prescribed by law for so doing? Why did they not execute an instrument in the form of a will, and attest the same, as the law requires? It is worthy of note

that it does not appear that the makers had no other property; a person making a testamentary disposition of property generally includes all his property, and makes disposition of it all. There was no provision for payment of the debts of the makers, a provision found in many instruments in form of deeds, which have been construed by the courts to be testamentary in nature. We are convinced that the clear intent of the makers was to transfer fee title to the grantee, subject to a

Deed—to take
effect after
death—effect.

life estate reserved to themselves; that upon the delivery and acceptance of the deed by the grantee, both he and appellants became possessed of rights thereunder, which could not be changed by any future acts of the makers. Our conclusion seems to be in harmony with the great weight of authority. In the following cases, the writings before the courts were all in the usual form of, contained the usual provisions of, and were executed, acknowledged, and delivered as, deeds. Each contained a provision similar to the one in the writing before us.

In *Shackleton v. Seebree*, 86 Ill. 616: "This deed not to take effect until after my decease."

In *Saunders v. Saunders*, 115 Iowa, 275, 88 N. W. 329: "The intention being that this deed shall not be in force or take effect until after the death of the grantor herein."

In *Lauck v. Logan*, 45 W. Va. 251, 31 S. E. 986: "But it is hereby distinctly understood and stipulated that this deed shall take and be in full force and effect immediately after the said [grantor] shall depart this life, and not sooner."

In *West v. Wright*, 115 Ga. 277, 41 S. E. 602: "This deed shall take effect at my death."

In *Abney v. Moore*, 106 Ala. 131, 18 So. 60: "Provided always, and it is expressly understood and agreed, that this conveyance is not to take effect until after my death, and that at my death the title to the foregoing . . . lands are to

vest immediately in my said children."

In *Wilson v. Carrico*, 140 Ind. 533, 49 Am. St. Rep. 213, 40 N. E. 50: The above obligation "to be of none effect until after the death of [grantors], then to be in full force."

In *Wyman v. Brown*, 50 Me. 139: "This deed . . . not to take effect during my lifetime, and to take effect and be in force from and after my decease."

In *Kelley v. Shimer*, 152 Ind. 290, 53 N. E. 233: "This deed is to take effect and be in full force on and after the death of this grantor."

In *Hunt v. Hunt*, 119 Ky. 39, 68 L.R.A. 180, 82 S. W. 998, 7 Ann. Cas. 788: "This deed is not to take effect until the death of said [grantors]."

In *Love v. Blauw*, 61 Kan. 496, 48 L.R.A. 257, 78 Am. St. Rep. 334, 59 Pac. 1059: "The estate in said lands and tenements not to vest in said named grantees and their heirs until the death of [grantors], she reserving in herself a life estate therein. To have and to hold unto the said . . . grantees and their heirs from and after the death of the said [grantor]."

Among all the cases cited by appellants, we find but four that do not reveal facts clearly justifying the conclusion of the courts, that the writing under consideration did not pass a present interest. These four reveal facts analogous to those before us, yet the courts held that the writings were not deeds. We refer to *Donald v. Nesbit*, 89 Ga. 290, 15 S. E. 367; *Pinkham v. Pinkham*, 55 Neb. 729, 76 N. W. 411; *Murphy v. Gabbert*, 166 Mo. 596, 89 Am. St. Rep. 736, 66 S. W. 536; *Carlton v. Cameron*, 54 Tex. 72, 38 Am. Rep. 620. We think, however, that the great weight of authority supports the following statement found in *Wilson v. Carrico*, supra: "While it may be said, in regard to the point under consideration, that the authorities 'fight on both sides' of the question, however, we find that in the later decisions the courts are inclined to uphold a deed of this char-

acter, if, upon a reasonable interpretation of all its parts, it can be said that the grantor did not intend to create, or, in other words, execute, that which must be construed and held to be void. In construing written instruments, courts frequently do—and properly, too—give to an expression a meaning different from that which it ordinarily bears, in order to import sense into it, and make it speak that which, upon an inspection of the whole, the parties really intended that it should."

And we also believe the following, from the same authority, is peculiarly applicable to the facts before us: "In Broom's Maxims, 540, in translating a fundamental maxim of the law, it is said: 'A liberal construction should be placed upon written instruments, so as to uphold them, if possible, and carry into effect the intention of the parties.' Applying the reason and the principle, as laid down by the authorities cited, and guided by the rule of construction, that the clause in controversy must be construed most favorably to the grantee, we cannot hold that the grantors intended that this obligation was to be null and

void; but we are constrained to decide that it conveyed a present interest in the real estate to the grantee, the full enjoyment of which was, by the subsequent clause, intended to be postponed until after the death of both of the grantors. By so holding, we carry into effect the intention of the parties, and we fail to recognize wherein this construction works an injury or injustice to anyone."

The judgment appealed from is affirmed.

NOTE.

The effect on the validity and character of an instrument in form of a deed, of provisions therein indicating an intention to postpone or limit the rights of the grantee until after the death of the grantor, is the subject of the annotation following *SHAULL v. SHAULL*, post, 23; specifically, for cases holding that a provision to the effect that the instrument is to take effect or operate at maker's death did not prevent its passing a present interest, or impress a testamentary character upon it, see subd. III. c, 2 (g); for the converse, see subd. III. c, 3 (e).

THOMAS W. SHAULL et al., Appts.,
v.

SARAH C. SHAULL et al.

Iowa Supreme Court—February 6, 1918.

(182 Iowa, 770, 166 N. W. 301.)

Deed — to take effect at death — validity.

A deed delivered and recorded in obedience to directions by one to whom it was delivered in escrow, conveying land to one and his heirs and assigns, passes title, although it provides that it is to take effect immediately upon the death of the grantors.

[See note on this question beginning on page 23.]

APPEAL by plaintiffs from a judgment of the District Court for Iowa County (Howell, J.) in favor of defendants in an action brought to quiet title to certain land. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. J. M. Dower and Dutcher & Davis, for appellants:

The deed expressly, in writing, did not become effectual until the death of the grantors, and therefore it was testamentary and void.

Leaver v. Gauss, 62 Iowa, 314, 17 N. W. 522; *Wilson v. Carter*, 132 Iowa, 444, 109 N. W. 886; *Ransom v. Pottawattamie County*, 168 Iowa, 570, 150 N. W. 657; *Re Tolerton*, 168 Iowa, 677, 150 N. W. 1051; *Saunders v. Saunders*, 115 Iowa, 275, 88 N. W. 329; *Pinkham v. Pinkham*, 55 Neb. 729, 76 N. W. 411; *Carpenter v. Carpenter*, 141 Wis. 544, 124 N. W. 488; *Bigley v. Souvey*, 45 Mich. 370, 8 N. W. 98; 9 Enc. Ev. 371; *Van Husen v. Omaha Bridge & Terminal R. Co.* 118 Iowa, 377, 92 N. W. 47.

Messrs. Popham & Havner, for appellees:

Where a deed is executed and delivered into the hands of a third person to be held in escrow, and is not recalled, the effect is to pass an interest in præsent.

Lippold v. Lippold, 112 Iowa, 134, 84 Am. St. Rep. 331, 83 N. W. 809; *Newton v. Bealer*, 41 Iowa, 334; *Saunders v. Saunders*, 115 Iowa, 275, 88 N. W. 329; *Miles v. Miles*, 168 Iowa, 153, 150 N. W. 21; *Ransom v. Pottawattamie County*, 168 Iowa, 570, 150 N. W. 657.

The question of delivery is generally held to be one of intent, and, ordinarily, where it appears that the grantor intended to part with the control of the deed and to pass the present title, the delivery is sufficient for that purpose.

Saunders v. Saunders, 115 Iowa, 275, 88 N. W. 329; *White v. Watts*, 118 Iowa, 549, 92 N. W. 660; *Foreman v. Archer*, 130 Iowa, 49, 106 N. W. 372; *Hinson v. Bailey*, 73 Iowa, 544, 5 Am. St. Rep. 700, 35 N. W. 626; *Schillinger v. Bawek*, 135 Iowa, 131, 112 N. W. 210; *Kneeland v. Cowperthwaite*, 138 Iowa, 193, 115 N. W. 1026; *Lacey v. State*, 152 Iowa, 477, 132 N. W. 843.

If the right to the property passed by the conveyance beyond the control of the grantor, it was a vested right.

Lacey v. State, supra; *Lamb v. Morrow*, 140 Iowa, 89, 18 L.R.A. (N.S.) 226, 117 N. W. 1118.

The declaration that the deed shall not go into effect until the death of the grantor does not give it a testamentary character.

Kelly v. Shimer, 152 Ind. 290, 53 N. E. 233; *Jones*, Real Prop. § 527; *Wilson v. Carrico*, 140 Ind. 533, 49 Am. St.

Rep. 213, 40 N. E. 50; *Owen v. Williams*, 114 Ind. 179, 15 N. E. 678; *Spencer v. Robbins*, 106 Ind. 580, 5 N. E. 726; *Gano v. Aldridge*, 27 Ind. 294; *Stout v. Dunning*, 72 Ind. 346.

If the provision, "This deed to take effect immediately upon the death of both the grantors herein," is in conflict with the granting clause, the granting clause must prevail.

Green Bay & M. Canal Co. v. Hewitt, 55 Wis. 96, 42 Am. Rep. 701, 12 N. W. 382; *Cates v. Cates*, 135 Ind. 272, 34 N. E. 957.

The instrument should be held to be a valid instrument, if possible.

Cates v. Cates, supra.

Stevens, J., delivered the opinion of the court:

The plaintiffs, and the defendants *Michael Shaull* and *Eva Shriver*, are the children of *George W. Shaull*, deceased. Defendant *Sarah C. Shaull* is his widow. The plaintiffs, being four in number, claim a four-sixths' interest in a certain 80 acres of land, of which it is claimed *George W. Shaull* died seised. They bring this action, asking that their title be quieted as against the defendants. Defendants deny that the plaintiffs have any interest in the land, or had any interest in the land at the time of the death of *George W. Shaull*, as his heirs or otherwise. *Michael Shaull* claims to be the absolute owner of the said 80 acres of land, by virtue of a warranty deed executed by *George W. Shaull* and his wife to *Michael Shaull*, on April 17, 1909. The widow joins in the claim of *Michael*, and alleges that, under the deed, she is entitled to a life estate. Plaintiffs' reply is that the instrument is void, because testamentary in its character. There are other allegations in the reply which we need not consider. There was a trial to the court, the decree entered in favor of the defendants, holding that *Michael Shaull* is the owner of the property, subject to a life estate in the widow *Sarah C. Shaull*, and decreeing that plaintiffs have no interest in the property in controversy.

It is conceded that the plaintiffs are heirs at law of *George W.*

Shaull, and are entitled to share in whatever property he left, and would be entitled to share in this property were it not for the execution of this deed. The deed relied upon by defendants recites: "We, George W. Shaull and Sarah C. Shaull his wife, in consideration of the sum of \$5,600 in hand paid by Michael Shaull, . . . do hereby sell and convey unto Michael Shaull and to his heirs and assigns, the following described premises: [Here follows a description of the property in controversy.]"

Following the description this clause appears: "This deed to take effect immediately upon the death of both the grantors herein," followed by the usual covenants of warranty of title, against encumbrance, and for quiet enjoyment.

The only question here for our consideration is whether or not the clause in the deed, to wit, "This deed to take effect immediately upon the death of both grantors herein," renders the deed void as an instrument of conveyance. It appears that this deed was executed on the 17th day of April, 1909, and retained in the possession of George W. Shaull, the grantor therein named, until September 27, 1911. On the 27th day of September, 1911, the said George W. Shaull delivered the said instrument to one Arthur M. Vette, president of the People's Savings Bank at Marengo, Iowa, and took his receipt therefor in the following words:

Received of George W. Shaull warranty deed dated April 17, 1909, for east $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 16, township 80 north, range 11 west of 5th P. M., left in escrow to be delivered to his son Michael Shaull, to take effect immediately upon the death of George W. Shaull, for a consideration of \$5,600.

[Signed] Arthur M. Vette.

On the 31st day of January, 1912, Mr. Vette and one Simmons went to the home of the deceased, and at that time the deceased told Mr. Vette that he wanted it recorded so

11 A.L.R.—2.

he would be sure it would be carried out the very way he wanted it to be. Mr. Simmons testified that he said to Mr. Vette that he would like to have him put it on record; that he thought it would be safer to do that than to keep it off the record. Mrs. Sarah C. Shaull, the mother, testified that he said he wanted it recorded, and wanted it handed over to Mike. He said he wanted Mike to have it. He said: "Record it, and hand it over to Mike." Thereafter it appears that deceased gave to Vette the following instructions in writing:

We hereby authorize Arthur M. Vette, president of the People's Savings Bank of Marengo, Iowa, to have the following deed recorded which was left in escrow with him September 27, 1911, and to be delivered to Michael Shaull upon the death of both grantors [here follows a description of the property], which was executed by grantors the 17th day of April, 1909.

Signed this 31st day of January, 1912.

George Shaull.

In accordance with the verbal instructions so given, Mr. Vette caused the deed to be recorded, as directed, on January 27, 1912, and within a few days thereafter, it is claimed by him, delivered the deed so recorded to Michael Shaull.

Upon this state of the record, we are asked to say that the deed so drawn, upon delivery, passed to Michael Shaull the fee title to the land in controversy, immediately upon its delivery, notwithstanding the limitation in the deed. The court below held that the deed passed title to Michael upon delivery, and that the words of the deed did not postpone the passing of title until the death of the grantors. This holding can be supported only on the theory that the deed itself conveyed the title in presenti, and that on the delivery to Vette, to be delivered to Michael on the death of the testator, the title passed immediately to Michael, the enjoyment of

the thing granted, only, being postponed until the death; or that the limitation, if construed to defeat the grant, being in the habendum, was void as repugnant to the grant, a holding which is supported by some of the authorities.

The rule adopted by this court in *Burlington University v. Barrett*, 22 Iowa, 72, 92 Am. Dec. 376, as follows: "If the instrument passes a present interest, although the right to its possession and enjoyment may not accrue till some future time, it is a deed or contract; but if the instrument does not pass an interest or right till the death of the maker, it is a will, or testamentary paper,"—prevails, in substance at least, in all jurisdictions in this country. There is, however, very great apparent conflict in its application by the courts of the different states, and it has not always been consistently applied by the courts of the same state.

One rule of construction to be observed is to ascertain and carry out the intention of the grantor, if possible; and, if the instrument is without ambiguity, such intention must be gathered therefrom. It is also a familiar rule of construction that effect must be given to all parts of the instrument, if possible. *Wilson v. Carter*, 132 Iowa, 442, 109 N. W. 886; *Yeager v. Farnsworth*, 163 Iowa, 537, 145 N. W. 87.

It is quite earnestly argued by counsel for appellant that the instrument in suit is clearly testamentary in character, and that the case is ruled by our prior decisions; whereas counsel for appellee maintains that the instrument may be given effect as a deed, without in any way transgressing any prior holding of this court. Before proceeding to a discussion of the question here presented, it may be profitable to determine the exact question before the court in each of the decided cases.

In *Burlington University v. Barrett*, supra; *Tuttle v. Raish*, 116 Iowa, 331, 90 N. W. 66; *Re Tolerton*, 168 Iowa, 677, 150 N. W. 1051; *Re Bybee*, 179 Iowa, 1089, 160 N. W.

900, and *Haulman v. Haulman*, 164 Iowa, 471, 145 N. W. 930, the instrument was either a contract or conveyance, not in the usual form of a deed.

In *Saunders v. Saunders*, 115 Iowa, 275, 88 N. W. 329; *Wilson v. Carter*, supra; *Leaver v. Gauss*, 62 Iowa, 314, 17 N. W. 522, and *Lewis v. Curnutt*, 130 Iowa, 423, 106 N. W. 914, the instrument was, in form, a deed.

The instrument construed by the court in *Burlington University v. Barrett*, supra, was in form and purpose so wholly unlike that before us in this case as to afford little or no assistance, beyond the statement of the rule above quoted.

In *Tuttle v. Raish*, 116 Iowa, 331, 90 N. W. 66, the instrument contained no words indicating an intention to convey the title to Jennie Tuttle, wife of the party executing the instrument, and it was neither in the form of a deed nor will, and expressly provided that "in the event of my death without children, . . . I . . . do hereby make and constitute my wife, Jennie Tuttle, the sole owner in her own right . . . of all of our property. . . ."

The court rightly held that no present interest passed under the instrument, and the case is controlling in the case at bar only in so far as it reaffirms the rule announced in *Burlington University v. Barrett*, 22 Iowa, 72, 92 Am. Dec. 376.

Re Tolerton involved a trust deed which, it was claimed, was testamentary in character; but same was sustained as a deed, and the language of the instrument was in no sense similar to that in the deed under consideration.

The instrument involved in *Ransom v. Pottawattamie County*, 168 Iowa, 570, 150 N. W. 657, was, in *Re Bybee*, construed as a will, and therefore entitled to probate.

Haulman v. Haulman, 164 Iowa, 471, 145 N. W. 930, is in no sense in conflict with the conclusion reached in this case, and throws light upon

the question here presented, only in so far as it states, or discusses, general rules to be observed and followed in the construction of written instruments of like character.

We come now to the consideration of cases more nearly analogous to the question before us, and in which the instruments before the court were deeds in form. The one most frequently cited by this and other courts is *Leaver v. Gauss*, 62 Iowa, 314, 17 N. W. 522. In that case the deed contained the following language: "To commence after the death of both the said grantors."

And also the following: "It is hereby understood and agreed between the grantors and the grantee that the grantee shall have no interest in the said premises as long as the said grantors, or either of them, shall live, and that, after the death of both the said grantors, the grantee shall have and hold the premises by fee simple title."

It will be observed that that instrument provided that it shall "commence after the death of both grantors," that they "shall have no interest in said premises" so long as either of the grantors survived, and that, "after the death of both . . . grantors, the grantee shall have and hold the premises by fee simple title."

The instrument twice, in express words or substance, states that the instrument shall become effectual to pass title at the death of grantors, and at least once, by express language, negatives any intention to pass title until after the death of grantors. The instrument was held testamentary in character and void.

The court held the intention of the grantor to pass a present interest, and to postpone the enjoyment of it, was apparent in *Saunders v. Saunders*, 115 Iowa, 275, 88 N. W. 329. The court in distinguishing this case and *Leaver v. Gauss*, supra, gives special emphasis to the language of the latter, negating the intention to pass a present interest.

In *Wilson v. Carter*, 132 Iowa, 442, 109 N. W. 886, the language

used, while affirming the intention to convey title to the grantee named, negatively declared that no title should pass until delivery of the deed after the death of grantor. The grantor clearly did not intend that the delivery of the deed to an escrow should pass title, or that title should pass until the instrument was delivered after her death.

Lewis v. Curnutt, 130 Iowa, 423, 106 N. W. 914, involved the construction of a deed and a separate instrument contemporaneously executed; but the deed was a warranty deed in the usual form, without qualification or limitation, and the necessity for construction arose because of the contract. We will refer to this case later in this opinion.

We now desire to consider a few decisions selected from the reports of other states, at random. These will serve to illustrate both the difficulties with which courts have to contend in cases of this character, and their divergent views thereon.

Deeds containing the usual granting clause and covenants were sustained as valid instruments of conveyance, notwithstanding the following words were used in the habendum:

"This deed not to take effect until the death of the said John and S. E. Hunt." *Hunt v. Hunt*, 119 Ky. 39, 68 L.R.A. 180, 82 S. W. 998, 7 Ann. Cas. 788.

"This deed shall take and be in full force and effect immediately after the said William Logan shall depart this life, and not sooner." *Lauck v. Logan*, 45 W. Va. 251, 31 S. E. 986. (The court in this place held that the intention of grantor was to reserve a life estate.)

"To be of no effect until after death of grantor, and then to be in full force." *Wilson v. Carrico*, 140 Ind. 533, 49 Am. St. Rep. 213, 40 N. E. 50.

"This deed not to take effect until after my decease, not to be recorded until after my decease." *Shackleton v. Seebree*, 86 Ill. 616.

"Not to take effect during my life-

time, and to take effect and be in force . . . after my decease."

Wyman v. Brown, 50 Me. 139.

"This deed to take effect at my death." West v. Wright, 115 Ga. 277, 41 S. E. 602.

"This conveyance is not to take effect until after my death, and that at my death the title to the foregoing described lands are to vest immediately in my said children." Abney v. Moore, 106 Ala. 131, 18 So. 60.

"And the deed shall go into full force and effect at my death." Bunch v. Nicks, 50 Ark. 367, 7 S. W. 563.

"To be in force from and after my decease, and not before." Latimer v. Latimer, 174 Ill. 418, 51 N. E. 548. (In this case, however, the grantee, who was the son of grantor, entered into possession and incurred expense in improvements before the grantor's death.)

"To have and to hold the above-described premises to the said Bryant P. Wynn, of the second part, his heirs and assigns, to be his at my death, and the death of my wife." Wynn v. Wynn, 112 Ga. 214, 37 S. E. 378.

"This deed is not to take effect until the death of Jesse Phillips, . . . [who] is to have and keep full possession of said farm during his life, and to have all proceeds of said farm until his death." Phillips v. Thomas Lumber Co. 94 Ky. 445, 42 Am. St. Rep. 367, 22 S. W. 652.

On the other hand, the following language was held testamentary and the instrument void:

"All my right, title, interest, and claim to the land described in the within deed to Diana McGahey, her heirs and assigns, for her sole benefit and use during her natural life. After her death the same to be divided among my legal heirs. Provided this assignment shall not be of any effect until after my death." Coulter v. Shelmadine, 204 Pa. 120, 53 Atl. 638.

"This deed is to take effect and be in full force from and after my death." Pinkham v. Pinkham, 55 Neb. 729, 76 N. W. 411.

"The conveyance of land herein named shall be and continue the property of the first party during his lifetime, and the remainder to said second party immediately at the death of said first party. But in the event of the death of the second party before the said first party, then the estate herein shall go to said first party as before." Bigley v. Souvey, 45 Mich. 370, 8 N. W. 98.

"But in no event is this deed to go into effect until after my death." Donald v. Nesbit, 89 Ga. 290, 15 S. E. 367.

"The intention of this instrument of writing is such that Mrs. Ann Ellison [the grantor] relinquishes her entire right at her death; then this deed is to immediately come into effect, but not until then." Murphy v. Gabbert, 166 Mo. 596, 89 Am. St. Rep. 733, 66 S. W. 536.

See also Griffin v. McIntosh, 176 Mo. 392, 75 S. W. 677; Hazleton v. Reed, 46 Kan. 73, 26 Am. St. Rep. 86, 26 Pac. 450; Horn v. Broyles, — Tenn. —, 62 S. W. 297; Brice v. Sheffield, 118 Ga. 128, 44 S. E. 843.

It will thus be observed that courts have construed instruments, in which the intention to pass a present interest is much less clearly evinced than in the instrument before us, as valid instruments of conveyance, and have held language quite similar in meaning and import to that in question, testamentary in character, and the instrument containing same ineffectual as a conveyance.

The supreme court of California, in Nichols v. Emery, 109 Cal. 323, 50 Am. St. Rep. 43, 41 Pac. 1089, states the characteristic elements of a testamentary instrument as follows: "The essential characteristic of an instrument testamentary in its nature is that it operates only upon and by reason of the death of the maker. Up to that time it is ambulatory. By its execution the maker has parted with no rights, and divested himself of no modicum of his estate; and, per contra, no rights have accrued to and no estate has vested in any other person.

The death of the maker establishes for the first time the character of the instrument. It at once ceases to be ambulatory. It acquires a fixed status, and operates as a conveyance of title. Its admission to probate is merely a judicial declaration of that status."

If, therefore, the clause: "This deed to take effect immediately upon the death of both the grantors herein," is to be construed as a limitation upon the granting clause, and to prevent the vesting of title until after the death of the grantor, then same is void because not properly executed as a testamentary grant. The language of the deed does not, in express terms, negative an intention upon the part of grantors to pass a present interest to said real estate; nor does it in clear terms declare that to be their intention. The instrument is in form a warranty deed, and it must be assumed that the makers had some understanding of the nature of the instrument they executed, and of the distinction between the same and a will.

The receipt given him by Mr. Vette referred to the instrument as a "warranty deed," and the written direction of the grantor George Shaull, to Mr. Vette, to record it, as a "deed." There was also evidence to the effect that Mr. Shaull said he wanted the deed delivered to appellee and recorded.

While it has often been held that the form of the instrument is not controlling, and, though in form a deed, it may nevertheless be construed as a will, yet the fact that the instrument is in form a warranty deed, containing the usual words of conveyance and covenant and covenants of warranty, should be given weight in ascertaining the intention of the grantor.

In *Saunders v. Saunders*, 115 Iowa, 275, 88 N. W. 329, the court had a deed before it containing the following provision: "Subject, however, to the occupancy and possession of said real estate for and during the natural life of the grantor; the intention being that this deed

shall not be in force or take effect until after the death of the grantor herein."

The court held that the intention of the grantor to pass a present interest, subject to the life use of the premises, was apparent from the terms of the instrument. As observed in this case, the instrument specifically stated that it should not take effect or be in force until after the death of the grantor. The court laid stress upon the form of the instrument, the fact that same was duly recorded, and the further fact that the instrument, if given effect at all, must be held to have conveyed a present interest, subject to the life use. The court in that case said: "It says that the maker does 'hereby sell and convey' land accurately and specifically described. It contains a covenant that the maker holds said premises by 'good and perfect title;' that she has 'good right and lawful authority to sell and convey the same;' that it is free from all encumbrances, and the title is warranted. It was acknowledged, delivered, and filed for record in the proper office, and duly recorded. All of these matters are considered as strong evidence of an intention, to convey an interest in *præsent*. Again, the instrument cannot be given force as a will, and the law presumes that the maker knew what requisites were necessary to give it such character, and that they were intentionally omitted. It is also to be presumed that she intended to make a valid instrument, and it will be so construed, if possible. The instrument says that the conveyance is 'subject, however, to the occupancy and possession of said real estate, for and during the natural life of the grantor.' It will be noticed that the language here used is only consistent with the conveyance of a present interest, and furnishes a strong indication of the intent of the grantor. Then, in the language following, the instrument is referred to as a 'deed,' and, from the whole instrument, there can be but little ques-

tion as to the grantor's intention when she executed it."

Again, in *Lewis v. Curnutt*, 130 Iowa, 423, 106 N. W. 914, it is said: "We must assume that the grantor was a person of average intelligence, and meant something by this formal deed and declaration."

Such has often been the holding of the courts. *Cates v. Cates*, 135 Ind. 272, 34 N. E. 957; *Love v. Blauw*, 61 Kan. 496, 48 L.R.A. 257, 78 Am. St. Rep. 334, 59 Pac. 1059; *West v. Wright*, 115 Ga. 277, 41 S. E. 602; *Jones v. Caird*, 153 Wis. 384, 141 N. W. 228, Ann. Cas. 1914A, 88; *Graves v. Atwood*, 52 Conn. 512, 52 Am. Rep. 610; *Wyman v. Brown*, 50 Me. 139.

The form of the instrument is, of course, not conclusive; but, when taken into consideration with the evident purpose of the grantor at the time the deed was delivered to Mr. Vette, and receipt given therefor, and the subsequent written direction to him to place same of record and deliver it to appellee, the intention to make a valid conveyance is apparent. The recording and direction to Vette to deliver the instrument to Mike Shaull could have been for no other purpose than to vest him with title to the land. The deed was to become finally effective at the death of the grantors, possession and enjoyment, which had been postponed by the clause in question, and all rights under said deed, were then to pass, and the evident purpose and intention of grantor was that the grantee should have title to the land.

Unless so construed, the instrument is void, and the purpose and intention of the grantor in the execution thereof defeated. It is elementary that the instrument must be sustained, if possible; and to do this it will be most strongly construed against the grantor. It is evident from the instrument that it

was the intention of the grantors that the possession of and full dominion over the property

Deed—to take effect at death—validity.

were to pass to grantee at the death of grantors, but that title was to vest under the instrument, subject to an implied limitation in their favor. This conclusion is not in conflict with our prior holdings, and is in harmony with the holding in *Saunders v. Saunders*, 115 Iowa, 275, 88 N. W. 329, and *Lewis v. Curnutt*, 130 Iowa, 423, 106 N. W. 914.

II. Appellants also rely upon the claim that grantor was mentally incompetent to make the conveyance, and that the deed was not delivered to the grantee. We will not discuss the evidence bearing upon the question of the grantor's competency, but have carefully examined the record, and are of the opinion that it is wholly insufficient to sustain this claim. The written direction to Mr. Vette at the time it was delivered to him, also later, to have same placed of record, coupled with his further oral direction to cause it to be recorded and delivered to the grantee, notwithstanding the evidence of actual delivery by Vette to Shaull, prior to the death of his father, is not entirely satisfactory, is sufficient, from which delivery may be inferred.

Other questions discussed are not controlling, and we need not refer thereto at this time.

For the reasons pointed out, the judgment of the lower court is affirmed.

Preston, Ch. J., and Weaver, Ladd, and Evans, JJ., concur.

Salinger, J., concurring:

This opinion runs counter to my dissent in *Meyer v. Stortenbecker*, — Iowa, —, 165 N. W. 456, decided at a recent sitting. But a rule of property is involved, and I now follow the majority in said cause, and therefore concur.

ANNOTATION.

Effect on validity and character of instrument in form of deed, of provisions therein indicating an intention to postpone or limit the rights of grantee until after the death of grantor.

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I. Scope.

The question here under discussion is the effect of provisions in instruments in the form of deeds, postponing their taking effect until after the death of the grantor, upon the character of the instrument, and its validity. As the character of the instrument, that is, whether it is a deed or a will, is dependent upon the interest passed by the instrument, the principal question in almost every case is the nature of the interest passed. "Interest," as used here, however, is not to be confused with "estate," this note not going into the question of the effect of the postponing provisions upon the estates created by them. However, reference is made to cases involving provisions postponing their taking effect until after the death of the grantor, in which it is assumed without question that the instruments are deeds, the only questions raised being in connection with the manner or extent of the estate created, such cases affording some slight degree of authority upon the matter of the nature of the interests passed by the postponing clauses contained therein.

The effect of the delivery of a deed to a third person, to be delivered to the grantee after the grantor's death, is beyond the scope of the note.

II. Operation of rule against creation of freehold estates in futuro.

a. In respect to real estate.

1. Ancient common-law rule.

The rules of the ancient common law required livery of seisin as an incident to the passing of a freehold estate. Inasmuch as there could be no livery of seisin where the owner of an estate conveyed a freehold therein and, at the same time, reserved a life estate for himself, it was the common-law rule that such an estate in freehold, to commence in futuro, could not be cre-

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ated. A conveyance of freehold had to take effect presently, either in possession or in remainder, in the latter case the particular tenant receiving livery of seisin, both for himself and for the remainderman. This rule against the creation of freehold estates to commence in futuro applied, of course, to deeds containing provisions postponing their taking effect until after the death of the grantor, in cases where such deeds were not construed as wills. For cases discussing the common-law rule in this connection, see *infra*, II. a, 2.

In *Carter v. Madgwick* (1692) 3 Lev. 389, 83 Eng. Reprint, 719, involving an indenture of bill and sale, with habendum restricting the estate to take effect after the grantor's death, it is held that the grantee takes the premises immediately, and that the possession of the premises thereafter by the grantor is tortious. The instrument is construed thus, to prevent the deed from being rendered wholly void under the rule against the conveyance of freeholds, to take effect in futuro.

And see *Goodtittle v. Gibbs* (1826) 5 Barn. & C. 709, 108 Eng. Reprint, 264, 8 Dowl. & R. 502, 4 L. J. K. B. 284, 29 Revised Rep. 366, 14 Eng. Rul. Cas. 779, where, the premises and the habendum being inconsistent, the latter containing a reservation of a life estate in the grantor, and the former not, the latter is held void, and the case is saved, according to the court, from the operation of the rule against the creation of estates in futuro.

2. Under Statute of Uses.

(a) In general.

The common-law rule against the creation of estates of freehold, to commence in futuro, was nullified by the Statute of Uses.

It is said in *Bunch v. Nicks* (1887) 50 Ark. 367, 7 S. W. 503, involving a grant "to go into full force and effect

at" the maker's death: "It was a principle of the feudal law of England that 'an estate of freehold must be created to commence immediately.' 'For,' says Blackstone, 'it is an ancient rule of the common law that an estate of freehold cannot be created to commence in future; but it ought to take effect presently, either in possession or remainder; because, at common law, no freehold in lands could pass without livery of seisin, which must operate either immediately or not at all. It would, therefore, be contradictory, if an estate, which is not to commence till hereafter, could be granted by a conveyance which imports an immediate possession.' Prior to the reign of Henry VIII., real estate could be conveyed to one person in trust or for the use of another, and equity would enforce the use . . . ; while . . . at common law . . . a freehold could not be made to commence in futuro, . . . a use might be raised after a limitation in fee, or it might be created in futuro, without any preceding limitation. . . . To prevent the abuses and frauds practised through them [uses], the Statute of 27 Hen. VIII. chap. 10, commonly called the Statute of Uses, was passed, by which it was enacted that the legal estate, or seisin, shall be in them that have the use, 'in such quality, manner, form, and condition as they before had in the use,' and thereby united the use and legal title . . . so that, while freehold estates to commence in futuro could not be conveyed at common law, such conveyances can be made under the Statute of Uses. . . . The result of the Statute of Uses was, several new modes of conveying legal estates, wholly unknown to the common law, came into use, among them covenants to stand seised to uses, and bargain and sale. In the first-mentioned conveyance, a man seised of lands covenants that he will stand seised to the use of the covenantee for life, in tail, or in fee. 'Here,' says Blackstone, 'the statute executes at once the estate; for the party intended to be benefited, having thus acquired the use, is thereby put at once into corporal possession, without ever seeing it, by a kind of parliamentary magic.' In the

bargain and sale, 'the bargainor for some pecuniary consideration bargains and sells, that is, contracts to convey the land to the bargainee, and becomes, by such a bargain, a trustee for or seised to the use of the bargainee, and then the Statute of Uses completes the purchase; or, as it hath been well expressed, the bargain first vests the use, and then the statute vests the possession.' By both modes, an estate of freehold to commence in futuro can be created under the Statute of Uses."

So, in *Vinson v. Vinson* (1879) 4 Ill. App. 138, involving a deed from a father to a son, conveying certain land at the grantor's death, it is said: "Here the legal effect of the deed, as interpreted by the Statute of Uses, was that the grantor reserved a life estate to himself, and covenanted to stand seised to the use of his son in fee, at his (the grantor's) death. The estate remained in the grantor till the use arose; the possession or seisin was then, contemporaneously with the grantor's death, executed to the use by operation of the statute, and the legal possession and legal estate vested in the *cestui que use*."

And in *Simmons v. Augustin* (1836) 3 Port. (Ala.) 69, involving a grant "after the demise of the maker," it is said: "Admitting the common-law doctrine, which is very clear as a general rule, that an estate of freehold cannot be created to commence in futuro, but that it must take effect presently, either in *possession* or *remainder*, and this for the reason that no such estate could pass without *livery of seisin*, which must operate immediately or not at all . . . yet if, during the interval, according to the import of the deed, the possession is to be enjoyed by the grantor, or any other, under a covenant to stand seised to the present use of himself, and the subsequent use of the grantee, or for the entire use of the latter, the object of the law is satisfied. In such a case, the inconsistency against which this principle of law was intended to guard, the granting an estate to commence in future, by a conveyance importing an immediate possession, would not arise; the possession would be consistent with the terms and object of the deed.

As a further answer to this objection, our Statute of Uses, similar to the English Statute of Hen. VIII., may be cited. It provides that 'in all cases, by deed of bargain and sale, or by deed of lease and release, or by covenant to stand seised to use, or by deed operating by way of covenant to stand seised to use, the possession of the bargainor or releasor, or covenantor, shall be deemed heretofore to have been, and hereafter to be, transferred to the bargainee, releasee, or person entitled to the use of the estate.'

Where, in *Dennett v. Dennett* (1860) 40 N. H. 498, a deed is urged to be void because the reservation of a life estate in the grantor operates to make it a grant of a freehold estate, to begin in futuro, it is said: "It is undeniable that, by any of the old common-law conveyances, a freehold could not be granted to take effect at a future time.

But we think it quite as well settled that an estate of freehold in futuro may be created by a conveyance taking effect under the Statute of Uses; . . . and that our ordinary conveyance will be construed a bargain and sale under the Statute of Uses, or a conveyance at common law, as will best carry into effect the design of the grantor. . . . Such a deed, with a reservation of a life estate, will be construed as a covenant to stand seised to his own use, and then to the use of the grantee."

And in *Merrill v. Publishers Paper Co.* (1914) 77 N. H. 285, 90 Atl. 786, the preceding case is cited and followed.

In *Wall v. Wall* (1855) 30 Miss. 91, 64 Am. Dec. 147, involving a deed containing a clause providing for its taking effect upon the death of the grantor, it is said that, "as to the real estate in this case, the deed was valid as a covenant to stand seised to the use of the donees, and, upon the determination of the life estate reserved to the donor, the estate vested in possession in the donees."

In *Bell v. Scammon* (1844) 15 N. H. 381, a deed containing the clause, "he, the said Lang, to take full possession at my marriage or death," is held not to be invalid, as attempting to create a freehold estate in futuro. "The deed

undoubtedly reserves an estate to the grantor during her life," it is said: "This is its obvious construction, and the remainder, after the expiration of the life estate, is all that the grantee took by the deed. There seems to be no reason why it may not operate under the Statute of Uses, both as a deed of bargain and sale, and as a covenant to stand seised to the use of the grantee, by either of which modes a freehold in futuro will pass."

In *Shackelton v. Sebree* (1877) 86 Ill. 616, involving a deed containing a clause providing that the instrument is not to take effect nor to be recorded until after the grantor's decease, it is held that the old common-law rule against the conveyance of estates to take effect in futuro is no longer in effect, livery of seisin having been abolished by statute, and the title following the use, under the Statute of Uses.

And in *Doe ex dem. Wilkinson v. Tranmarr* (1757) Willes, 682, 125 Eng. Reprint, 1383, involving a deed of lease and release, in which the grantor releases certain premises after his death, it is held that the deed cannot operate as a release, under the common-law rule against the conveyance of freeholds in futuro; but that it is good as a covenant to stand seised, under the Statute of Uses.

It is said in *Eckman v. Eckman* (1871) 68 Pa. 460, involving a deed containing a reservation of the rents and profits during the grantor's life, that "if it cannot be treated as a deed of bargain and sale because there was, in fact, no pecuniary consideration, yet, if the consideration of blood did exist, it shall be supported as a covenant to stand seised." And the court adds: "We may say here that in Pennsylvania a recorded deed will be construed as having the effect of a feoffment, with livery of seisin, or as a deed under the Statute of Uses, as will best accomplish the intention and design of the parties."

In *Savage v. Lee* (1884) 90 N. C. 320, 47 Am. Rep. 523, involving a deed reserving a life estate in the grantor, it is held that an estate in freehold to commence in futuro can be conveyed under the Statute of Uses.

In *Rembert v. Vetoe* (1911) 89 S. C. 198, 2 A.L.R. 918, 71 S. E. 959, where the instrument contained an habendum "to have and to hold . . . from and after my death," the court satisfies itself with the citation of authority to sustain the proposition that "the reservation of a life estate by the grantor did not invalidate the deed as an attempt to convey a freehold to commence in futuro, it being effectual as a covenant to stand seised to uses."

Where, in *West v. West* (1892) 155 Mass. 317, 29 N. E. 582, a grantor conveys to his prospective wife in consideration of marriage, passing the right to the use and disposal of the estate for the wife's support in case of his death, reserving the use of the land during his life, and providing that the property shall revert to him in case of the wife's failure to survive him, it is said that "it [the instrument] can be construed as a covenant to stand seised, and supported, at least so far as to give to the demandant [grantee] an estate for her life."

In *Watson v. Watson* (1886) 24 S. C. 228, 58 Am. Rep. 247, an instrument in which the maker recites that he has granted, and does at his death grant, certain property to his wife, in consideration of the affection he bears her, is held to be valid as a covenant to stand seised to uses.

And in *Pledger v. David* (1812) 4 Desauss. Eq. (S. C.) 264, involving a deed in which the grantor reserves a third part of the premises during her life, the objection that the deed conveys a freehold to begin in futuro is answered by holding the deed valid under the Statute of Uses.

So, a deed worded so as not to take effect until after the death of the grantor is held, in *Cook v. Cooper* (1901) 59 S. C. 560, 38 S. E. 218, to be valid, notwithstanding its taking effect in futuro.

In *Sumner v. Harrison* (1898) 54 S. C. 353, 32 S. E. 572, where property was conveyed in trust to a person who was to hold for the term of twenty years after the grantor's death, it is said that, although it be implied that it was the grantor's intention to reserve the usufruct of the land for herself during her life, yet that "that

would not invalidate the deed, as an attempt to convey a freehold to commence in futuro."

In *Kinsler v. Clark* (1844) 1 Rich. L. (S. C.) 170, a deed providing that "no right or title whatever is to vest" in the grantees, during the grantor's lifetime, is held to create a remainder in the grantees, to take effect upon the death of the grantor; and the deed is construed as a covenant by the grantor to stand seised for herself during life, and for the grantees at her death.

See *Den ex dem. Sasser v. Blyth* (1796) 2 N. C. (1 Hayw.) 259, where, without discussion, a deed containing a clause providing that it shall not take effect during the lives of the grantor and his wife is held to be valid, as a covenant to stand seised.

See also *Lauck v. Logan* (1898) 45 W. Va. 251, 31 S. E. 986.

In *Singleton v. Bremar* (1826) 4 M'Cord, L. (S. C.) 12, 17 Am. Dec. 699, involving an instrument in which the grantor gives, "in case of his death," certain property to a designated person, it is said that "it is one of the settled rules of the common law that a fee cannot be created to take effect in futuro . . . and such a deed would therefore be void." It is held, further, that the instrument cannot operate as a covenant to stand seised, there being neither a good nor a valuable consideration expressed. The instrument recites that the grantor has received "full value," but no specific consideration is named.

(b) Necessity of good consideration in covenants to stand seised to use.

In England, the Statute of Enrolments required all deeds of bargain and sale to be enrolled, to be valid; and, to prevent the defeat of the purpose of the statute, the courts found it necessary to construe all deeds reciting a valuable consideration as deeds of bargain and sale, coming within the meaning of the statute. As a result of this, the mere recital in an instrument of a valuable consideration was sufficient to take it out of the category of covenants to stand seised to use, and to stamp it definitely as a deed of bargain and sale. An instrument reciting a valuable con-

sideration could not be construed as a covenant to stand seised to use, and, accordingly, could not be brought within the terms of the Statute of Uses. Out of this situation arose the rule that deeds of bargain and sale, conveying freeholds to take effect in futuro, could not claim advantage of the Statute of Uses, but were void, under the common-law rule against conveyances of freehold to take effect in futuro. Inasmuch as the Statute of Enrolments is, as a general thing, not considered a part of the American common law, however, this rule, which depends upon that statute for existence, has not received much favorable consideration in the American courts.

In *Marden v. Chase* (1850) 32 Me. 329, involving a deed of bargain and sale, reserving the use, occupation, and control of the premises for the lives of the grantor and his wife, it is said that, "if the reservation is absolute, without any qualification, the deed will be utterly inoperative for every purpose," the rule being that of the common law that a bargain and sale of a fee-simple estate, to take effect in futuro, is inoperative and void. In this deed, however, the reservation is qualified by the words "for their support and maintenance," and, on the ground that the reservation was thus restricted and qualified, the deed is held valid, although creating an estate in futuro. It seems to be the position of the court that, under such a qualified reservation, the grantee takes something at the time of delivery. In referring to this case in *Wyman v. Brown* (1863) 50 Me. 139, in which it is held that, under the Statute of Uses, a deed of bargain and sale may convey an estate in freehold, to commence in futuro, it is said: "It is true that, in Massachusetts and this state, when determining that the deeds then under consideration were valid upon other grounds, judges have expressed the opinion that a freehold to commence in futuro could not be conveyed by a deed of bargain and sale; but these opinions are mere obiter dicta, for they have never yet had the effect of defeating a deed." The court goes on to say that "it was a principle of the

old feudal law of England that there should always be a known owner of every freehold estate, and that the freehold should never, if possible, be in abeyance. This rule was established for two reasons: (1) That the superior lord might know on whom to call for the military services due from every freeholder, as otherwise the defense of the realm would be weakened. (2) That every stranger who claimed a right to any lands might know against whom to bring his suit for the recovery of them; as no real action could be brought against anyone but the actual tenant of the freehold. Consequently, at common law, a freehold to commence in futuro could not be conveyed, because in that case the freehold would be in abeyance from the execution of the conveyance till the future estate of the grantee should vest. And it is laid down in unqualified terms in several cases in Massachusetts, and in one in this state, that an estate of freehold cannot be conveyed, to commence in futuro, by a deed of bargain and sale, which owes its validity to the Statute of Uses, and not to the common law. But the doctrine that freehold estates to commence in futuro cannot be conveyed by deeds of bargain and sale, since the passage of the Statute of 27 Hen. VIII. chap. 10, commonly called the Statute of Uses, is clearly erroneous." In this case, the deed in question contained a clause reserving the "quiet possession and the entire income of the premises," until the maker's decease.

And in *Drown v. Smith* (1862) 52 Me. 141, on the authority of the preceding case, it is held that, although a deed provides that the grantee is not to take possession until the grantor's death, the grantor reserving full power and control over the farm during his natural life, such deed is valid, "notwithstanding it purports to convey a freehold estate to commence in futuro."

In *Trafton v. Hawes* (1869) 102 Mass. 533, 3 Am. Rep. 494, involving a deed of bargain and sale on a valuable consideration, containing an habendum by which the grantee was to have and to hold after the grantor's decease, the theory of the distinction between deeds of bargain and sale and covenants to

stand seised to use is denied. The court says, in part: "Prior to the Statute of Uses, deeds of bargain and sale and of covenant to stand seised did not operate to convey the title, but only the right to the beneficial use. As affecting the land itself, they were regarded as executory or unexecuted contracts. At law, they were of no force as conveyances. In equity, they were enforced by requiring him in whom was the legal title to hold that title for the benefit of him to whom the right of use had thus been transferred. A bargain and sale implies the sale and transfer of an interest existing at the time in the bargainor, whether in possession, or in remainder, or expectancy. A covenant to stand seised implies the creation of a new interest in the bargainee, out of the estate of the bargainor. In either case, the bargainor, having the legal title, was held to stand seised to the use of the bargainee: In the covenant to stand seised, because such was the nature of his contract, either in express terms or by judicial interpretation; in the bargain and sale, because the court imposed it upon him as an obligation resulting from his sale of the use, and necessary to give it effect. That construction was generally adopted which was best calculated to give effect to the instrument. Whether a deed belonged to the one class or the other was determined by the nature of the subject-matter and the apparent intent of the parties, rather than by the form of the instrument. Courts of equity, however, refused to be moved to interfere actively in favor of a mere volunteer. It became necessary, therefore, in all cases, to show that the deed was founded upon a good consideration. A 'bargain and sale' necessarily involves the idea of a valuable consideration. A covenant to stand seised does not exclude it. But the courts held that a consideration of blood or marriage was also sufficiently meritorious to sustain a deed of the latter class. The Statute of Uses . . . provided that the legal title should follow the beneficial interest, and vest in the cestui que trust, 'after such quality, manner, form and condition as they had before, in or to the use, confidence, or trust

that was in them.' Under this statute, it would seem that the rules affecting the consideration and construction of instruments would remain unchanged. The law simply carried the legal title where equity placed the equitable right. The Statute of Enrolments, passed during the same year, 27 Hen. VIII. chap. 16, provided that no lands 'shall pass from one to another, whereby any estate of inheritance or freehold shall be made or take effect, or any use thereof to be made, by reason only of any bargain and sale except by writing indented, sealed and enrolled.' In applying this statute, as it did not include covenants to stand seised, the courts found it necessary to construe all deeds upon valuable consideration to be deeds of bargain and sale. Otherwise, the purpose of the statute would have been entirely defeated; because a deed of bargain and sale, in form, might be construed as a covenant to stand seised, as it was in effect, and had always been construed whenever the nature of the case required; and a deed in form of a covenant to stand seised would operate to carry into effect that which was, in fact, a bargain and sale. The consequence was that all deeds founded upon a valuable consideration were required to be enrolled in order to be held valid, and, as they could be enrolled only as deeds of bargain and sale, it was held that they must take all the characteristics of a bargain and sale, according to the construction which had always been put upon that form of transfer. Covenants to stand seised upon consideration of blood or marriage continued to be good without enrolment, and were effectual to convey the legal title under the Statute of Uses. But they could not be aided by a valuable consideration, because, under the construction of the Statute of Enrolments, that had no effect, except to show a bargain and sale, void if not enrolled, and operating, if enrolled, only as a bargain and sale. Hence, it became, and has ever since remained, the settled law of England, that a covenant to stand seised upon a valuable consideration, without the relation of blood or marriage, is of no effect to pass title to

lands. . . . The English Statute of Enrolments has no application to this country. In Massachusetts, all deeds of land are required to be recorded alike. A deed of itself imports a consideration. The recital of a consideration is conclusive for the purpose of supporting the deed against the grantor and his heirs. . . . The reason for distinguishing between a deed of bargain and sale and a covenant to stand seised, on the ground of the nature of the consideration, does not exist."

A deed of the grantor's property, personal and real, which may be remaining in his name and ownership at the time of his death, is held in *Ricker v. Brown* (1903) 183 Mass. 424, 67 N. E. 353, valid. "It is plain," the court says, "that he [grantor] intended to have the property during his life, and to retain the right to dispose of such portion during his life as he saw fit, and that at his death the balance should go to her [grantee] in fee simple. . . . If there had not been reserved a power to dispose of the property during the lifetime of the grantee, there would have been no difficulty. It is held in this state that although a freehold estate cannot be created to commence in futuro, yet that, where the grantor is to have a life estate, the deed may take effect as a covenant to stand seised to the use of the grantor for his life, and, after his decease, to the use of the grantee and his heirs, the latter use, by operation of the Statute of Uses, becoming, on the death of the grantor, a legal estate in fee in the grantee. . . . And, whatever may be the rule in England and elsewhere, it is not necessary in this state that there should be any relationship by blood or marriage between the grantor and grantee. . . . We do not think that the existence of the power to dispose of the property prevents the application of the principle."

In *Jackson ex dem. Howell v. Delancey* (1825) 4 Cow. (N. Y.) 427, a deed in consideration of services to be performed, conditioned upon the grantee's permitting the grantor to remain in possession and retain the use and enjoyment of the property conveyed

during his lifetime, is held void. "It cannot operate as a bargain and sale," the court says, "for want of pecuniary consideration . . . and, if it cannot operate as a covenant to stand seised, it is void, because it purports to convey a freehold in futuro. . . . It certainly cannot operate as a covenant to stand seised, for want of the considerations of blood or marriage." In the later case of *Rogers v. Eagle Fire Co.* (1832) 9 Wend. (N. Y.) 611, involving the same instrument, the court, after a long and illuminating discussion, reaches the conclusion that the Statute of Enrolments was never in force in that state, and that "a future freehold might be created by this conveyance, operating as a bargain and sale merely, provided it was founded upon a sufficient consideration to raise a use."

Where, in *Jackson ex dem. Wood v. Swart* (1822) 20 Johns. (N. Y.) 85, the grantors in a deed of bargain and sale, based on a pecuniary consideration, reserve to themselves "the use of the premises during their natural lives," the deed is held not to be invalid as creating an estate in futuro, a deed of bargain and sale founded on a pecuniary consideration, and conveying a future estate, being effectual as a covenant to stand seised to uses.

In *Jackson ex dem. Watson v. McKenny* (1829) 3 Wend. (N. Y.) 233, a grantor, by an instrument in writing, conveyed certain premises, and took back from the grantees on the same day a written instrument, declaring the intention of the parties to be that the grantor should hold and enjoy the property, and take the rents and profits thereof, during his life. After holding these two instruments to be parts of the same contract, properly to be taken and considered together, it is held that the instrument, although conveying property in futuro, is valid, as a covenant to stand seised. The court says that "it is abundantly settled that a deed of bargain and sale, founded on a pecuniary consideration, to take effect in futuro, is effectual."

See *Bunch v. Nicks* (1887) 50 Ark. 367, 7 S. W. 563, and *Singleton v. Bremer* (1826) 4 M'Cord, L. (S. C.) 12, 17 Am. Dec. 699, *supra*, II. a, 2, (a.).

In a few of the early cases, while hesitating to break entirely away from the English rule, as has more latterly been done, the courts sought to make a distinction on behalf of deeds of bargain and sale, where the relationship between the grantor and grantee was such that a good (as distinguished from a valuable) consideration might be implied therefrom.

In *Brewer v. Hardy* (1839) 22 Pick. (Mass.) 376, 33 Am. Dec. 747, it is held that a deed of bargain and sale from a father to a daughter, reserving the use and improvement of the premises to the grantor for the term of his life and that of his wife, while void as a deed of bargain and sale to take effect in futuro, is good as a covenant to stand seised to uses, a good consideration upon which such a covenant may be founded being implied from the relationship of the parties. This is on the theory that a deed of bargain and sale is on a valuable consideration, while a covenant to stand seised to uses can be sustained only by a consideration of blood or marriage. The authority for this decision is *Wallis v. Wallis* (1808) 4 Mass. 135, 3 Am. Dec. 210, where a deed of bargain and sale from a father to a son is involved, containing a clause "to have and to hold after the death of the grantor," in which it is held that, although not expressed, a consideration of natural affection, in addition to the valuable consideration set out, may be implied, and the instrument sustained as a covenant to stand seised to uses.

And in *Chancellor v. Windham* (1844) 1 Rich. L. (S. C.) 161, 42 Am. Dec. 411, a deed in which the grantor gives, grants, and releases to his son certain land, at his death to have and to hold, is held to create an estate in the son in futuro, valid as a covenant to stand seised to uses. The consideration of blood seems not to have been recited. The court says: "The authorities . . . show that a deed, whether in form a feoffment, a bargain and sale, or a lease and release, if the consideration of blood or marriage exists, may, to effect the intention of the parties, be construed to be a covenant to stand seised; that 'give,' and 'grant,' are apt words for such a covenant, and that it is the duty of courts,

by reasonable construction, to give effect to the intention of parties not inconsistent with law."

The Statute of Enrolments not being in force in the United States, there are no grounds for making any distinction between instruments because of a difference in the kinds of consideration recited. In the cases set out above, deeds of bargain and sale are held valid as covenants to stand seised to use, although dependent upon valuable considerations. In another case, an instrument in the form of a covenant to stand seised is held valid, although dependent upon a valuable consideration.

Where, in *Exum v. Canty* (1857) 34 Miss. 533, involving a deed in which the grantor covenants, in consideration of his "regard and good will," and services rendered and to be rendered, to stand seised to his own use during his life, and to the use of a trustee at his death, it is objected that the deed is invalid as a covenant to stand seised, for want of a sufficient consideration, there being neither the relation of blood nor of marriage between the parties, and it being urged that in such case, a good consideration will not support the deed, the court points out the valuable consideration recited, and holds it sufficient to support the instrument.

8. Under state statutes.

It is held in *Bunch v. Nicks* (1887) 50 Ark. 367, 7 S. W. 563, involving a grant "to go into full force and effect" at the maker's death, that, independently of the Statute of Uses, estates of freehold to commence in futuro may be created in that jurisdiction, the tenure being allodial, and it being specifically provided by statute that any person may convey his land, although another is in adverse possession thereof, and that "if any person 'shall convey any real estate by deed, purporting to convey the same in fee simple absolute, or any less estate, and shall not at the time of such conveyance have the legal estate in such lands, but shall afterwards acquire the same, the legal or equitable estate after acquired shall immediately pass to the grantee, and such conveyance shall be as valid as if such legal or equitable estate had

been in the grantor at the time of the conveyance." In that case, a grant "to go into full force and effect at" the grantor's death is involved.

And, on the authority of the preceding case, it is held in *Lewis v. Tisdale* (1905) 75 Ark. 321, 88 S. W. 579, that an instrument having the usual contents of a deed, and containing a clause providing that the grantor "shall have and retain the use and enjoyment, the rents and profits, of the . . . premises for and during her natural life, and that this grant, bargain, and sale shall not be operative and shall not take effect until her death," is a valid deed.

In *Latimer v. Latimer* (1898) 174 Ill. 418, 51 N. E. 548, it is said: "Under the statutes of this state, livery of seisin is abolished. At common law, a freehold estate could not be created to commence in futuro, except where there was a particular estate to support it as a remainder. This was because a charter of feoffment was the only common-law instrument for the conveyance of a freehold, and a feoffment was void without livery of seisin, and that ceremony was necessarily performed presently. In this state, by the Act of 1827, livery of seisin was abolished, and it was provided, in substance, that every deed or other conveyance should be sufficient, without livery of seisin, for conveying or transferring lands, so as absolutely and fully to vest in every donee, grantee, bargainee, or purchaser of such estate or estates, as should be specified in the deed or other conveyance. . . . The rule is well established, a conveyance of real estate delivered, but not to take effect or to be recorded until the death of the grantee, is good and valid without the creation of an intermediate estate to support it." The instrument involved contained a clause providing that it was "to be in force from and after" the grantor's decease, "and not before."

So, in *Vinson v. Vinson* (1879) 4 Ill. App. 138, involving a deed conveying property at the grantor's death, it is held that, under the Illinois statute abolishing livery of seisin, such a conveyance is not invalid, as conveying an estate in futuro, without the creation of a particular estate.

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And see *Shackelton v. Sebree* (1877) 86 Ill. 616, supra, II. a, 2 (a), to the same effect.

And the preceding case is cited and followed in *White v. Willard* (1908) 232 Ill. 464, 83 N. E. 954 (reservation of use and control for life, and provision that title of grantees become absolute only on grantor's death); *Calef v. Parsons* (1892) 48 Ill. App. 253 (reservation of possession during grantor's life).

In *Gorham v. Daniels* (1851) 23 Vt. 600, a case involving a conveyance in which a portion of the conveyed premises was not to come into possession of the grantee till the grantor's death, after holding that the Statute of Uses has never been in force in that state, it is said: "The granting of an estate in fee, to take effect after a particular estate reserved as an estate for life, or lives, is not inconsistent with the law of England. And if it were, it could have no application here; for under our Statute of Conveyancing, there being no livery of seisin in fact necessary to invest the grantee with the title, but only the seisin resulting from the due execution and recording of the deed, there is no objection whatever to the creating of a freehold estate, in terms, to take effect in futuro."

And, independently of the Statute of Uses, it is held in *Savage v. Lee* (1884) 90 N. C. 320, 47 Am. Rep. 523, a deed reserving a life estate in the grantor may have the effect of passing a freehold estate in futuro, livery of seisin having been abolished by statute.

So, it is said in *Dick v. Miller* (1908) 150 N. C. 63, 63 S. E. 176, involving a deed providing that the title is vested in the grantor during his life, and at his death passes to the grantee, that, "in this state, an estate of freehold may be made to commence in futuro."

And in *McLain v. Garrison* (1905) 39 Tex. Civ. App. 431, 88 S. W. 484, rehearing denied in (1905) 39 Tex. Civ. App. 440, 89 S. W. 284, involving a deed containing a clause providing that it shall not take effect until the grantor's death, it is said: "It was a principle recognized by the feudal law that there should always be a known owner of every freehold estate, and that the

title thereto should never be in abeyance. Hence, at common law, a freehold to commence in futuro could not be conveyed for the reason that the same would be in abeyance from the execution of the conveyance until the future estate of the grantee should vest. Under the statute of this state, a freehold estate may be created to commence in futuro; . . . and hence the common-law principle above stated has been entirely abrogated." The Texas statute provides that an estate of freehold or inheritance may be made to commence in futuro by deed or conveyance, in like manner as by will.

Under statutes providing that "conveyances of lands, or of any estate or interest therein, may be made by deed executed by any person having authority to convey the same, . . . and acknowledged and recorded . . . without any other act or ceremony," and that "an estate of freehold or inheritance may be made to commence in future by deed, in like manner as by will," it is held in *O'Day v. Meadows* (1905) 194 Mo. 588, 112 Am. St. Rep. 542, 92 S. W. 637, that a deed creating an estate in futuro, by provision for its commencing upon the death of the grantor, is valid, despite the common-law rule.

So, it is said in *Hurst v. Hurst* (1874) 7 W. Va. 289, where the grantor reserved a life interest in the property conveyed, that, "by the Code of Virginia of 1860, . . . which was in force in this state in 1863, any estate may be made to commence in futuro by deed, in like manner as by will."

Under a statute providing that "a freehold estate . . . may be created to commence at a future day," the common-law rule existing prior to the Statute of Uses is abrogated, and future estates may be created. *Spencer v. Robbins* (1886) 106 Ind. 580, 5 N. E. 726 (provision that property is to be divided among grantees upon grantor's decease); *Cates v. Cates* (1893) 135 Ind. 272, 34 N. E. 957 (reservation of "all the estate in said land, and the use and occupation," during grantor's life); *Wilson v. Carrico* (1894) 140 Ind. 533, 49 Am. St. Rep. 213, 40 N. E. 50 (provision that the instrument be "of none effect until after the death" of the grantors).

But, under such a statute, "any language employed by the grantor, which would be sufficient to create an estate to commence at a future day, would, in the nature of the case, give a present interest in the property;" and an instrument which does not give a present interest does not come within the provision of the statute. *Leaver v. Gauss* (1883) 62 Iowa, 314, 17 N. W. 522. In this case, the deed provided that it was to "commence after the death of both grantors," and that the grantee shall have no interest in the premises, as long as the grantors shall live.

In *Wyman v. Brown* (1863) 50 Me. 139, after holding that freeholds may be conveyed to commence in futuro, under the Statute of Uses, it is said: "We are also of opinion that effect may be given to such deeds by force of our own statutes, independently of the Statute of Uses. Our deeds are not framed to convey a use merely, relying upon the statute to annex the legal title to the use. They purport to convey the land itself, and being duly acknowledged and recorded, as our statutes require, operate more like feoffments than like conveyances under the Statute of Uses." In this connection *Oliver on Conveyancing* is quoted, to the effect that, in the transfer authorized by statute in this mode, "the land itself is conveyed, as in a feoffment, except that livery of seisin is dispensed with upon complying with the requisitions of the statute, acknowledging and recording substituted instead of it."

So, in *Abbott v. Holway* (1881) 72 Me. 298, involving a deed in which the grantor provides that the instrument is not to take effect until his decease, and that, in case he survives the grantee, the instrument is not to be operative, the preceding case is cited and followed. Referring to the opinion in that case, it is said: "And he [Walton, J.] concludes that deeds executed in accordance with the provisions of our statutes, and deriving their validity therefrom, may be upheld thereby, as well as under the Statute of Uses, notwithstanding they purport to convey freeholds to commence at a future day. In other words, the mere

technicalities of ancient law are dispensed with upon compliance with statute requirements. The acknowledgment and recording are accepted in place of livery of seisin, and it is competent to fix such time in the future as the parties may agree upon, as the time when the estate of the grantee shall commence. No more necessity for limiting one estate upon another, or for having an estate (of some sort) pass immediately to the grantee, in opposition to the expressed intention of the parties. The feoffment is to be regarded as taking place, and the livery of seisin as occurring, at the time fixed in the instrument, and the acknowledgment and recording are to be considered as giving the necessary publicity which was sought in the ancient ceremony."

See *Lauck v. Logan* (1898) 45 W. Va. 251, 31 S. E. 986.

4. Independently of both common law and statute.

Although a bargain and sale be inoperative as a covenant to stand seised to uses, because the consideration expressed is valuable, and not merely blood or marriage, or although the Statute of Uses be not in force when the bargain and sale is executed, it is held in *Chandler v. Chandler* (1880) 55 Cal. 267, involving the deed reserving the entire use of the land conveyed for the grantor's life, that, in either case, the court of equity should contemplate the actual rights of the parties, and construe the instrument in such a manner as to effectuate their intention, and that it has power to determine the actual rights of the parties and prevent future complications, and that such a deed, reserving a life estate in the grantor, should be treated as a contract to convey, and enforced by the decreeing of a formal conveyance of the fee to the grantee, and a reconveyance by the grantee of a life estate to the grantor.

So, it is held in *Fish v. Sawyer* (1836) 11 Conn. 545, that, irrespective of the English common law, it has been the practice and usage in that jurisdiction to consider conveyances to take effect in futuro as valid, and that, accordingly, by the common law in

Connecticut, a deed conveying a fee and reserving a life estate in the grantor is not invalid. In that case, the grantor reserved the use and improvement of the property during his life.

And although both implied covenants and uses have been abolished in that jurisdiction by statute, it is held in *Ferguson v. Mason* (1884) 60 Wis. 377, 19 N. W. 420, that a conveyance of land in fee, to take effect in futuro, is valid. The decision is based on the present system of allodial tenures in operation in that state.

In holding, in *Puukalaieka v. Hiaa* (1885) 5 Haw. 484, that the rule of the common law with respect to the impossibility of creating estates to commence in futuro is not in force in Hawaii, it is said that "this rule is based on the necessity which once existed, but has now passed away, of livery of seisin."

b. In respect to personality.

Where, in *Ingram v. Porter* (1827) 4 M'Cord, L. (S. C.) 198, involving a grant of a slave to hold after the grantor's death, it is urged that, in analogy to the principle regarding covenants to stand seised to the use of land, the grant might be considered as giving the right to the grantee and making the grantor trustee for life, or as making the grantee trustee for the grantor for life, it is held that the Statute of Uses relates entirely to lands, and that it has no effect to render valid a grant of a future estate in chattels, wherein a life estate is reserved.

So, in *Vernon v. Inabnit* (1810) 2 Brev. (S. C.) 411, involving a deed of a slave, in which the grantor reserved possession of the slave during his life, it is said that "it is settled law that a man cannot limit a personal chattel to one for life, and the remainder to another, except by will or by deed of trust."

However, in *Jaggers v. Estes* (1848) 2 Strobb. Eq. (S. C.) 843, 49 Am. Dec. 674, involving a deed conveying to the grantee certain slaves, "to have and to hold . . . at my death," it is held that a future interest in a chattel may

be created by deed, without the necessity of resorting to a trust.

And the preceding case is cited and followed in *Babb v. Harrison* (1856) 9 Rich. Eq. (S. C.) 111, 70 Am. Dec. 208.

And it is held in *Duke v. Dyches* (1829) 2 Strobh. Eq. (S. C.) 353, note, involving an instrument in which the maker gave certain slaves to his daughter, reserving to himself a life estate therein, that personal property can be limited over by deed, to take effect after the termination of a life estate therein.

And where, in *Alexander v. Burnett* (1851) 5 Rich. L. (S. C.) 189, a grantor of slaves provided in his deed that the instrument was to be of no effect until his death, it is said that "since the cases of *Duke v. Dyches* (S. C.) supra, and *Jaggers v. Estes* (S. C.) supra, it is no longer an open question whether a man may not, by deed *duly delivered as such*, give to another a negro, reserving to himself a life estate therein, provided that, by the operation of the deed, a present title passes to the donee, but the possession only is postponed to the death of the donor."

And so in *Wall v. Wall* (1855) 30 Miss. 91, 64 Am. Dec. 147, involving a deed conveying both real and personal estate, and containing provisions construed as amounting to a reservation of a life estate in the grantor, it is said: "With regard to the personal estate, the rule is generally held by the courts in this country that a deed conveying chattels to a donee, reserving the possession and use of the property to the donor during his life, is valid, though the deed be not made to a trustee for the parties in interest."

In *Banks v. Marksberry* (1823) 3 Litt. (Ky.) 275, involving a gift of slaves in which the grantor reserves a life estate, it is held that, although slaves are, by statute, made real estate, yet they are subject to the rules regulating personalty, and accordingly not within the common-law rule relating to the creation of estates to begin in futuro.

"Nothing is better settled," it is said in *Caines v. Marley* (1831) 2 Yerg. (Tenn.) 582, "than that an interest in

remainder, after an interest for life expires, may be limited in a deed for slaves, and that the first taker for life does not take the entire interest, as was, in earlier times, the English law with reference to personal property." The instrument in question is a deed of gift, in which the donor reserves the "possession, use, and labor" of the slaves for his lifetime, and provides that, after his death, the donee is to have "actual possession, in connection with his absolute title."

It is said obiter in *Watson v. Watson* (1885) 24 S. C. 228, 58 Am. Rep. 247: "It is true that the Statute of Uses does not apply to personalty, and it is also true that, at common law, while a conveyance of a chattel might be made to commence in futuro at a definite time fixed, yet it could not be made after a life estate, because a life estate was supposed to be of longer duration than any chattel. This ancient common-law rule, however, has been much modified since, and it cannot be said now that it has been established as an inflexible rule to be applied in all cases of personalty, without regard to the circumstances.

III. Will and deed distinguished.

a. In general.

1. Instrument passing present irrevocable interest.

As is pointed out above, the term "interest," as used in this note, is not to be confused with "estate." A deed may pass a present interest in property, the estate in which is a future one. One has an interest in property when he presently owns or holds some property rights therein, regardless of the time at which the estate comes into enjoyment.

Where the provision in an instrument in the form of a deed, postponing its taking effect until after the death of the grantor, is construed as passing a present interest in the grantee, the instrument is a deed.

Alabama.—*Thompson v. Johnson* (1851) 19 Ala. 59; *Gillham v. Mustin* (1868) 42 Ala. 365; *McGuire v. Bank of Mobile* (1868) 42 Ala. 589; *Daniel v. Hill* (1875) 52 Ala. 430; *Jordan v. Jordan* (1880) 65 Ala. 301; *Trawick v. Da-*

vis (1888) 85 Ala. 342, 5 So. 83; Abney v. Moore (1894) 106 Ala. 131, 18 So. 60; Mays v. Burleson (1913) 180 Ala. 396, 61 So. 75; Graves v. Wheeler (1913) 180 Ala. 412, 61 So. 341; Smith v. Davis (1917) 199 Ala. 687, 75 So. 22.

Arkansas.—Bunch v. Nicks (1887) 50 Ark. 367, 7 S. W. 563.

California.—Tennant v. John Tennant Memorial Home (1914) 167 Cal. 570, 140 Pac. 242; Niccolls v. Niccolls (1914) 168 Cal. 444, 143 Pac. 712.

Florida.—Johns v. Bowden (1914) 68 Fla. 32, 66 So. 155.

Georgia.—Watson v. Watson (1857) 22 Ga. 460; Hall v. Bragg (1859) 28 Ga. 330; Daniel v. Veal (1861) 32 Ga. 589; Brewer v. Baxter (1870) 41 Ga. 212, 4 Am. Rep. 530; Shelton v. Edenfield (1918) 148 Ga. 128, 96 S. E. 3.

Illinois.—Roth v. Michalis (1888) 125 Ill. 325, 17 N. E. 809.

Indiana.—Spencer v. Robbins (1886) 106 Ind. 580, 5 N. E. 726; Stroup v. Stroup (1894) 140 Ind. 179, 27 L.R.A. 523, 39 N. E. 864; Timmons v. Timmons (1911) 49 Ind. App. 21, 96 N. E. 622.

Iowa.—Craven v. Winter (1874) 38 Iowa, 471; Leaver v. Gauss (1883) 62 Iowa, 314, 17 N. W. 522; Saunders v. Saunders (1901) 115 Iowa, 275, 88 N. W. 329; Tuttle v. Raish (1902) 116 Iowa, 331, 90 N. W. 66; Lewis v. Currutt (1906) 130 Iowa, 423, 106 N. W. 914; Ransom v. Pottawattamie County (1915) 168 Iowa, 570, 150 N. W. 657; Meyer v. Stortenbecker (1917) 184 Iowa, 441, 165 N. W. 456; SHAULL v. SHAULL (reported herewith) ante, 15.

Kansas.—Reed v. Hazleton (1887) 37 Kan. 321, 15 Pac. 177; Bevins v. Phillips (1897) 6 Kan. App. 324, 51 Pac. 59.

Kentucky.—Rawlings v. McRoberts (1894) 95 Ky. 346, 25 S. W. 601; Ison v. Halcomb (1910) 136 Ky. 523, 124 S. W. 813; Taylor v. Purdy (1912) 151 Ky. 82, 151 S. W. 45.

Michigan.—Hitchcock v. Simpkins (1894) 99 Mich. 198, 58 N. W. 47; Leonard v. Leonard (1906) 145 Mich. 563, 108 N. W. 985; Moody v. Macomber (1910) 159 Mich. 657, 134 Am. St. Rep. 755, 124 N. W. 549.

Minnesota.—Thomas v. Williams (1908) 105 Minn. 88, 117 N. W. 155;

Smith v. Corey (1914) 125 Minn. 190, 145 N. W. 1067.

Mississippi.—Wall v. Wall (1855) 30 Miss. 91, 64 Am. Dec. 147; Sartor v. Sartor (1861) 39 Miss. 760; McDaniel v. Johns (1871) 45 Miss. 632; Cunningham v. Davis (1884) 62 Miss. 366; Thomas v. Byrd (1916) 112 Miss. 692, 73 So. 725; Cox v. REED (reported herewith) ante, 5.

Missouri.—Miller v. Holt (1878) 68 Mo. 584; Murphy v. Gabbert (1901) 166 Mo. 596, 89 Am. St. Rep. 733, 66 S. W. 536; Griffin v. McIntosh (1903) 176 Mo. 392, 75 S. W. 677; O'Day v. Meadows (1905) 194 Mo. 588, 112 Am. St. Rep. 542, 92 S. W. 637; Aldridge v. Aldridge (1906) 202 Mo. 565, 101 S. W. 42; Givens v. Ott (1909) 222 Mo. 395, 121 S. W. 23; Terry v. Glover (1911) 235 Mo. 544, 139 S. W. 337; Sims v. Brown (1913) 252 Mo. 58, 158 S. W. 624; Priest v. McFarland (1914) 262 Mo. 229, 171 S. W. 62.

Nebraska.—Pinkham v. Pinkham (1898) 55 Neb. 729, 76 N. W. 411.

New Jersey.—Sibley v. Somers (1901) 62 N. J. Eq. 595, 50 Atl. 321.

New York.—Re Diez (1872) 50 N. Y. 88.

North Carolina.—Clayton v. Liverman (1846) 29 N. C. (7 Ired. L.) 92; Phifer v. Mullis (1914) 167 N. C. 405, 83 S. E. 582.

Oregon.—Beebe v. McKenzie (1890) 19 Or. 296, 24 Pac. 236; Sappingfield v. King (1907) 49 Or. 102, 8 L.R.A.(N.S.) 1066, 89 Pac. 142, affirmed on rehearing in (1907) 49 Or. 109, 90 Pac. 150.

Pennsylvania.—Turner v. Scott (1866) 51 Pa. 126; Nixon v. Frick Coke Co. (1900) 27 Pa. Co. Ct. 150; Muntz v. Whitcomb (1909) 40 Pa. Super. Ct. 553.

South Carolina.—Ragsdale v. Booker (1826) 2 Strobb. Eq. 348, note; Jagers v. Estes (1848) 2 Strobb. Eq. 343, 49 Am. Dec. 674; Babb v. Harrison (1856) 9 Rich. Eq. 111, 70 Am. Dec. 203; Folk v. Varn (1857) 9 Rich. Eq. 303; Williams v. Sullivan (1858) 10 Rich. Eq. 217.

South Dakota.—TRUMBAUER v. RUST (reported herewith) ante, 10.

Tennessee.—Watkins v. Dean (1837) 10 Yerg. 321, 31 Am. Dec. 583; Swails v. Bushart (1859) 2 Head, 561; Swiney

v. Swiney (1884) 14 Lea, 316; Ellis v. Pearson (1900) 104 Tenn. 591, 58 S. W. 318.

West Virginia.—Lauck v. Logan (1898) 45 W. Va. 251, 31 S. E. 986.

Wyoming.—Watts v. Lawrence (1919) — Wyo. —, 185 Pac. 719, rehearing denied in (1920) — Wyo. —, 188 Pac. 84.

England.—Habergham v. Vincent (1793) 2 Ves. Jr. 204, 30 Eng. Reprint, 595, 4 Bro. Ch. 353, 29 Eng. Reprint, 931; Shingler v. Pemberton (1832) 4 Hagg. Eccl. Rep. 356.

In Georgia, it is specifically provided by Code that an instrument passing a present interest in property is a deed. Bright v. Adams (1874) 51 Ga. 239; Williams v. Tolbert (1880) 66 Ga. 127; Sperber v. Balster (1881) 66 Ga. 317; Ward v. Campbell (1884) 73 Ga. 97; Worby v. Daniel (1892) 90 Ga. 650, 16 S. E. 938; COLLIER v. CARTER (reported herewith) ante, 1.

As said above, it is not necessary to a deed that the grantee take a present estate in the property conveyed. If the interest is a present one, the instrument is a deed, and it is immaterial that the enjoyment of the estate is postponed till some future time.

Alabama.—Gillham v. Mustin (1868) 42 Ala. 365; McGuire v. Bank of Mobile (1868) 42 Ala. 589; Jordan v. Jordan (1880) 65 Ala. 301; Trawick v. Davis (1888) 85 Ala. 342, 5 So. 83; Crocker v. Smith (1891) 94 Ala. 295, 16 L.R.A. 576, 10 So. 258; Mays v. Burleson (1913) 180 Ala. 396, 61 So. 75; Craft v. Moon (1917) 201 Ala. 11, 75 So. 302.

Arkansas.—Bunch v. Nicks (1887) 50 Ark. 367, 7 S. W. 563.

Georgia.—Daniel v. Veal (1861) 32 Ga. 589.

Indiana.—Stroup v. Stroup (1894) 140 Ind. 179, 27 L.R.A. 523, 39 N. E. 864; Timmons v. Timmons (1911) 49 Ind. App. 21, 96 N. E. 622.

Iowa.—Craven v. Winter (1874) 38 Iowa, 471; Lewis v. Curnutt (1906) 130 Iowa, 423, 106 N. W. 914; Ransom v. Pottawattamie County (1915) 168 Iowa, 570, 150 N. W. 657; SHAULL v. SHAULL (reported herewith) ante, 15.

Kansas.—Reed v. Hazleton (1887) 37 Kan. 321, 15 Pac. 177.

Minnesota.—Thomas v. Williams (1908) 105 Minn. 88, 117 N. W. 155.

Mississippi.—McDaniel v. Johns (1871) 45 Miss. 632.

Missouri.—Christ v. Kuehne (1902) 172 Mo. 118, 72 S. W. 537; O'Day v. Meadows (1905) 194 Mo. 588, 112 Am. St. Rep. 542, 92 S. W. 637; Aldridge v. Aldridge (1906) 202 Mo. 565, 101 S. W. 42; Sims v. Brown (1913) 252 Mo. 58, 158 S. W. 624; Priest v. McFarland (1914) 262 Mo. 229, 171 S. W. 62.

Nebraska.—Pinkham v. Pinkham (1898) 55 Neb. 729, 76 N. W. 411.

New York.—Re Diez (1872) 50 N. Y. 88.

North Carolina.—Phifer v. Mullis (1914) 167 N. C. 405, 83 S. E. 582.

Oregon.—Beebe v. McKenzie (1890) 19 Or. 296, 24 Pac. 236; Sappingfield v. King (1907) 49 Or. 102, 8 L.R.A. (N.S.) 1066, 89 Pac. 142, affirmed on rehearing in (1907) 49 Or. 109, 90 Pac. 150.

Pennsylvania.—Nixon v. Frick Coke Co. (1900) 27 Pa. Co. Ct. 150.

South Carolina.—Babb v. Harrison (1856) 9 Rich. Eq. 111, 70 Am. Dec. 203; Folk v. Varn (1857) 9 Rich. Eq. 303; Williams v. Sullivan (1858) 10 Rich. Eq. 217.

South Dakota.—TRUMBAUER v. RUST (reported herewith) ante, 10.

Tennessee.—Swails v. Bushart (1859) 2 Head, 561; Swiney v. Swiney (1884) 14 Lea, 316; Ellis v. Pearson (1900) 104 Tenn. 591, 58 N. W. 318.

West Virginia.—Lauck v. Logan (1898) 45 W. Va. 251, 31 S. E. 986.

Canada.—Simpson v. Hartman (1868) 27 U. C. Q. B. 460.

England.—Habergham v. Vincent (1793) 2 Ves. Jr. 204, 30 Eng. Reprint, 595, 4 Bro. Ch. 353, 29 Eng. Reprint, 931.

And, in Georgia, it is provided by Code that, where the interest passed is a present one, the instrument is a deed, irrespective of the postponement of the enjoyment of the estate granted. Williams v. Tolbert (1880) 66 Ga. 127; Worley v. Daniel (1892) 90 Ga. 650, 16 S. E. 938.

The conveyance of a present interest operates, of course, unless there is a specific reservation of a power of revocation, to cut off all the grantor's rights in the interest conveyed. Hav-

ing disposed of it by a present conveyance, he cannot retake it; and the conveyance is irrevocable. Hence, it is said that an instrument containing a clause postponing its taking effect until after the maker's death, which passes an interest that is irrevocable, is a deed. Crocker v. Smith (1891) 94 Ala. 295, 16 L.R.A. 576, 10 So. 258; Abney v. Moore (1894) 106 Ala. 131, 18 So. 60; Gomez v. Higgins (1900) 130 Ala. 493; Mays v. Burleson (1913) 180 Ala. 396, 61 So. 75; Craft v. Moon (1917) 201 Ala. 11, 75 So. 302; McGlawn v. McGlawn (1855) 17 Ga. 234; COLLIER v. CARTER (reported herewith) ante, 1; Abbott v. Holway (1881) 72 Me. 298; O'Day v. Meadows (1905) 194 Mo. 588, 112 Am. St. Rep. 542, 92 S. W. 637; Priest v. McFarland (1914) 262 Mo. 229, 171 S. W. 62; Williams v. Sullivan (1858) 10 Rich. Eq. (S. C.) 217.

It is said in Sharp v. Hall (1888) 86 Ala. 110, 11 Am. St. Rep. 23, 5 So. 497: "Deeds, once executed, are irrevocable, unless such power is reserved in the instrument. Wills are always revocable, so long as the testator lives and retains testamentary capacity. Deeds take effect by delivery, and are operative and binding during the life of the grantor. Wills are ambulatory during the life of the testator, and have no effect until his death."

2. Instrument passing revocable interest to take effect after maker's death.

As is pointed out above, the term "interest," as used in this note, is not to be confused with "estate." A deed may pass a present interest in property, the estate in which is a future one. One has an interest in property when he presently owns or holds some property rights therein, regardless of the time at which he comes into enjoyment of the estate.

Where the provision in an instrument, postponing its effect until after the death of the grantor, is construed as passing an interest not to take effect until the death of the maker, the instrument is testamentary in character, notwithstanding that in form it may be a deed.

Alabama.—Gillham v. Mustin (1868) 42 Ala. 365; McGuire v. Bank of Mobile

(1868) 42 Ala. 589; Daniel v. Hill (1875) 52 Ala. 430; Jordan v. Jordan (1880) 65 Ala. 301; Trawick v. Davis (1888) 85 Ala. 342, 5 So. 83; Crocker v. Smith (1891) 94 Ala. 295, 16 L.R.A. 576, 10 So. 258; Abney v. Moore (1894) 106 Ala. 131, 18 So. 60; Gomez v. Higgins (1900) 130 Ala. 493; Mays v. Burleson (1913) 180 Ala. 396, 61 So. 75; Smith v. Davis (1917) 199 Ala. 687, 75 So. 22.

Arkansas.—Bunch v. Nicks (1887) 50 Ark. 367, 7 S. W. 568.

Georgia.—Cumming v. Cumming (1847) 3 Ga. 460; Jackson v. Culpepper (1847) 3 Ga. 569; Watson v. Watson (1857) 22 Ga. 460; Hall v. Bragg (1859) 28 Ga. 330; Daniel v. Veal (1861) 32 Ga. 589; Price v. Gross (1918) 148 Ga. 137, 96 S. E. 4.

Illinois.—Roth v. Michalis (1888) 125 Ill. 325, 17 N. E. 809; Robinson v. Brewster (1892) 140 Ill. 649, 33 Am. St. Rep. 265, 30 N. E. 683.

Indiana.—Stroup v. Stroup (1894) 140 Ind. 179, 27 L.R.A. 523, 39 N. E. 864; Timmons v. Timmons (1911) 49 Ind. App. 21, 96 N. E. 622.

Iowa.—Craven v. Winter (1874) 38 Iowa, 471; Saunders v. Saunders (1901) 115 Iowa, 275, 88 N. W. 329; Tuttle v. Raish (1902) 116 Iowa, 331, 90 N. W. 66; Lewis v. Curnutt (1906) 130 Iowa, 423, 106 N. W. 914; Ransom v. Pottawattamie County (1915) 168 Iowa, 570, 150 N. W. 657; SHAULL v. SHAULL (reported herewith) ante, 15.

Kansas.—Reed v. Hazleton (1887) 37 Kan. 321, 15 Pac. 177; Bevins v. Phillips (1897) 6 Kan. App. 324, 51 Pac. 59.

Kentucky.—Phillips v. Thomas Lumbar Co. (1893) 94 Ky. 445, 42 Am. St. Rep. 367, 22 S. W. 652; Rawlings v. McRoberts (1894) 95 Ky. 346, 25 S. W. 601; Hunt v. Hunt (1904) 119 Ky. 39, 68 L.R.A. 180, 82 S. W. 998, 7 Ann. Cas. 788; Ecklar v. Robinson (1906) 29 Ky. L. Rep. 1038, 96 S. W. 845; Ison v. Halcomb (1910) 136 Ky. 523, 124 S. W. 813; Taylor v. Purdy (1912) 151 Ky. 82, 151 S. W. 45.

Michigan.—Bigley v. Souvey (1881) 45 Mich. 370, 8 N. W. 98; Re Lautenschlager (1890) 80 Mich. 285, 45 N. W. 147; Hitchcock v. Simpkins (1894) 99

Mich. 198, 58 N. W. 47; *Lincoln v. Felt* (1902) 132 Mich. 49, 92 N. W. 780; *Leonard v. Leonard* (1906) 145 Mich. 563, 108 N. W. 985; *McIntyre v. McIntyre* (1909) 156 Mich. 240, 120 N. W. 587; *Moody v. Macomber* (1910) 159 Mich. 657, 134 Am. St. Rep. 755, 124 N. W. 549.

Minnesota.—*Thomas v. Williams* (1908) 105 Minn. 88, 117 N. W. 155; *Smith v. Corey* (1914) 125 Minn. 190, 145 N. W. 1067.

Mississippi.—*Wall v. Wall* (1855) 30 Miss. 91, 64 Am. Dec. 147; *Sartor v. Sartor* (1861) 39 Miss. 760; *McDaniel v. Johns* (1871) 45 Miss. 632; *Cunningham v. Davis* (1884) 62 Miss. 366; *SIMPSON v. MCGEE* (reported herewith) ante, 4; *Thomas v. Byrd* (1916) 112 Miss. 692, 73 So. 725; *Cox v. REED* (reported herewith) ante, 5.

Missouri.—*Miller v. Holt* (1878) 68 Mo. 584; *Murphy v. Gabbert* (1901) 166 Mo. 596, 89 Am. St. Rep. 733, 66 S. W. 536; *Christ v. Kuehne* (1902) 172 Mo. 118, 72 S. W. 537; *Griffin v. McIntosh* (1903) 176 Mo. 392, 75 S. W. 677; *O'Day v. Meadows* (1905) 194 Mo. 588, 112 Am. St. Rep. 542, 92 S. W. 637; *Aldridge v. Aldridge* (1906) 202 Mo. 565, 101 S. W. 42; *Givens v. Ott* (1909) 222 Mo. 395, 121 S. W. 23; *Terry v. Glover* (1911) 235 Mo. 544, 139 S. W. 337; *Sims v. Brown* (1913) 252 Mo. 58, 158 S. W. 624; *Goodale v. Evans* (1914) 263 Mo. 219, 172 S. W. 370; *WIMPEY v. LEDFORD* (reported herewith) ante, 7.

Nebraska.—*Pinkham v. Pinkham* (1898) 55 Neb. 729, 76 N. W. 411.

New Jersey.—*Sibley v. Somers* (1901) 62 N. J. Eq. 595, 50 Atl. 321.

New York.—*Re Diez* (1872) 50 N. Y. 88.

North Carolina.—*Robertson v. Dunn* (1812) 6 N. C. (2 Murph.) 133, 5 Am. Dec. 525; *Re Belcher* (1872) 66 N. C. 51; *Egerton v. Carr* (1886) 94 N. C. 648, 55 Am. Rep. 630; *Phifer v. Mullis* (1914) 167 N. C. 405, 83 S. E. 582.

Oregon.—*Beebe v. McKenzie* (1890) 19 Or. 296, 24 Pac. 236; *Sappingfield v. King* (1907) 49 Or. 102, 8 L.R.A. (N.S.) 1066, 89 Pac. 142, affirmed on rehearing in (1907) 49 Or. 109, 90 Pac. 150.

Pennsylvania.—*Turner v. Scott* (1866) 51 Pa. 126; *Nixon v. Frick Coke*

Co. (1900) 27 Pa. Co. Ct. 150; *Muntz v. Whitcomb* (1909) 40 Pa. Super. Ct. 553.

South Carolina.—*Ragsdale v. Booker* (1826) 2 Strobb. Eq. 348, note; *Crawford v. M'Elvy* (1843) 2 Speers, L. 225; *Welch v. Kinard* (1843) Speers, Eq. 256; *Jaggers v. Estes* (1848) 2 Strobb. Eq. 343, 49 Am. Dec. 674; *Babb v. Harrison* (1856) 9 Rich. Eq. 111, 70 Am. Dec. 203; *Alexander v. Burnet* (1851) 5 Rich. L. 189.

South Dakota.—*TRUMBAUER v. RUST* (reported herewith) ante, 10.

Tennessee.—*Watkins v. Dean* (1837) 10 Yerg. 321, 31 Am. Dec. 583; *Swails v. Bushart* (1859) 2 Head, 561; *Ellis v. Pearson* (1900) 104 Tenn. 591, 58 S. W. 318.

Texas.—*Faulk v. Faulk* (1859) 23 Tex. 653; *Ellison v. Keese* (1860) 25 Tex. Supp. 83; *Ferguson v. Ferguson* (1864) 27 Tex. 339; *Carlton v. Cameron* (1880) 54 Tex. 72, 38 Am. Rep. 620; *Chavez v. Chavez* (1890) — Tex. —, 13 S. W. 1018.

West Virginia.—*Roberts v. Coleman* (1892) 37 W. Va. 143, 16 S. E. 482; *Lauck v. Logan* (1898) 45 W. Va. 251, 31 S. E. 986.

Canada.—*Simpson v. Hartman* (1868) 27 U. C. Q. B. 460.

England.—*Habergham v. Vincent* (1793) 2 Ves. Jr. 204, 30 Eng. Reprint, 595, 4 Bro. Ch. 353, 29 Eng. Reprint, 931; *Shingler v. Pemberton* (1832) 4 Hagg. Eccl. Rep. 356.

In Georgia, it is specifically provided by Code that an instrument which conveys an interest, to take effect at the maker's death, is a will. *Bright v. Adams* (1874) 51 Ga. 239; *Williams v. Tolbert* (1880) 66 Ga. 127; *Sperber v. Balster* (1881) 66 Ga. 317; *Ward v. Campbell* (1884) 73 Ga. 97; *Worley v. Daniel* (1892) 90 Ga. 650, 16 S. E. 938; *COLLIER v. CARTER* (reported herewith) ante, 1.

The maker of a dispositive instrument which passes an interest that is to take effect only upon the maker's death does not thereby deprive himself of the right of revoking the instrument; and it is revocable and ambulatory. Hence, it is said that an instrument containing a clause postponing its taking effect until after the

maker's death, which passes an interest that is revocable and ambulatory, is testamentary in character.

Alabama.—Sharp v. Hall (1888) 86 Ala. 110, 11 Am. St. Rep. 23, 5 So. 497; Crocker v. Smith (1891) 94 Ala. 295, 16 L.R.A. 576, 10 So. 258; Abney v. Moore (1894) 106 Ala. 131, 18 So. 60; Mays v. Burleson (1913) 180 Ala. 396, 61 So. 75; Craft v. Moon (1917) 201 Ala. 11, 75 So. 302.

Arkansas.—Bunch v. Nicks (1887) 50 Ark. 367, 7 S. W. 563.

California.—Re Hall (1906) 149 Cal. 143, 84 Pac. 839; Tennant v. John Tennant Memorial Home (1914) 167 Cal. 570, 140 Pac. 242.

Georgia.—Hester v. Young (1847) 2 Ga. 31; Jackson v. Culpepper (1847) 3 Ga. 569; Johnson v. Yancey (1856) 20 Ga. 707, 65 Am. Dec. 646; Brewer v. Baxter (1870) 41 Ga. 212, 5 Am. Rep. 530; COLLIER v. CARTER (reported herewith) ante, 1.

Indiana.—Heaston v. Krieg (1906) 167 Ind. 101, 119 Am. St. Rep. 475, 77 N. E. 805.

Kentucky.—Rawlings v. McRoberts (1894) 95 Ky. 346, 25 S. W. 601.

Maine.—Abbott v. Holway (1881) 72 Me. 298.

Minnesota.—Thomas v. Williams (1908) 105 Minn. 88, 117 N. W. 155.

Mississippi.—McDaniel v. Johns (1871) 45 Miss. 632.

Missouri.—O'Day v. Meadows (1905) 194 Mo. 588, 112 Am. St. Rep. 542, 92 S. W. 637; Priest v. McFarland (1914) 262 Mo. 229, 171 S. W. 62; WIMPEY v. LEDFORD (reported herewith) ante, 7.

North Carolina.—Phifer v. Mullis (1914) 167 N. C. 405, 83 S. E. 582.

Pennsylvania.—Nixon v. Frick Coke Co. (1900) 27 Pa. Co. Ct. 150.

Texas.—Ferguson v. Ferguson (1864) 27 Tex. 339; Chavez v. Chavez (1890) — Tex. —, 13 S. W. 1018.

"The essential characteristic of an instrument testamentary in its nature is that it operates only upon and by reason of the death of the maker. Up to that time, it is ambulatory. By its execution, the maker has parted with no rights, and divested himself of no modicum of his estate; and, per contra, no rights have accrued to and

no estate has vested in any other person. The death of the maker establishes for the first time the character of the instrument. It at once ceases to be ambulatory; it acquires a fixed status, and operates as a conveyance of title." Nichols v. Emery (1895) 109 Cal. 323, 50 Am. St. Rep. 43, 41 Pac. 1089.

b. Rules of construction for determination of interest passed by instrument.

1. Intent of maker followed.

"The intention of the maker is the ultimate object of the inquiry to determine whether a given document is a deed or a will, as to whether it is intended to be ambulatory and revocable, or to create rights and interests at the time of its execution." Craft v. Moon (1917) 201 Ala. 11, 75 So. 302.

It is a rule everywhere recognized that in construing an instrument in the form of a deed, containing a provision postponing its taking effect until after the death of the grantor, the intent of the grantor as to the interest which he intends to pass—whether a present irrevocable one, or an ambulatory one, to take effect after the maker's death—is controlling.

Alabama.—Mosser v. Mosser (1858) 32 Ala. 551; Jordan v. Jordan (1880) 65 Ala. 301; Sharp v. Hall (1888) 86 Ala. 110, 11 Am. St. Rep. 23, 5 So. 497; Crocker v. Smith (1891) 94 Ala. 295, 16 L.R.A. 576, 10 So. 258; Mays v. Burleson (1913) 180 Ala. 396, 61 So. 75; Josey v. Johnston (1916) 197 Ala. 482, 73 So. 27; Smith v. Davis (1917) 199 Ala. 687, 75 So. 22; Craft v. Moon, *supra*.

Arkansas.—Bunch v. Nicks (1887) 50 Ark. 367, 7 S. W. 563.

Georgia.—Watson v. Watson (1857) 22 Ga. 460; Brewer v. Baxter (1870) 41 Ga. 212, 5 Am. Rep. 530; Price v. Gross (1918) 148 Ga. 137, 96 S. E. 4.

Indiana.—Cates v. Cates (1893) 135 Ind. 272, 34 N. E. 957; Stroup v. Stroup (1894) 140 Ind. 179, 27 L.R.A. 523, 39 N. E. 864; Kokomo Trust Co. v. Hiller (1917) — Ind. App. —, 116 N. E. 332.

Iowa.—Saunders v. Saunders (1901) 115 Iowa, 275, 88 N. W. 329; Ransom v. Pottawattamie County (1915) 168

Iowa, 570, 150 N. W. 657; *SHAULL v. SHAULL* (reported herewith) ante, 15.

Kentucky.—*Phillips v. Thomas Lumber Co.* (1898) 94 Ky. 445, 42 Am. St. Rep. 367, 22 S. W. 652; *Hunt v. Hunt* (1904) 119 Ky. 39, 68 L.R.A. 180, 82 S. W. 998, 7 Ann. Cas. 768; *Eckler v. Robinson* (1906) 29 Ky. L. Rep. 1038, 96 S. W. 845.

Michigan.—*Bassett v. Budlong* (1889) 77 Mich. 338, 18 Am. St. Rep. 404, 43 N. W. 984; *Springer v. Ensley* (1920) — Mich. —, 178 N. W. 714.

Minnesota.—*Thomas v. Williams* (1908) 105 Minn. 88, 117 N. W. 155; *Smith v. Corey* (1914) 125 Minn. 190, 145 N. W. 1067.

North Carolina.—*Phifer v. Mullis* (1914) 167 N. C. 405, 83 S. E. 582.

Oregon.—*Beebe v. McKenzie* (1890) 19 Or. 296, 24 Pac. 236.

Pennsylvania.—*Felbush v. Egen* (1908) 221 Pa. 420, 70 Atl. 816.

South Dakota.—*TRUMBAUER v. RUST* (reported herewith) ante, 10.

Tennessee.—*Armstrong v. Armstrong* (1874) 4 Baxt. 357; *Ellis v. Pearson* (1900) 104 Tenn. 591, 58 S. W. 318.

Texas.—*McLain v. Garrison* (1905) 39 Tex. Civ. App. 431, 88 S. W. 484, rehearing denied in (1905) 39 Tex. Civ. App. 440, 89 S. W. 284.

Vermont.—*Blanchard v. Morey* (1883) 56 Vt. 170.

England.—*Thorold v. Thorold* (1809) 1 Phillim. Eccl. Rep. 1.

And, by the Code in Georgia, the intent of the maker is specifically provided to be controlling. *Williams v. Tolbert* (1880) 66 Ga. 127; *White v. Hopkins* (1887) 80 Ga. 154, 4 S. E. 863; *Rollins v. Davis* (1895) 96 Ga. 107, 23 S. E. 392; *Barnes v. Stephens* (1899) 107 Ga. 436, 33 S. E. 399; *West v. Wright* (1902) 115 Ga. 277, 41 S. E. 602; *COLLIER v. CARTER* (reported herewith) ante, 1.

It is the maker's intention, however, as to the interest conveyed, and not his belief as to whether the paper executed is a will or a deed, that is controlling. *Daniel v. Veal* (1861) 32 Ga. 589; *Brewer v. Baxter* (1870) 41 Ga. 212, 5 Am. Rep. 530.

In the former of these two cases, it

is said: "In determining whether an instrument be a deed or a will, the court will not consider what the maker believed it to be, but what, in point of law, it is. The intention of the maker as to the character of the estate conveyed is the criterion by which the court will determine whether a given paper is a deed or a will."

It may be added, by way of explanation, that the rules of construction set out in the following sections are rules to which recourse is had, in cases in which the intent of the maker of the instrument is not apparent from the language used. Where the maker's intent is clear (a rare thing, in cases of this kind), the court is relieved from the labor of trying to discover it by construction of the instrument. Furthermore, the purpose of the construction, it must be borne in mind, is to arrive at the intent of the maker, and not to override it.

2. Name as evidence of intent.

The fact that an instrument in the form of a deed, containing a provision postponing its taking effect until after the death of the grantor, is designated a deed on its face, has been held to be some evidence of an intent to create a present interest. *Saunders v. Saunders* (1901) 115 Iowa, 275, 88 N. W. 329; *TRUMBAUER v. RUST* (reported herewith) ante, 10; *Lauck v. Logan* (1898) 45 W. Va. 251, 31 S. E. 986.

So, it is said in *Crocker v. Smith* (1891) 94 Ala. 295, 16 L.R.A. 576, 10 So. 258, that the fact that an instrument "is designated on its face as a *deed of gift* is ordinarily regarded of little moment, though it may become of more or less importance when, upon a comparison of the terms of the instrument, and consideration of the bearing of each on the others, the meaning is ambiguous, and the mind is left in doubt as to the intention of the maker."

In this connection, see *Bunch v. Nicks* (1887) 50 Ark. 367, 7 S. W. 563, *infra*, III. c. 2 (g), and *Crawford v. Thomas* (1920) — Ga. —, 104 S. E. 211, *infra*, III. c. 2 (c).

But see *Alexander v. Burnet* (1851) 5 Rich. L. (S. C.) 189.

But the name of such an instrument does not determine conclusively the nature of the interest passed. *Dunn v. Bank of Mobile* (1842) 2 Ala. 152; *Shepherd v. Nabors* (1844) 6 Ala. 631; *Walker v. Jones* (1853) 23 Ala. 448; *Gillham v. Mustin* (1868) 42 Ala. 365; *Jordan v. Jordan* (1880) 65 Ala. 301; *Abney v. Moore* (1894) 106 Ala. 131, 18 So. 60; *Daniel v. Veal* (1861) 32 Ga. 589; *Price v. Gross* (1918) 148 Ga. 137, 96 S. E. 4; *Heaston v. Krieg* (1906) 167 Ind. 101, 119 Am. St. Rep. 475, 77 N. E. 805; *Wall v. Wall* (1855) 30 Miss. 91, 64 Am. Dec. 147; *Re Diez* (1872) 50 N. Y. 88; *Henry v. Ballard* (1816) 4 N. C. (2 Car. Law Repos.) 595; *Egerton v. Carr* (1886) 94 N. C. 648, 55 Am. Rep. 630.

"No matter that the paper is in name or form a deed, a bond, a note, or an agreement, if it is to pass title only at death, and vest no manner of estate till then, it is not a deed, bond, note, or agreement, but a will or testamentary paper, no matter what its maker called the paper or believed it to be. What does it say? What is its effect in law? That is the question." *Lauck v. Logan* (1898) 45 W. Va. 251, 31 S. E. 986.

So, it is said in *Ferguson v. Ferguson* (1864) 27 Tex. 339, that, whenever it appears that an instrument, although in the form of a deed, is intended to take effect as a will, "any contrary title or designation which the maker may have given to the instrument will be disregarded."

And in *Cunningham v. Davis* (1884) 62 Miss. 366, it is said that, if the instrument in question "was not to have any operation or effect until the death of the maker, it could not be treated as a deed, although it was so named, and is in form a deed."

See *infra*, III. b, 8.

3. Form as evidence of intent.

The fact that an instrument containing a provision postponing its taking effect until after the death of the maker is in the form of a deed has been held to be evidence of the intention of the maker as to the nature of

the interest passed. *Rawlings v. McRoberts* (1894) 95 Ky. 346, 25 S. W. 601; *Fellbush v. Fellbush* (1906) 216 Pa. 141, 65 Atl. 28, reversing (1904) 31 Pa. Co. Ct. 350; *Alexander v. Burnet* (1851) 5 Rich. L. (S. C.) 189.

"While it has often been held that the form of the instrument is not controlling, and, though in form a deed, it may nevertheless be construed as a will, yet the fact that the instrument is in form a warranty deed, containing the usual words of conveyance and covenant and covenants of warranty, should be given weight in ascertaining the intention of the grantor." *SHAULL v. SHAULL* (reported herewith) ante, 15.

So, it is said in *Moye v. Kittrell* (1860) 29 Ga. 677, that "the form is evidence of the intention of the maker." This is quoted with approval in *West v. Wright* (1902) 115 Ga. 277, 41 S. E. 602.

And in *Watson v. Watson* (1857) 22 Ga. 460, it is said: "The form of an instrument also may help to indicate the intention of its author."

And see *Harris v. Saunders* (1835) 2 Strobb. Eq. (S. C.) 370, note, *infra*, III. c, 2 (d).

But in *Beebe v. McKenzie* (1890) 19 Or. 296, 24 Pac. 236, it is held that the fact that the instrument in question "is, in form and phraseology, a deed, signifies nothing."

By the undisputed rule, the form of an instrument in the form of a deed, containing a provision postponing its taking effect until after the death of the grantor, does not determine conclusively the nature of the interest passed. *Dunn v. Bank of Mobile* (1841) 2 Ala. 152; *Shepherd v. Nabors* (1844) 6 Ala. 631; *Gillham v. Mustin* (1868) 42 Ala. 365; *Jordan v. Jordan* (1880) 65 Ala. 301; *Seay v. Huggins* (1915) 194 Ala. 496, 70 So. 113; *Hester v. Young* (1847) 2 Ga. 81; *Daniel v. Veal* (1861) 32 Ga. 589; *SHAULL v. SHAULL* (reported herewith) ante, 15; *Rawlings v. McRoberts* (1894) 95 Ky. 346, 25 S. W. 601; *Sartor v. Sartor* (1861) 39 Miss. 760.

It is said in *Re Lautenshlager* (1890) 80 Mich. 285, 45 N. W. 147, that "the form of any instrument is of

little consequence in determining whether it is a will or not."

And in *Cunningham v. Davis* (1884) 62 Miss. 366, it is said that, if the instrument in question "was not to have any operation or effect until the death of the maker, it could not be treated as a deed, although it was so named, and is in form a deed."

And see *Lauck v. Logan* (1898) 45 W. Va. 251, 31 S. E. 986, *supra*, III. b, 2. See *infra*, III. b, 8.

4. Execution as evidence of intent.

(a) In general.

As a general rule, the manner of the execution of instruments in the form of deeds, containing provisions postponing their taking effect until after the death of the maker, are some evidence of the intention of the maker as to the interest passed by the instrument. If, for example, he executes the instrument in a manner not required in the case of deeds, but necessary to the validity of a will, the fact seems to point to a belief, on the part of the maker, that he has executed a will and, accordingly, constitutes some evidence of an intent to make such an instrument. But the manner of the execution of such an instrument does not determine conclusively the nature of the instrument or of the interest passed thereby.

See *Re Lautenschlager* (1890) 80 Mich. 285, 45 N. W. 147; *Harris v. Saunders* (1835) 2 Strobh. Eq. (S. C.) 370, note, *infra*, III. c, 2, (d); *Ferguson v. Ferguson* (1864) 27 Tex. 339, *infra*, III. b, 4, (b).

(b) Delivery.

Inasmuch as delivery is requisite to the validity of deeds, but not of wills, the fact that an instrument in the form of a deed, containing a provision postponing its taking effect until after the death of the grantor, is delivered, constitutes additional evidence that the maker intended the instrument to pass a present interest, and to constitute a deed. *Worley v. Daniel* (1892) 90 Ga. 650, 16 S. E. 938; *Brice v. Sheffield* (1903) 118 Ga. 128, 44 S. E. 843; *Griffith v. Douglas* (1904) 120 Ga. 582, 48 S. E. 129; *Jones v. Lingo* (1904) 120

Ga. 693, 48 S. E. 190; *Sharpe v. Matthews* (1905) 123 Ga. 794, 51 S. E. 706; *COLLIER v. CARTER* (reported herewith) ante, 1; *Saunders v. Saunders* (1901) 115 Iowa, 275, 88 N. W. 329; *SHAULL v. SHAULL* (reported herewith) ante, 15; *Herrington v. Bradford* (1832) Walk. (Miss.) 520; *Fellbush v. Fellbush* (1906) 216 Pa. 141, 65 Atl. 28, reversing (1904) 31 Pa. Co. Ct. 350.

In *Ferguson v. Ferguson* (1864) 27 Tex. 339, the instrument is designated by its maker a deed, and its execution and phraseology are more analogous to deeds than to wills. It contains an habendum clause and the operative word "give," which might be used in either kind of instrument. It also contains a provision that the donees shall not take nor hold possession of the property until the death of the maker, which is said to be as consistent with the supposition that a present gift, with the reservation of a life estate, is meant, as that the instrument was intended to be of a testamentary character. On the other hand, the instrument attempts to dispose of property subsequently to be acquired by the maker, which gives it the flavor of a will. "The legitimate conclusion, therefore, to be deduced from the face of the paper," says the court, "leaves it a matter of doubt whether it was intended to operate as a deed or will. And, in such cases, the fact of its delivery, and the intention and purpose of its execution, should be submitted as questions of fact to the jury, to be guided in their determination of them, however, by the construction given to the terms of the instrument by the court, together with such extrinsic testimony as may be furnished by the parties, to aid in their elucidation."

And see *Gilham v. Mustin* (1868) 42 Ala. 365, *infra*, III. c, 3 (j); *Abney v. Moore* (1894) 106 Ala. 131, 18 So. 60, *infra*, III. c, 2, (g); *Josey v. Johnston* (1916) 197 Ala. 482, 73 So. 27, *infra*, III. c, 2, (b); *Craft v. Moon* (1917) 201 Ala. 11, 75 So. 302, *infra*, III. c, 2, (e); *Bunch v. Nicks* (1887) 50 Ark. 367, 7 S. W. 563, *infra*, III. c, 2, (g); *Re Hall* (1906) 149 Cal. 143.

84 Pac. 839; *Moye v. Kittrell* (1860) 29 Ga. 677, *infra*, III. b, 4, (c); *Kisecker's Estate* (1899) 190 Pa. 476, 42 Atl. 886, *infra*, III. c, 3, (d); *Bethea v. Allen* (1915) 101 S. C. 350, 85 S. E. 903, *infra*, III. c, 2, (a); *TRUMBAUER v. RUST* (reported herewith) *ante*, 10.

It is held, however, in *Daniel v. Veal* (1861) 32 Ga. 589, that the fact of delivery is not conclusive upon the question of the character of an instrument in the form of a deed, containing a provision postponing its taking effect until after the death of the maker.

See, however, in this connection, *Hathaway v. Cook* (1913) 258 Ill. 92, 101 N. E. 227, *infra*, III. c, 2, (g); *Nowakowski v. Sobeziak* (1915) 270 Ill. 622, 110 N. E. 809, *infra*, III. c, 2, (q).

For the same reason that delivery of an instrument in the form of a deed, containing a provision postponing its taking effect until the death of the grantor, is evidence of an intent on the part of the maker to execute a deed, a failure on the part of the maker to deliver the instrument is viewed as being indicative of an intent to execute a will, and not a deed.

The fact that the maker of an instrument in the form of a deed, but reserving the use, control, and consumption, does not deliver it, but places it in an envelop, indorsed, "Not to be opened until after my death," is said, in *Sharp v. Hall* (1888) 86 Ala. 110, 111 Am. St. Rep. 28, 5 So. 497, to be a proper subject of consideration in arriving at the testator's intention.

So, where, in *Leonard v. Leonard* (1906) 145 Mich. 563, 108 N. W. 985, an instrument in the form of a deed is construed to be testamentary in character, the court says that "this construction is in harmony with the conduct of the parties. There is no evidence of a delivery, or an intention to deliver the instrument during the lifetime of the makers."

And see *Folk v. Varn* (1857) 9 Rich. Eq. (S. C.) 303.

See also *Nichols v. Chandler* (1875) 55 Ga. 369, *infra*, III. c, 3 (h); *Baxter v. Chapman* (1917) 147 Ga. 438, 94 S. E. 544, *infra*, III. c, 3 (e).

(c) Recording.

Inasmuch as recording is requisite to the validity of deeds, but not of wills, the fact that an instrument in the form of a deed, containing a provision postponing its taking effect until after the death of the grantor, is recorded, constitutes some evidence that the maker intended the instrument to pass a present interest, and to constitute a deed. *Saunders v. Saunders* (1901) 115 Iowa, 275, 88 N. W. 329; *SHAULL v. SHAULL* (reported herewith) *ante*, 15; *Pentico v. Hays* (1907) 75 Kan. 76, 9 L.R.A.(N.S.) 224, 88 Pac. 738; *TRUMBAUER v. RUST* (reported herewith) *ante*, 10.

After stating, in *Moye v. Kittrell* (1860) 29 Ga. 677, that the recording of a deed is equivalent to a delivery thereof to the grantee, it is said that the maker of the instrument in question, by putting it upon record, manifested his purpose to part with the title to the property conveyed, and to make the transfer irrevocable.

The recording of an instrument in the form of a deed, containing a provision postponing its taking effect until after the death of the grantor, is not, as a general rule, conclusive evidence of an intent on the part of the maker to execute a deed. *Daniel v. Veal* (1861) 32 Ga. 589; *Pentico v. Hays* (1907) 75 Kan. 76, 9 L.R.A.(N.S.) 224, 88 Pac. 738.

However, in *Rawlings v. McRoberts* (1894) 95 Ky. 346, 25 S. W. 601, involving a deed postponing the taking effect of the grant till the death of the grantor, "it is said that "the significant fact that the instrument was to be put to record is substantially conclusive of the point involved. This shows its irrevocable nature."

See *Wilson v. Carrico* (1894) 140 Ind. 583, 49 Am. St. Rep. 213, 40 N. E. 50, *infra*, III. b, 9, (a).

(d) Acknowledging.

Inasmuch as acknowledgment is requisite to the validity of deeds, but not of wills, in most jurisdictions, the fact that an instrument in the form of a deed, containing a provision postponing its taking effect until after the death of the grantor, is acknowledged, constitutes some evidence that the

maker intended the instrument to pass a present interest, and to constitute a deed. *Saunders v. Saunders* (1901) 115 Iowa, 275, 88 N. W. 329; *Pentico v. Hays* (1907) 75 Kan. 76, 9 L.R.A. (N.S.) 224, 88 Pac. 738. And see *Bunch v. Nicks* (1887) 50 Ark. 367, 7 S. W. 563, *infra*, III. c. 2 (g); *Emerson v. Pate* (1914) — Tex. Civ. App. —, 165 S. W. 469, *infra*, III. c. 2 (e).

The fact that such an instrument is acknowledged, however, is not conclusive evidence of the intent of the maker to pass a present interest. *Pentico v. Hays* (1907) 75 Kan. 76, 9 L.R.A. (N.S.) 224, 88 Pac. 738.

(e) *Attestation.*

Where an instrument in the form of a deed, containing a provision postponing its taking effect until after the death of the maker, is not attested, as required of wills, it is evidence that the maker intended the instrument to pass a present interest, and to be a deed. *Griffith v. Douglas* (1904) 120 Ga. 582, 48 S. E. 129, *infra*, III. c. 2, (g); *Sharpe v. Mathews* (1905) 123 Ga. 794, 51 S. E. 706, *infra*, III. c. 2, (f); *Isler v. Griffin* (1909) 134 Ga. 192, 67 S. E. 854, *infra*, III. c. 2, (g); *Mayo v. Fletcher* (1911) 137 Ga. 27, 72 S. E. 408, *infra*, III. c. 2, (f); *COLLIER v. CARTER* (reported herewith) *ante*, 1.

Where, in *Abney v. Moore* (1894) 106 Ala. 131, 18 So. 60, an instrument in the form of a deed, containing a clause postponing its taking effect until after the grantor's death, is executed without the attestation of witnesses, it is said: "We must presume the maker knew that a will could not be executed without a witness, and this is a fact of very controlling importance, when the intention in the execution of the instrument is sought. Construing his intentions by his acts, he must have known that an acknowledgment before a notary public, in due form, was sufficient to make the paper a deed, so far as related to its execution, and that this was not sufficient for its legal execution as a will."

And see *Emerson v. Pate* (1914) — Tex. Civ. App. —, 165 S. W. 469, *infra*, III. c. 2, (e).

The manner of the attestation of

such instrument, however, is not conclusive of the character thereof.

In *Jones v. Lingo* (1904) 120 Ga. 693, 48 S. E. 190, it is said: "That three witnesses attested the instrument might be of importance, if its character was otherwise doubtful; but the instrument is not changed from a deed into a will, by the number of witnesses."

5. *Effort to construe instrument as deed where not properly executed as will.*

In addition to the rules set out above, making the execution of instruments in the form of deeds, containing provisions postponing their taking effect until the death of the maker, evidence of the intent of the maker, there exists another rule, generally accepted, to the effect that where such an instrument cannot operate as a will, because of insufficient execution, and it is sufficiently executed to operate as a deed, the courts will make an effort to construe it so as to prevent it from becoming a mere nullity. *Craft v. Moore* (1917) — Ala. —, 75 So. 302 (obiter); *Wynn v. Wynn* (1900) 112 Ga. 214, 37 S. E. 378; *West v. Wright* (1902) 115 Ga. 277, 41 S. E. 602; *COLLIER v. CARTER* (reported herewith) *ante*, 1; *Saunders v. Saunders* (1901) 115 Iowa, 275, 88 N. W. 329; *Jacoby v. Nichols* (1901) 23 Ky. L. Rep. 205, 62 S. W. 734; *Hunt v. Hunt* (1904) 119 Ky. 39, 68 L.R.A. 180, 82 S. W. 998, 7 Ann. Cas. 788; *Thomas v. Williams* (1908) 105 Minn. 88, 117 N. W. 155; *Herrington v. Bradford* (1832) Walk. (Miss.) 520; *Clayton v. Liverman* (1846) 29 N. C. (7 Ired. L.) 92; *TRUMBAUER v. RUST* (reported herewith) *ante*, 10.

And see *Bowler v. Bowler* (1898) 176 Ill. 541, 52 N. E. 437, and *Jones v. Caird* (1913) 153 Wis. 384, 141 N. W. 228, Ann. Cas. 1914A, 88, *infra*, III. c. 2, (o).

The foregoing rule, however, is merely a rule of construction, adopted in cases where the intent of the maker, as deduced from the language used in the instrument, is doubtful.

After holding, in *Moye v. Kittrell* (1860) 29 Ga. 677, that the instrument in question is a deed, and not a will,

the court says that even "if the words were doubtful, we should incline to that construction which would support the instrument. And this can be done only by holding it to be a deed. For as a will, it must fail, wanting the necessary attestation."

Commenting on this case, Little, J., in a dissenting opinion in *West v. Wright* (1902) 115 Ga. 277, 41 S. E. 602, says: "In the case of *Moye v. Kittrell* (Ga.) supra, . . . it was said that, if the words of the instrument are doubtful, the court would incline to that construction which would support the instrument; and there can be no doubt that is sound policy, as well as the correct rule for the construction of instruments of this character. But it is only applicable when the words of the instrument create a doubt whether the maker of it intended to convey a present estate." And where, in *Dismukes v. Parrott* (1876) 56 Ga. 531, the instrument, construed as a will, would be a nullity because of the lack of sufficient witnesses, the court, being doubtful as to the construction thereof, holds it to be a deed, so as to give effect to it.

However, it is said in *Louck v. Logan* (1898) 45 W. Va. 251, 31 S. E. 986: "The law says that property can be passed by the act of the parties only by deed or will, and when a paper is a will, it is not a deed. . . . If it were an open question, I would say that the law ought to give a paper, not so executed as to be good as a will, effect as a deed, if good as a deed, and a paper, executed so as not to be good as a deed, effect as a will, if good as a will."

6. Effort to construe instrument as will where not properly executed as deed.

In addition to the rules set out above, making the execution of instruments in the form of deeds, containing provisions postponing their taking effect until the death of the maker, evidence of the intent of the maker, there exists another generally accepted rule, to the effect that, where such an instrument cannot operate as a deed because of insufficient execu-

tion, and it is sufficiently executed to operate as a will, the courts will make an effort to construe it so as to prevent it from becoming a mere nullity. *TRUMBAUER v. RUST* (reported herewith) ante, 10.

See *Louck v. Logan* (1898) 45 W. Va. 251, 31 S. E. 986, supra, III. b, 5.

It is pointed out, supra, III. b, 5, that the rule relating to the effort made by the courts to construe an instrument as a deed, where not properly executed as a will, has application only in cases where the intent of the maker as to the nature of the interest passed is left doubtful, by the language used in the instrument. What is said there applies with equal force here. Where the intent of the maker clearly appears from the language used, the courts will not override it, merely to prevent the instrument from being invalid.

In *Sharp v. Hall* (1888) 86 Ala. 110, 11 Am. St. Rep. 28, 5 So. 497, it is said: "If a paper cannot have operation as a deed, but may as a will, then, in doubtful cases, we should pronounce it a will, 'ut res magis valeat.'" In that case, the instrument in question was not delivered by the maker, but was placed in an envelop, indorsed, "Not to be opened until after my death."

In connection with this section, reference is made to III. b, 7, *infra*, where it is stated as a general rule that the courts will make an effort to construe as a will any instrument in the form of a deed, containing a provision preventing its taking effect until the death of the maker, some of the provisions of which would be without effect, were the instrument construed to be a deed.

7. Effort to construe instrument as will where provisions can have no effect as deed.

In order to prevent an instrument in the form of a deed, containing a clause postponing its taking effect until after the death of the maker, from becoming a nullity because effect cannot be given to provisions of the instrument, operating as a deed, it is a general rule that, in such cases, the

instrument will be construed as a will if sufficiently executed to operate as a will. *Thompson v. Johnson* (1851) 19 Ala. 59 (obiter); *Abney v. Moore* (1894) 106 Ala. 131, 18 So. 60; *Mays v. Burleson* (1913) 180 Ala. 396, 61 So. 75; *Seay v. Huggins* (1915) 194 Ala. 496, 70 So. 113; *Craft v. Moon* (1917) 201 Ala. 11, 75 So. 302 (obiter); *COLLIER v. CARTER* (reported herewith) ante, 1.

Thus, it is said in *Trawick v. Davis* (1888) 85 Ala. 342, 5 So. 83, that, "when [an instrument] can have no effect as a deed, the court is inclined to regard it as a will, if in that character effect can be given to the evident intention of the maker."

In *Heaston v. Krieg* (1906) 167 Ind. 101, 119 Am. St. Rep. 475, 77 N. E. 805, the instrument contained a grant of the whole of the residue of the maker's estate, real, personal, and mixed, upon her death, and provided for the payment of certain legacies out of such residue. On the ground that these clauses can be given effect only by construing the instrument to be a will, it is so construed. This is said to be in accordance with the maxim, "ut res magis valeat quam pereat."

And where, in *Crocker v. Smith* (1891) 94 Ala. 295, 16 L.R.A. 576, 10 So. 258, the instrument purports to pass, not only the property owned by the maker at the time of making the instrument, but also all property that he might thereafter own, and, because of the absence of covenants of warranty in the instrument, it can have no operation on property thereafter to be acquired, it is said that, "in doubtful cases, the instrument will be pronounced a will, when it cannot have operation as a deed, but may as a will."

This is a rule of construction, however, and is not to be applied except in cases where the intent of the maker does not clearly appear from the language used in the instrument. In other words, the courts will not violate the plain intention of the grantor as to the interest created, merely to prevent the instrument from being

held invalid. See *Crocker v. Smith* (Ala.) supra.

In connection with this section, reference is made to III. b, 6, supra, where the rule is laid down that the courts will make an effort to construe as a will any instrument in the form of a deed, containing a provision preventing its taking effect until the death of the maker, which would be invalid as a deed because of insufficient execution.

8. Presumption that instrument is deed.

"Another rule of construction in such cases is that, when the paper on its face is equivocal, the presumption is against its operating as testamentary, unless it is made clearly to appear that it was executed animo testandi, or being intended by the maker to operate as a posthumous disposition of his estate." *Abney v. Moore* (1894) 106 Ala. 131, 18 So. 60.

While no authority has been found directly contradicting this case, neither has any authority been found in support of it. It is possible that the court, in this case, intended nothing more than a strong statement of the rules set out above (III. b, 2, and III. b, 3), that the name and form of the instrument are, in doubtful cases, evidence of the intent of the maker.

In *Price v. Gross* (1918) 148 Ga. 137, 96 S. E. 4, the court observed that if it be doubtful whether the instrument is a deed or a will, it will be held to be a deed, the court preferring to give the intention of the maker some effect rather than to defeat his intention altogether.

9. Admissibility of evidence outside the body of the instrument.

(a) Admissibility in general.

In its effort to arrive at the intent of the maker of an instrument in the form of a deed, containing a clause postponing its taking effect until the death of the maker, the court will regard not only the instrument itself and the language and formalities made use of, but will also take into consideration evidence of facts and circumstances outside the body of the

instrument, attendant upon the execution thereof, bearing upon the intent of the maker. *Sharp v. Hall* (1888) 86 Ala. 110, 11 Am. St. Rep. 28, 5 So. 497; *Josey v. Johnston* (1916) 197 Ala. 482, 73 So. 27; *Smith v. Davis* (1917) 199 Ala. 687, 75 So. 22; *Bunch v. Nicks* (1887) 50 Ark. 367, 7 S. W. 563; *Brice v. Sheffield* (1903) 118 Ga. 128, 44 S. E. 843; *Craven v. Winter* (1874) 38 Iowa, 471; *Leonard v. Leonard* (1906) 145 Mich. 563, 108 N. W. 985; *Re Dowell* (1908) 152 Mich. 194, 115 N. W. 972; *Wall v. Wall* (1855) 30 Miss. 91, 64 Am. Dec. 147; *Sartor v. Sartor* (1861) 39 Miss. 760; *Aldridge v. Aldridge* (1906) 202 Mo. 565, 101 S. W. 42; *Egerton v. Carr* (1886) 94 N. C. 648, 55 Am. Rep. 630; *Phifer v. Mullis* (1914) 167 N. C. 405, 83 S. E. 582; *Kisecker's Estate* (1899) 190 Pa. 476, 42 Atl. 886; *TRUMBAUER v. RUST* (reported herewith) ante, 10.

"And whenever a paper of dubious import is so framed as in any event to postpone actual enjoyment under it until the death of the maker, as in the case here, all the attendant circumstances may be put in proof as aids in determining whether the maker intended it should operate as a deed or a will." *Seay v. Huggins* (1915) 194 Ala. 496, 70 So. 113, *infra*, III. c, 3, (e).

So, it is held in *Hannig v. Hannig* (1893) — Tex. Civ. App. —, 24 S. W. 695, that an instrument in the form of a deed, containing a clause reserving the possession, rents, and profits to the grantor for his lifetime, and providing that the property is then "to pass immediately into the possession" of the grantee, "in absolute fee," is ambiguous, and that the court committed no error in submitting it for construction to the jury, together with extrinsic testimony bearing upon the question.

And in *Herrington v. Bradford* (1832) Walk. (Miss.) 520, involving an instrument in the form of a deed, conveying the lands possessed by the grantor at his decease, and providing that the property is to pass at the grantor's decease, and not before, evidence of the execution and delivery

of the instrument, and of the acts, intentions, and declarations of the grantor as to the character of the instrument, are held admissible, on the question of the character of the instrument.

And see *Wilson v. Carrico* (1894) 140 Ind. 533, 49 Am. St. Rep. 213, 40 N. E. 50, where it is held that, where the maker of an instrument in the form of a deed, containing a clause postponing its taking effect until his death, suffers the instrument to be recorded and the land to be sold, such acts are incompatible with the theory that the grantor has not conveyed a present interest in the lands to the grantee.

It is said in *Clayton v. Liverman* (1846) 29 N. C. (7 Ired. L.) 92, that "when the question is whether an instrument of writing is a testamentary paper or a deed, it [the maker's intent] becomes a fact to be proved by all kinds of evidence, by which, in law, any other fact may be established. The evidence which arises from the face of the instrument may be aided or opposed by evidence aliunde."

See *Moody v. Macomber* (1910) 159 Mich. 657, 124 N. W. 549; *Ferguson v. Ferguson* (1864) 27 Tex. 339, *supra*, III. b, 4, (b).

(b) *Admissibility dependent upon existence of ambiguity on face of instrument.*

While parol evidence is admissible to explain the terms of a written instrument whose language is not entirely clear, it is a well-known rule of law that parol evidence is not admissible to contradict or vary the terms of a written instrument, unambiguous in its language. It is under the former rule that outside evidence is admissible upon the question of the intent of the maker of an instrument, containing a provision postponing its taking effect until the death of the maker. But under the latter rule the admissibility of such parol evidence is limited strictly to cases in which the language of the instrument is ambiguous, and the intent of the grantor as to the interest intended to be passed is not clearly apparent therefrom. *Seay v. Huggins* (1915) 194 Ala. 496, 70 So.

113; *Noble v. Fickes* (1907) 230 Ill. 594, 13 L.R.A.(N.S.) 1203, 82 N. E. 950, 12 Ann. Cas. 282; *Wilson v. Carrico* (1894) 140 Ind. 533, 49 Am. St. Rep. 213, 40 N. E. 50; *Clay v. Layton* (1903) 134 Mich. 317, 96 N. W. 458; *Herrington v. Bradford* (1832) Walk. (Miss.) 520; *Robertson v. Dunn* (1812) 6 N. C. (2 Murph.) 133, 5 Am. Dec. 525; *Egerton v. Carr* (1886) 94 N. C. 648, 55 Am. Rep. 630; *Kisecker's Estate* (1899) 190 Pa. 476, 42 Atl. 886.

In *Phifer v. Mullis* (1914) 167 N. C. 405, 83 S. E. 582, involving an instrument conveying all of the grantor's personal property at her death, it is said: "Where the instrument itself suggests uncertainty as to its character, parol evidence of facts and circumstances, as well as instructions given the draftsman, is competent to shed light upon the purpose of the maker. But such evidence is incompetent where the instrument, upon its face, gives unmistakable evidence as to its legal character, as we think the instrument before us does." The instrument is held to be a will.

So, in *Felbush v. Egan* (1908) 221 Pa. 420, 70 Atl. 816, involving an instrument providing that the estate granted was to take effect upon the death of the grantor it is said that "where the language used is fairly capable of only one construction, as it is here, the intent of the maker must be gathered from his language. It is sometimes said that the question is not what he may have meant, but what is the meaning of his words, a most unfortunate form of expression, for the construction must always be according to his actual intent, whatever the words used; but, where the meaning of his words is clear, his intent is to be gathered solely from them. It is only where his words are ambiguous to the extent of being capable of more than one construction that resort can be had to other evidence, dehors the instrument, to discover his intent." Notwithstanding what is said here with respect to the lack of ambiguity in the words of the instrument in question, however, in *Felbush v. Felbush* (1906) 216 Pa. 141, 65 Atl. 28, reversing (1904) 31 Pa. Co.

Ct. 350, where this instrument is determined to be a deed, the court goes outside the instrument, and takes into consideration the delivery thereof in arriving at its conclusion.

And it is said in *TRUMBAUER v. RUST* (reported herewith) ante, 10, that the rule that the intention of the maker is to be gathered primarily from the language of the instrument does not preclude the court, in doubtful cases, from a consideration of the facts and circumstances under which the writing was made.

So, it is held in *Noble v. Fickes* (1907) 230 Ill. 594, 13 L.R.A.(N.S.) 1203, 82 N. E. 950, 12 Ann. Cas. 282, that parol evidence to establish the testamentary intention of the maker of an instrument in the form of a deed, plainly conveying a present interest, is inadmissible, in accordance with the parol evidence rule, it being only when the writing is of doubtful import that such evidence is admissible.

See *Hannig v. Hannig* (1893) — Tex. Civ. App. —, 24 S. W. 695, supra, III. b, 9, (a.).

(c) *Admissibility of directions to draftsman.*

It is uniformly held that the instructions given to the draftsman by the maker of an instrument in the form of a deed, containing a clause postponing its taking effect until the maker's death, are admissible in evidence upon the question of the maker's intent. *Sharp v. Hall* (1888) 86 Ala. 110, 11 Am. St. Rep. 28, 5 So. 497.

In *Anspach v. Lightner* (1906) 31 Pa. Super. Ct. 218, evidence that the maker of the instrument in question did not want a will made is used.

And see *Robertson v. Dunn* (1812) 6 N. C. (2 Murph.) 133, 5 Am. Dec. 525, infra, III. c, 2, (v); *Clayton v. Liverman* (1846) 29 N. C. (7 Ired. L.) 92, infra, III. c, 2, (b); *Re Belcher* (1872) 66 N. C. 51, infra, III. c, 3, (a); *Phifer v. Mullis* (1914) 167 N. C. 405, 83 S. E. 582, supra, III. b, 9, (b); *Leslie v. McKinney* (1896) — Tex. Civ. App. —, 38 S. W. 378, infra, III. c, 2, (d); *De Bajligethy v. Johnson* (1906) 23 Tex. Civ. App. 272, 56 S. W. 95, infra, III. c, 3, (e).

(d) *Admissibility of direct evidence of maker's intent.*

Where, in *Sharp v. Hall* (1828) 86 Ala. 110, 11 Am. St. Rep. 28, 5 So. 497, a subscribing witness to an instrument in the form of a deed, but reserving the use, control, and consumption of the property to the maker during her life, was permitted to testify as to the maker's intention in making the instrument, it is said that "the intention cannot be proved by a witness, speaking directly thereto." In that case, however, the objection was put on the ground that the testimony violated the rule against the variance of a written instrument by parol, and it was not sustained.

In the unreported case of *Ward v. Campbell* (1884) 73 Ga. 97, involving an instrument in the form of a deed, but containing words of a testamentary nature, it is said in the syllabus that "it was not competent to prove, by one of the witnesses to this instrument, that the parties intended it as a deed."

c. *Construction of specific language.*

1. *In general.*

Broad general principles for the construction of instruments in the form of deeds, containing provisions postponing their taking effect till after the death of the maker, have been set out above, and very little disagreement has been found to exist among the courts with reference thereto. As has been repeatedly said by courts and text-writers, however, it is impossible to go farther in the matter of agreement, and the greatest apparent confusion is found to exist, not only between the specific applications of the general principles as made by different courts, but not infrequently among the applications of these principles made in the same jurisdiction. This is due in large measure to the fact that the same language, and the same circumstances surrounding execution, are rarely, if ever, found to exist in two different cases. While the courts may agree upon the general principles, each specific case must be decided upon its own facts, peculiar to itself and different, to a greater or

less degree, from the facts in any other case found in the books. Accordingly no rules further than those already set out are possible of deduction; and the formulation of none is attempted. The cases are set out in the following subdivisions, but no effort is made to distinguish, criticize, or discuss. To do so intelligently would be impossible. It may be said here, however, that the tendency of the courts is in the direction of greater liberality in construing instruments containing such provisions. The courts are coming more and more to construe instruments of the kind here under discussion, as deeds, and not as wills.

In this connection attention is called to the following language from the opinion of the Illinois supreme court in *Young v. Payne* (1918) 283 Ill. 649, 119 N. E. 612: "While it is true, as the deed states, that it was made in lieu of a will, yet such statement would not render the deed void as a testamentary instrument. As a matter of fact, most deeds of trust by which a trust is created to continue after the death of the grantor may be said to be, in a sense, testamentary in character, and made to avoid the making of a further disposition of the property involved in such trust by will; but such provision, so far as we are advised, has never been held to render an otherwise valid instrument void as a testamentary disposition of property, nor do we think such provision in this deed had that effect."

2. *Language construed as passing present interest.*

(a) *"At my death," contained in granting clause.*

For cases construing the instrument as a will, see *infra*, III. c, 3 (a).

An instrument in the form of a deed is not converted into a will by the words, "at and after my death," following the words of grant, where the grantor in the same clause explains his intent as follows: "That is, I now give the . . . lands . . . only reserving my life estate in the same." *Worley v. Daniel* (1892) 90 Ga. 650, 16 S. E. 938. The court says: "She gives it to them 'now,' and reserves

'only,' her 'life estate in the same.' The language last quoted is not repugnant to that which precedes it, but is simply explanatory, and the whole constitutes but one clause. The rule as to repugnant clauses is therefore inapplicable." And title in remainder in *præsenti* is held in *Swails v. Bushart* (1859) 2 Head (Tenn.) 561, to be conveyed by an instrument in the form of a deed, whereby property is given, sold, and delivered unto the grantee after the death of the grantor; and the instrument is held to be a deed, and not a will.

In *Gay v. Gay* (1899) 108 Ga. 739, 32 S. E. 846, an instrument stating that, in consideration of the support by the grantee of the grantor's wife during her widowhood, the grantor has "given, granted, bargained, and sold, at" his death, certain land, "to have and to hold . . . at and after" his death, is held to be a deed.

So, a deed conveying and warranting lands "after my decease, and not before," is held in *Owen v. Williams* (1887) 114 Ind. 179, 15 N. E. 678, not to be testamentary in character, but to operate merely to postpone the grantee's use and enjoyment.

And it is said in *Hollomon v. Hollomon* (1857) 12 La. Ann. 607, that a deed conveying slaves at the death of the grantor and his wife is, "by the laws of Alabama, a donation of the property in the slaves to defendant [grantee], with a reservation of a life estate in the donor; or a gift of the property, subject to a loan for use, to the grantor, by which fee present passed to the donor at the date of the instrument."

And a grant, "at my death," of certain negroes, is held in *Williams v. Sullivan* (1858) 10 Rich. Eq. (S. C.) 217, to pass a present interest, and to be a deed.

An instrument in writing, delivered in the lifetime of the maker, and purporting to give, at the maker's death, in consideration of natural love and affection, all the property that came to the maker from a certain estate, with limitations over on the death of the donees without heirs, and containing covenants of warranty, is a deed,

it is held in *Bethea v. Allen* (1915) 101 S. C. 350, 85 S. E. 903, and not a will.

In *Watson v. Watson* (1885) 24 S. C. 228, 58 Am. Rep. 247, an instrument in which the maker recites that he has granted, and does at his death grant, certain property to his wife, is held to be a deed, and not a testament.

In *Gregory v. Walker* (1861) 38 Ala. 26, an instrument is held a deed, and not a will, where it is made in the form of a deed, in consideration of the regard entertained by the grantor for the grantees, and for the further consideration of \$1 in hand paid, and conveys to the grantees, by the words of conveyance usually employed in deeds, certain real and personal property, "together with the right to control the same at" the death of the grantor.

So, an instrument in the form of a deed, conveying certain described land, "together with all the rights and privileges thereunto belonging, at my death, forever in fee simple," is held in *Kytile v. Kytile* (1907) 128 Ga. 387, 57 S. E. 748, to be a deed reserving a life estate, and not a will.

In *Brice v. Sheffield* (1903) 118 Ga. 128, 44 S. E. 843, an instrument is held a deed, which provides that "this is to certify that I have given my son . . . 10 acres of land . . . in consideration of building me a house, said land to belong to him at my death." In view of the delivery of the instrument, and the testimony of the grantee to the effect that the grantor had agreed to convey him the land, reserving only a life estate, the instrument is construed as conveying the title in *præsenti* with the right of possession postponed until the death of the grantor.

In *Golding v. Golding* (1854) 24 Ala. 122, the grantor, in an instrument in the form of a deed, provides: "Know all men by these presents, at my death, that I . . . do hereby give and grant unto my son . . . my negro woman . . . and her son . . .; also, 80 acres of land . . . for which I hereby warrant and defend from the balance of my heirs, executors, administrators, and assigns." The

phrase, "at my death," the court thinks, "does not appear to have been intended to operate on the words of gift, or grant, or upon the estate intended to be granted, but most naturally refers to and limits the time when the grantee shall enter upon the enjoyment of the estate granted. It presents, then, the common case of a gift by deed, of lands, with the reservation of a life estate to the donor." The instrument is held not to be testamentary in character.

In *Cains v. Jones* (1833) 5 Yerg. (Tenn.) 249, the grantor grants and conveys, after his death, all of his rights in certain lands. To the objection that the deed is void as conveying a future estate, it is said: "It was the intention of John Wright [grantor] to convey a present estate . . . ; and it is equally manifest he intended to reserve a life estate to himself. To this, it is apprehended, there can be no valid legal objection."

See *Evans v. Lauderdale* (1882) 10 Lea (Tenn.) 73, involving an instrument in which the maker "agrees that, at his death," certain persons "shall be the lawful heirs of all the land he now owns," which instrument is held to be an executory contract, and not a testamentary paper.

And see *Jacoby v. Nichols* (1901) 23 Ky. L. Rep. 205, 62 S. W. 734; *Mitchell v. Mitchell* (1891) 108 N. C. 542, 13 S. E. 187; *Macumber v. Bradley* (1859) 28 Conn. 445. See also *Simmons v. Augustin* (1836) 3 Port. (Ala.) 69, *supra*, II. a, 2, (a); *King v. Slater* (1910) 96 Ark. 589, 133 S. W. 173, *infra*, III. c, 2, (p); *Bowler v. Bowler* (1898) 176 Ill. 541, 52 N. E. 487, *infra*, III. c, 2, (o); *Vinson v. Vinson* (1879) 4 Ill. App. 138, *supra*, II. a, 2, (a); *Chavez v. Chavez* (1890) — Tex. —, 13 S. W. 1018, *infra*, III. c, 2, (1); *Roe ex dem. Wilkinson v. Trammarr* (1757) Willes, Rep. 682, 125 Eng. Reprint, 1383, 2 Ld. Kenyon, 239, 96 Eng. Reprint, 1168, 2 Wils. 785, 95 Eng. Reprint, 694, *supra*, II. a, 2, (a).

(b) "*At my death,*" contained in *habendum*.

For cases construing the instrument as a will, see *infra*, III. c, 3 (b).

An instrument in the form of a deed, conveying real estate in consideration of services to be rendered, is held in *Guthrie v. Guthrie* (1898) 105 Ga. 86, 31 S. E. 40, to be a deed, although the habendum reads "to have and to hold . . . forever in fee simple, after the death" of the grantor.

So a paper in the form of a warranty deed is held in *Wynn v. Wynn* (1900) 112 Ga. 214, 37 S. E. 378, to be a deed passing a present interest, notwithstanding a clause in the following language: "To have and to hold the above-described premises . . . to be his at my death and the death of my wife."

And an instrument in the form of a deed, reciting the grantor's purpose to be the securing to the grantee of a home after his death, and containing an habendum "to have and to hold . . . forever, from and after my death, the delivery hereof not to occur until my death," is held in *Stevens v. Haile* (1914) — Tex. Civ. App. —, 162 S. W. 1025, to be a deed, executed to convey title, and not a will.

Where an instrument in the form of a deed contains a clause of present grant and covenants of warranty, a recital that the purpose of the instrument is to provide for the grantees after the grantor's death, and a further statement that, "at the time of the death" of the grantor, the grantees are to have and to hold the property, do not give the instrument a testamentary character, it being the intent of the grantor to pass a present interest in the grantees, himself retaining a life estate. *Ecklar v. Robinson* (1906) 29 Ky. L. Rep. 1038, 96 S. W. 845.

An instrument in the form of a deed, conveying to the grantee certain slaves, "to have and to hold . . . at my death," is held, in *Jaggers v. Estes* (1848) 2 Strobb. Eq. (S. C.) 343, 49 Am. Dec. 674, to be "a good and valid deed," the effect of which is to pass a present title to the grantee of a future interest. In this case, the grantor gives to the grantee, "in as ample and full a manner as I am capable of bestowing, to have and to hold . . . from henceforth and forever, as her

lawful right and property, at my death."

. And in *Clayton v. Liverman* (1846) 29 N. C. (7 Ired. L.) 92, the instrument states that the makers "have given and bequeathed" certain property to a certain person, to have and to keep, "at our death, free from any enthrallments whatever." In view of the fact that the language of the instrument, with the exception of the word "bequeath," is that belonging to a deed, in view of the testimony of the scrivener that he had been requested by the makers to write a deed of gift, and in view of the testimony of other witnesses that the makers delivered the instrument as their deed, the instrument is viewed as passing a present interest, and to be a deed, and not a will.

So, a paper containing words of present grant, and having a distinct granting clause, and habendum and tenendum, is a deed, and not a will, although the habendum reads, "to have and to hold the aforesaid property at my death," the phrase "at my death" deferring the time of taking possession, and not the time of the passing of title. *Johnson v. Hines* (1861) 31 Ga. 720. In this case, the court assigns two grounds for its decision; the first being that the granting clause is meant to grant an estate in presenti, and the habendum is meant to reserve a life estate, the two being consistent. This reason is proper and sufficient. But in its other reason the court errs. Although the question is whether the instrument is a will or a deed, and it is specifically said that in the case of wills the last expression of testamentary intention must prevail, the court, assuming the granting clause and the habendum to be irreconcilable, applies the rule of construction applicable to deeds, and holds that the clause first appearing in the instrument must control. Thus, in trying to prove the instrument to be a deed, it is assumed to be a deed. If the court had assumed the instrument to be a will, and had applied the rule of construction applicable, according to its own statement, to wills, it would have proved in exactly the same manner

that the instrument was of a testamentary nature.

A written instrument in the form of a warranty deed of land to the grantor's daughter, who was living with him on the land, executed on the day the grantor was dividing his lands among his children, and delivered by the grantor to the grantee immediately following its execution, is viewed in *Josey v. Johnston* (1916) 197 Ala. 482, 73 So. 27, as a deed, and not a will, despite a clause therein "to have at my death." In reaching its conclusion, the court takes into consideration, not only the language of the instrument set out, but also the attendant circumstances mentioned.

Where a grantor conveys lands to his wife, "to have and to hold . . . from and after the death" of the grantor, and provides that it is to be understood "that this conveyance is made upon the express condition that the said . . . [grantee] shall, during his lifetime, retain the possession and control of the premises," the instrument passes a present interest to the grantee, with the enjoyment thereof postponed till the grantor's death, and is a deed, and not a will. *Christ v. Kuehne* (1902) 172 Mo. 118, 72 S. W. 537.

See *Ingram v. Porter* (1827) 4 M'Cord, L. (S. C.) 198, not involving any question of distinguishing between a will and a deed, where a father, by an instrument in the form of a deed, conveyed a slave to his daughter, and by the habendum provided that she was to have and to hold it after his death, where it is held that "the habendum, after the death of the father, is utterly inconsistent with the present interest [granted by the present words of conveyance in the premises], and therefore cannot take effect."

And see *Gay v. Gay* (1899) 108 Ga. 739, 32 S. E. 846, supra, III. c. 2, (a); *Noble v. Fickes* (1907) 230 Ill. 594, 13 L.R.A.(N.S.) 1203, 82 N. E. 950, 12 Ann. Cas. 282; *Book v. Book* (1883) 104 Pa. 240; *Milledge v. Lamar* (1816) 4 Desauss. Eq. (S. C.) 617. See also *Trafton v. Hawes* (1869) 102 Mass. 533, 3 Am. Rep. 494, supra,

II. a, 2, (b); Wallis v. Wallis (1808) 4 Mass. 135, 3 Am. Dec. 210, supra, II. a, 2, (b).

(c) *"At my death," following description.*

In Lewis v. Curnutt (1906) 130 Iowa, 423, 106 N. W. 914, the maker of a deed of trust executed and delivered, as a part of the transaction, an instrument in which she prescribed that, upon her death, the trustee was to pay her debts and funeral expenses, and divide the remainder of her estate among certain specified persons. This instrument contained, following the description of the property and preceding the conditions of the trust, the words "from and after my death, and not before." The court is of the opinion that, "upon a fair construction of the writings as a whole, the words 'from and after my death' have no reference to the time when the title or interest shall pass under the deed, but to the time when the trustee shall have authority to take possession, and proceed with the active performance of his trust. That this must be so is to be seen, not only from the language employed, but from the fact that then and there, and as a part of the same transaction, the grantor made and delivered to the trustee an unconditional conveyance of the title. . . . To suppose that, while delivering with one hand to the trustee a deed, the legal meaning and effect of which she is held to have understood, she also passed to him with the other hand an instrument by which the deed was intended to be made null and void, is to assume that the entire deal was a solemn farce."

In Sumner v. Harrison (1899) 54 S. C. 353, 32 S. E. 572, an instrument in the form of a deed provided, following the description of the land: "In trust, nevertheless, and it is the true intent and meaning of these presents that the said S. T. McCrary [trustee] shall hold the said premises for the term of twenty years from and after the date of my death, for the sole use and behoof of my said children." This instrument is held to pass title in present.

In Crawford v. Thomas (1920) — Ga. —, 104 S. E. 211, an instrument attested by three witnesses and in all respects in the form of a deed, including the expression of a consideration, was held to be not a will, but a conveyance, which, if delivered, would have passed title in present with right of possession postponed, notwithstanding the words, following the description and preceding the habendum, "this deed goes into effect at the death of me and my wife." Accordingly, probate of the instrument as a will was denied, although it had never been delivered and was therefore not effectual as a deed.

(d) *Specific reservation of life estate.*

For cases construing instrument as a will, see infra, III. c, 3 (c).

A reservation of a life estate to the grantor, in an instrument purporting to grant the fee, creates a strong presumption that the deed was intended to take effect immediately, as a present conveyance of a future estate; for otherwise such a reservation would be useless. Young v. Payne (1918) 283 Ill. 649, 119 N. E. 612.

In light of facts showing that the maker directed the draftsman to draw a deed to take effect after her death, and that, after making it, she requested him to make delivery thereof, an instrument in the form of a deed, reserving a life estate in the lands conveyed and limiting the conveyance "to take effect after my [her] death, and no sooner," is held in Leslie v. McKinney (1896) — Tex. Civ. App. —, 38 S. W. 378, to be a deed passing a present estate, to commence in futuro.

So, in Galloway v. Devaney (1860) 21 Ark. 526, the conveyance in question was not copied into the bill of exceptions, but in the agreed statement of facts it is stated that it was a deed, duly executed and recorded, by which the grantor conveyed land, reserving to himself a life estate therein. "Taking this to be true," it is said, "the proposition that the mere reservation of a life estate in Robinson [grantor] necessarily made the conveyance testamentary in its character is not maintainable. On the contrary, under our

system of conveyancing, the deed vested Mrs. Devaney with a present interest in the land, to be enjoyed in futuro."

And where, in *Harris v. Saunders* (1835) 2 Strobb. Eq. (S. C.) 370, note, the grantor, in an instrument in the form of a deed, conveyed a slave to his son, reserving to himself a life estate therein, the instrument is held to be a deed. "It had the form and requisites of a deed," the court says; "it was executed, published, and recited as a deed; and the transaction was always referred to by the donor as an actual gift."

So, notwithstanding a clause in a deed, wherein the grantor excepts and reserves to himself "a freehold estate for the term of" his natural life, "with full power of control and management as such tenant for life," it is held in *Deckenbach v. Deckenbach* (1913) 65 Or. 160, 130 Pac. 729, that the instrument is a deed, and not a will. "An estate for life," it is said, "although one of freehold, is not one of inheritance, and it will be observed that it does not reserve the right to convey the property, but only the power to control and manage; and not only so, but those functions are to be exercised only as such tenant for life."

In *Owen v. Smith* (1893) 91 Ga. 564, 18 S. E. 527, the deed involved provides that the grantor reserves a life estate in the property conveyed, "with power to direct, manage, and control it as she sees proper, during her lifetime," and it is further provided that the grantee is to "live with her, care for and provide for her, supply her necessary wants, take care of and protect the property and herself," and that, upon compliance with these terms by the grantee, "whatever at her death is left, together with the natural increase thereof . . . is to belong to" the grantee in fee simple. In holding the instrument to be a deed, it is said: "A reasonable supposition as to her real intention is that an interest was to pass to him at the time of the delivery of the deed, with a postponement only of the possession and use until she should be dead."

It is said in *Riegel v. Riegel* (1910)

243 Ill. 626, 90 N. E. 1108: "This deed contained a reservation of a life estate in the grantors, which raises a strong presumption that it was intended the title should immediately vest in the remaindermen, for the reason that, if such intention had not existed, there would be no reason for such reservation."

An instrument conveying negroes and their future increase absolutely to the grantee, and reserving "a life estate in the property," is a deed, and not a will. *Robinson v. Schly* (1849) 6 Ga. 515.

In *Williams v. Tolbert* (1880) 66 Ga. 127, an indenture, containing words of present conveyance, an habendum clause, and a warranty, is held to be a deed under the Code, requiring the conveyance of a present interest as a requisite of a deed, although the maker specifically reserves to himself "a life estate in the tract of land . . . conveyed, to have, use, occupy, and enjoy the same during his natural life, and to take and enjoy the rents, issues and profits of the same during his life only."

And it is held in *Prindle v. Iowa Soldiers Orphans Home* (1911) 153 Iowa, 234, 133 N. W. 106, that the specific reservation of a life estate by the grantors, in a deed, does not render the instrument testamentary in character.

And in *Cross v. Benson* (1904) 68 Kan. 495, 64 L.R.A. 560, 75 Pac. 553, a trust deed reserving a life estate in the grantor, and providing that, upon her death, the property is to be sold and the proceeds invested for the benefit of a third person, is held not to be testamentary in character.

So, it is said in *Sargent v. Roberts* (1914) 265 Ill. 210, 106 N. E. 805, involving a deed reserving a life estate in the grantor, that "the reservation of a life estate in the grantor raises a strong presumption that it was intended that the title should immediately vest in the remainderman, for the reason that, if such intention had not existed, there would be no reason for the reservation."

In *Carter v. Walden* (1911) 136 Ga. 700, 71 S. E. 1047, an instrument pur-

porting to convey a tract of land is held to be a deed, although it contains a clause providing that the grantor "is to hold a lifetime lease on said . . . land . . . , said lease to expire at the death of the party of the first part."

An instrument in the form of a deed conveying real estate to a grantee "after the expiration of the life estate herein reserved, in fee simple forever," is a deed conveying the property in *præsentî*, with the right of possession postponed until the grantor's death. *Watkins v. Nugen* (1903) 118 Ga. 372, 45 S. E. 262.

And see *Muntz v. Whitcomb* (1909) 40 Pa. Super. Ct. 553, where it is said by the court that the grantor reserved a life estate, but the exact language of the instrument is not set out.

And see *King v. Slater* (1910) 96 Ark. 589, 133 S. W. 173, *infra*, III. c, 2, (p); *Worley v. Daniel* (1892) 90 Ga. 650, 16 S. E. 938, *supra*, III. c, 2, (a); *Love v. Blauw* (1900) 61 Kan. 496, 48 L.R.A. 257, 78 Am. St. Rep. 334, 59 Pac. 1059, reversing on other grounds (1899) 9 Kan. App. 55, 57 Pac. 258, *infra*, III. c, 2, (o); *Powers v. Scharling* (1902) 64 Kan. 339, 67 Pac. 820, *infra*, III. c, 2, (i); *Pentico v. Hays* (1907) 75 Kan. 76, 9 L.R.A. (N.S.) 224, 88 Pac. 738, *infra*, III. c, 2, (g); *Brady v. Fuller* (1908) 78 Kan. 448, 96 Pac. 854, *infra*, III. c, 2, (k); *Dennett v. Dennett* (1860) 40 N. H. 498, *supra*, II. a, 2, (a). See also *Trawick v. Davis* (1888) 85 Ala. 342, 5 So. 83; *Davenport v. Wynne* (1845) 28 N. C. (6 Ired. L.) 128, 44 Am. Dec. 70.

In other cases involving similar instruments, the specific question as to the character of the instrument is not raised, it being assumed, apparently, that the instruments are deeds, and that the only question raised by the clause postponing the taking effect of the instrument is in respect of the extent or nature of the estate created in the grantee, or reserved in the grantor or his wife, thereby. It is not intended to go into these various questions of estate here, the cases being set out merely for whatever value they have upon the question here under discussion.

In *Den ex dem. Ward v. Ward* (1793) 1 N. C. pt. 1, p. 18 (*Martin*, pt. 1, p. 28) it is held that where a deed conveys absolutely to the grantee, an exception of the grantor's lifetime in any part or parcel of the land, contained in the premises, though not in the habendum, is void, and that the fee passes immediately to the grantee.

In *Senterfeit v. Shealey* (1904) 71 S. C. 259, 51 S. E. 142, involving a deed reserving "a lifetime claim" in the land to one of the grantors, a life estate is held to be reserved thereby to such grantor, the remainder vesting in the grantee.

So, where, in *Hurst v. Hurst* (1874) 7 W. Va. 289, the grantor reserved a "life interest" in the property conveyed, the court says that "when the owner of land in fee simple conveys the land in fee simple, reserving therein a 'life estate,' it should be construed as meaning an estate for the life of the grantor is reserved."

In *Lemon v. Lemon* (1918) 273 Mo. 484, 201 S. W. 103, the grantor reserved a life estate for himself and his wife in the property granted. The grantor's wife signed the instrument as a grantor, but had no interest therein, except her inchoate dower and a contingent estate of homestead, which she specifically declared it was her intention to retain. Under a statute requiring conveyances of land to be in writing, it is held that the wife, after the husband's death, took no interest or estate in the property by reason of the reservation, the words of the deed with respect thereto being words of reservation or exception, and not of grant, and she being a grantor, and not a grantee. The estate reserved for her life was held to have remained in the husband, he never having conveyed it to her.

See *Lockridge v. McCommon* (1896) 90 Tex. 234, 38 S. W. 33, where the grantor reserved a life estate in himself and his wife in specific language, providing further that they are to retain the use, enjoyment, control, and possession of the land, and that, at their deaths, their interest and estate in the lands shall cease, and all their

right, title, interest, and estate shall vest in the grantees.

In *Jerman v. Orchard* (1692) *Skinner*, 528, 90 Eng. Reprint, 237, 1 Salk. 346, 91 Eng. Reprint, 303, the holder of a lease for a thousand years conveyed it by deed, the premises of which conveyed presently, and the habendum of which reserved a life estate. On the ground that the premises and habendum are inconsistent, and that the habendum, not being necessary, should not be permitted to render void that which was perfect before, it is held that the premises should prevail. The inconsistency consisted in the reservation of a life estate which is, in contemplation of law, a larger estate than one for a thousand years.

(c) *Reservation of use, possession, enjoyment, and control during maker's life.*

For cases construing instrument, see *infra*, III. c, 3 (d).

In *Adams v. Broughton* (1848) 13 Ala. 731, an instrument purporting to be a deed of gift of certain slaves, in consideration of the "love and good will" of the grantor for the grantee, is construed as a deed, although containing a clause wherein the grantor reserves "to himself and his wife Polly the use and enjoyment of the slaves during his lifetime and the lifetime of his said wife." Ormond, J., says: "The effect of this deed was to convey to the donee, immediately upon its delivery, the title to the slaves, the right to the possession being reserved to the donor. The instrument was not testamentary in its character, but became immediately operative upon its execution."

So, in *Wilks v. Greer* (1848) 14 Ala. 437, it is held that a deed conveying slaves, in consideration of love and affection, to the grantor's daughters, and providing that the grantor and his wife are to have the use of the slaves during their lives, vests "the right to the slaves conveyed, upon its delivery, and operates as a conveyance in *præsent*i, and not as a testamentary paper."

And, where the grantor reserves "to his own use and enjoyment the full interest and estate in the above-described properties, the rents, issues,

and profits thereof, for and during the term of his natural life," the contention that the instrument is a will is "entirely untenable." *Knowlson v. Fleming* (1894) 165 Pa. 10, 30 Atl. 519. The effect of the clause is held to be the reservation of a life estate in the grantor, which "is entirely consistent with a presently passing estate in fee simple in the grantee."

In *McIntyre v. McIntyre* (1909) 156 Mich. 240, 120 N. W. 587, the following paragraph was contained in a deed: "It is understood that this deed is made for the purpose of creating a future estate, preserving to the grantee [grantor] hereof and his wife full use and occupancy thereof until the death of the survivor of them, to the end that the use and occupation, rental and enjoyment, thereof, shall be and belong to them and the survivor of them during life, and the full title and enjoyment of the above-described land shall only become operative upon the death of the survivor of the grantors hereof, and at that time, and not before, the said grantee shall enjoy the full title and control hereof." This instrument is viewed by the court as passing a vested interest in the grantee, and, consequently, not being testamentary in character.

In *Baltimore v. Williams* (1854) 6 Md. 235, the owner of land conveyed it in trust, reserving the right to use, occupy, possess, and enjoy the land during her life, and to have the rents, profits, issues, and income thereof during that period. She provided further that, immediately after her death, the property was to be held in trust for such uses as were specified in a will already executed. This instrument is held to be a deed, and not a will, and accordingly not revocable.

An instrument in the form of a formal conveyance in fee is not rendered testamentary, it is held in *Cable v. Cable* (1891) 146 Pa. 451, 23 Atl. 223, by an exception in the habendum to the effect that the grantors reserve "the right and use of said lot during their natural lives," and a mention in the warranty of the "exception above stated, the right of living on and using said lot while they live."

So, the reservation of the use and occupation of the granted premises during the natural lives of the grantor and his wife does not have the effect, it is held in *McDaniel v. Johns* (1871) 45 Miss. 632, of making the instrument a will; but the instrument is a deed, conveying, upon execution and delivery, a present interest, with postponement of enjoyment thereof.

In *Exum v. Canty* (1857) 34 Miss. 533, grantor, in an instrument in the form of a deed, covenants to stand seised to his own use during his life, and to the use of a trustee after his death, with directions to the trustee as to the disposition of the property after the grantor's death. This was held to take effect upon its execution and delivery, and not to be testamentary in character.

Nor is a testamentary character which prevents its operation as a conveyance in *præsent*i impressed upon a deed purporting to grant successive life estates with remainder, by an express reservation to the grantor, for the term of her natural life, of "the use, possession, and control of all and every part of said premises and all incomes, rents, and profits therefrom," the habendum clause also reading "to [grantee of the first life estate], after the death of said party of the first part, the possession, use, management, and control of said premises for and during the term of his natural life," etc. *Hudspeth v. Grunke* (1919) — Mo. —, 214 S. W. 865.

A deed in *Vessey v. Dwyer* (1911) 116 Minn. 245, 133 N. W. 613, contained the following clause: "This conveyance and the title of said second parties to the above-described lands to take [effect] only upon the death of said first party; and this conveyance is made only upon the covenant and agreement between all said parties that said first party shall continue to own and occupy said land as her own during her natural life, and said first party hereby reserves to herself the use, occupation, rents, and profits of all said described land during her natural life." The court is of the opinion that "it was the intention that the

deed take effect as a conveyance in *præsent*i, with a reservation in the grantor of the use and occupancy thereof during her natural life. . . . The words, 'shall continue to own,' may be consistently construed to refer to the right of control and occupancy of the land, and to the use of the rents and profits to be derived from the land during her natural life." The court is also influenced in its conclusion by the fact that the instrument, if construed to be a will, will be without effect.

So, an instrument in the form of a conveyance of a fee-simple title, using words importing a present transfer of title and the statutory warranty, and reserving to the grantor no power to defeat or jeopardize the operation thereof, is a deed, and not a will, although the grantor reserves a right to the use of the land for her life. *Adair v. Craig* (1902) 135 Ala. 332, 38 So. 902.

See *Folk v. Varn* (1857) 9 Rich. Eq. (S. C.) 303, involving an instrument in which the grantor reserves the use of the property during his lifetime, in which, despite the use of the word "bequeath," in connection with the ordinary words of grant and the lack of internal evidence of delivery, the instrument is held to be a deed.

And see *Smith v. Davis* (1917) 199 Ala. 687, 75 So. 22, where an instrument in the form of a deed, reserving to the grantor the use and possession of the property until the time of her death, is held a deed. The attendant facts are not set out.

See also *Matthews v. Moses* (1879) 21 Tex. Civ. App. 494, 52 S. W. 113, involving an instrument in the form of a deed, with respect to which the parties had an oral understanding that the grantor was to retain the use of the premises during her life, in which the instrument is held not, on that account, to be testamentary.

An instrument in the form of a deed, but providing that the property is to go into the possession of the grantees at the grantor's death, is held in *Moye v. Kittrell* (1860) 29 Ga. 677, to be a deed, and not a will. It has been held competent, the court says, "for

the donor to reserve a *life estate* in the property conveyed, without making the paper testamentary. A reservation of the possession merely is not equal to a life estate."

So, a deed in the usual form, containing a recital that the grantor is "to retain the possession of the above-described property until his death, then to go to the" grantee, delivered to a third person to be delivered to the grantee at the death of the grantor, is held in *Tansel v. Smith* (1911) 49 Ind. App. 263, 93 N. E. 548, rehearing denied in (1911) 49 Ind. App. 268, 94 N. E. 890, to give the grantee a fee-simple title, and not to constitute a testamentary disposition.

And a deed in the usual form, except that it is stated in the final clause thereof that the grantee is not to go into possession until after the deaths of the grantor and the grantor's wife, is held in *Craven v. Winter* (1874) 38 Iowa, 471, to convey a present interest, with the reservation of a life estate in the grantor, and to be a deed, and not a will.

Where an instrument in the form of a deed provides that the conveyance is "to be completed and done" at the grantor's death, and that the possession of the land is to remain in the grantor till his death, it is held in *Beebe v. McKenzie* (1890) 19 Or. 296, 24 Pac. 236, that "the intention is to convey presently the freehold or fee to the grantee, subject to the grantor's possession and use during his life," and that it is a deed, and not a will.

In *Wright v. Giles* (1910) 60 Tex. Civ. App. 550, 129 S. W. 1163, the conveyance in question contained the following clause: "That the above-described land remain in possession of the said B. M. Giles [grantor], and the proceeds of said land to be used by him for the defraying of all expenses of said land and support of himself and wife and children during their natural lifetime, and at their death said land is to become the property of W. S. Giles in fee simple." The instrument is held not to be testamentary in character.

And in *Emerson v. Pate* (1914) — Tex. Civ. App. —, 165 S. W. 469, the

instrument in question is in the form of a deed, except that it contains the following clause: "And it is further agreed that this deed and conveyance of the within-described tract of land is to be held in our possession, and occupied by us as a home until our death." The instrument was signed without witnesses, and acknowledged as a deed, and the grantors, in a subsequent conveyance, refer to it as a deed. The court holds it a deed, and not a will.

In connection with the preceding case, see *Emerson v. Rice* (1914) — Tex. Civ. App. —, 165 S. W. 471, which involves the same facts, and is decided on the opinion there set out.

A deed is not rendered testamentary, it is held in *Ekblaw v. Nelson* (1914) 124 Minn. 335, 144 N. W. 1094, by a clause providing that the grantor is "to remain in full possession and ownership of said described real estate during his lifetime," and that "this deed is not to be placed on record until after the death of" the grantor. "The intention to convey the fee, reserving to the grantor a life estate, is readily seen," according to the court.

Although conveying, with certain exceptions, all of the personal estate of the grantor, and reserving the right "to hold and enjoy" the property conveyed during his natural life, and, if he think proper, to part with any of the stock, accounting to the grantee for the proceeds of the sale, an instrument in the form of a deed, stating the purpose of the maker to be the advancement of gifts to his children in his lifetime, which it should not be in his power to revoke, is held in *Lightfoot v. Colgin* (1813) 5 Munf. (Va.) 42, to be a deed.

So, in *Bevins v. Phillips* (1897) 6 Kan. App. 324, 51 Pac. 59, the instrument in question was in the form of a warranty deed, in the usual form, except that it contained the following recital: "Conditions of this deed is such as said party of the second part that this land shall not be encumbered in any way, or this deed shall be void. The party of the first part is to hold said property his lifetime." The in-

strument is held to be a deed, it being the intention of the grantor to convey a present interest in the land, subject to his life estate and the restriction against encumbrance.

In *Low v. Low* (1915) — Tex. Civ. App. —, 172 S. W. 590, the grantor, by words of present conveyance, grants and conveys all of his property to his wife. In the second clause, he provides as follows: "I do not intend by this deed to convey a present interest to my said wife and children, but convey on the limitation specifically hereafter mentioned. I intend to retain control and possession of said property, and to manage the same, together with the rents and profits arising therefrom, as long as I may choose to do so, or as long as I may live." He grants a life estate to his wife at his death, the life estate to terminate on the wife's remarriage, and provides that "when such event should occur, or in case of her death, then the whole of the property shall go and vest absolutely in fee to my two said children." The instrument is held to be a deed.

So, in *Graves v. Wheeler* (1913) 180 Ala. 412, 61 So. 341, a clause reserving the right to manage and control the property so long as the grantor lives, without liability to account to the grantee, is held not to change the character of the instrument from that of a deed to a will, the operation thereof not being by the clause postponed until the death of the grantor.

And in *Craft v. Moon* (1917) 201 Ala. 11, 75 So. 302, an instrument in the form of a deed, so denominated, and acknowledged, delivered, and recorded as such, is held a deed, and not a will, although it contains an habendum reading "to have and to hold the said tract . . . after my death, forever," and provides further in the next sentence that "the full use and control of the above land" is "reserved to myself during my natural life; but after my death this deed is to have full force and effect."

An instrument containing the technical terms of conveyance used in a deed is not rendered testamentary, it is held in *Bass v. Bass* (1874) 52 Ga.

531, by a clause providing that the maker and his wife are to have "the use, benefit, and control" of the land, during their natural lives.

To the same effect is *Shelton v. Ed-enfield* (1918) 148 Ga. 128, 96 S. E. 3, where an instrument executed in the form of a fee-simple warranty deed recited that the grantor was "to have and control the sale of the land during her natural life, thence" to the named grantee.

And a deed conveying, among other things, two negro girls, is not transformed into a will with respect to the girls, by a clause reserving to the grantor the use and control of the girls during the grantor's lifetime. *Meek v. Holton* (1857) 22 Ga. 491. The net effect of the instrument was, according to the court, "to cause the remainder in the two to pass out of Taylor [grantor] into his daughter . . . immediately on the execution of the instrument." In distinguishing between this case and *Symmes v. Arnold* (1851) 10 Ga. 506, *infra*, III. c, 3, (s), and *Cravy v. Rawlins* (1850) 8 Ga. 450, *infra*, III. a, 3, (s), it is said: "In the present, the donor, after saying that he gives the whole of the property, says that he is to have an interest for his life in a *part* of the property. It is certain, therefore, that the instrument of conveyance is a deed as to a *part* of the property—that part in which there is no reservation of any interest. And it may be argued . . . that, if words of conveyance are words of a deed in reference to a part of the property which they convey, they are to be considered as words of a deed, in reference to the other part of the property which they convey. In those two cases, respectively [the cases cited above], the donor, after saying that he gives the whole of the property, says that he reserves to himself an interest for his life, in the *whole* of the property. It is no more certain, therefore, that the instrument of conveyance is a deed, as to one part of the property, than that it is as to another."

In *Dismukes v. Parrott* (1876) 56 Ga. 513, an instrument in the form of a deed, but reserving the control of

the conveyed premises during the life of the grantor, and providing that the grantee is to have and to hold them after the grantor's death, is held, in view of the fact that, on account of the lack of sufficient witnesses, it cannot be given effect as a will, to be a deed.

In *Jones v. Lingo* (1904) 120 Ga. 693, 48 S. E. 190, an instrument in the usual form of a deed, expressing a consideration, containing a warranty, and delivered to the grantee, is held to be a deed, notwithstanding a clause providing that, for the purpose of paying the grantor's debts and making a division of the remainder of the proceeds to the grantor's daughters, the grantee is to sell the property after the grantor's death, which clause states further that the grantor reserves the right to control and possess and own during his lifetime.

The deed in question in *Hart v. Rust* (1877) 46 Tex. 556, provides for the retention of the possession, control, use, management, and disposition of the property by the grantor and his wife during their lives, and declares that, in event of the death of the grantee without issue during the lives of the grantor and his wife, the property shall revert to them, or the survivor of them. The court can "perceive nothing in the instrument, or the circumstances connected with its execution, to warrant the inference that it was intended by the grantors to have effect as a will, and not as a deed."

So, the condition, inserted in a deed, reserving to the grantor "full possession and control" of the land for his lifetime, is held in *Mays v. Burleson* (1913) 180 Ala. 396, 61 So. 75, not to operate to change the instrument into a will.

And in *Kokomo Trust Co. v. Hiller* (1917) — Ind. App. —, 116 N. E. 332, an instrument in the form of a deed, containing a reservation of possession and control on the part of the grantor, and the right to sell and convey during his lifetime, and providing that if the grantor die seised of the premises the conveyance is to be in full force and effect, is held to grant a fee from which a life estate is excepted, de-

feasible by a reserved power, and not to be testamentary.

A written instrument, reciting a consideration, and containing the usual granting habendum and warranty clauses, and concluding with a reservation of the "full ownership and control of the above-named premises during my natural life," in which it is stated that "at my death this property belongs" to the grantee, and that the conveyance "is intended as a relinquishment of all my interest" in the property, "except the ownership and control during my natural life," is held in *Chrisman v. Wyatt* (1894) 7 Tex. Civ. App. 40, 26 S. W. 759, to be a deed, and not a will.

It is held in *Pratt v. Balcom* (1911) 45 N. S. 123, that a conveyance of all the grantor's real and personal property, with a reservation of the management and control thereof during the lifetime of the grantor and his wife, is a deed, and not a will.

In *Eckman v. Eckman* (1871) 68 Pa. 460, a deed in the usual form contained the following clause: "The said Daniel Eckman [grantor] reserves the rents and profits arising out of the said premises and dwellings for and during his natural life or lifetime, and, at his decease, then the right of rents and profits of and in said land becomes vested in" the grantees. This is held to be a present grant, and not one to take effect on the death of the grantor.

Likewise, a reservation by the grantor of "the occupation, rents, issues, and profits of the said above-granted premises, for and during the term of my natural life," does not, it is held in *Simpson v. Hartman* (1868) 27 U. C. Q. B. 460, render testamentary an instrument, otherwise in the usual form of a deed.

In *Pruett v. Cowsart* (1911) 136 Ga. 756, 72 S. E. 30, an instrument in the form of a deed, given in consideration of love and affection and the right of the grantor to remain in possession of the lands, and to receive the benefits thereof during his lifetime, is held to convey an estate in praesenti, with possession postponed until after the death of the grantor, and not to be testamentary in character.

And in *Wood v. Moss* (1917) 176 Ky. 419, 195 S. W. 1077, the deed expressly reserves the right of possession during the grantor's lifetime, and the right to collect rents from the property conveyed. The court says that "while this did not destroy the effect of the conveyance as a deed, it did have the effect to make it testamentary in character, and therefore [it] did not require the same mental capacity to execute it as is required in one made between parties dealing at arm's length."

A written instrument in the form of a deed, executed by a husband and wife under seal, using the ordinary words of bargain, sale, and conveyance, containing a covenant of warranty, reciting a valuable consideration, attested by two witnesses, delivered on the day of its date, and subsequently recorded, is held in *Griffith v. Marsh* (1888) 86 Ala. 302, 5 So. 569, to be a deed, and not a will, despite the following clause contained in the instrument: "And we . . . agree that, at and after our death, the said Mary E. [grantee] is to have all the benefits of said lands in fee simple, but it is to belong to us as long as we or either of us shall live."

So, an instrument in the form of a deed, disposing of all the property of the grantor, with the exception of the reservation of a life estate, and providing that the purchase price is to be paid by the grantee to persons designated by the grantor, after the grantor's death, is not testamentary, it is held in *Meyer v. Stortenbecker* (1917) 184 Iowa, 441, 165 N. W. 456; neither the retention of the beneficial use, nor the postponement of the payment of consideration till after the grantor's death, having the effect of preventing the passing of present title.

An instrument in the form of a deed, reserving to the grantors "the right to take and receive all the rents, issues, and profits thereof during their joint lives . . . the grantors to pay all the taxes, assessments, and governmental charges," is held in *Magoon v. Lord-Young Engineering Co.* (1914) 22 Haw. 327, to constitute a good conveyance of the fee to the grantees, subject

to the joint life estate in the grantors, and not to be testamentary.

And a deed, without other ambiguity, exception, or limitation, and containing a clause whereby the grantor "expressly excepts and reserves from this grant all the estate in said lands, and the use and occupation, rents and proceeds, thereof, unto himself during his natural life," is held in *Cates v. Cates* (1893) 135 Ind. 272, 34 N. E. 957, to convey a present interest, the enjoyment of which is postponed, and not to be testamentary in character. The court is of the opinion that the reservation of the use and occupation indicates a purpose to reserve a life estate, and that it could not be the maker's intention, by his reservation of "all the estate in said lands," to withhold the fee from the grantees until after his death, and thus to render the reservation of the life estate a nullity.

An instrument in the form of a deed, containing a clause excepting "the uses, rents, and profits" of the land conveyed during the grantor's natural life, is held in *Dozier v. Toalson* (1903) 180 Mo. 546, 103 Am. St. Rep. 586, 79 S. W. 420, to convey a vested fee in remainder, and to be a deed, and not a will.

In *Summerlin v. Gibson* (1849) 15 Ala. 406, involving a deed of gift of certain slaves, absolute on its face, but modified by a parol agreement between the grantor and grantee that the latter was not to trouble the property during the grantor's lifetime, the court, considering the deed as though the oral provision were contained in the instrument, holds that the effect thereof is the reservation of a life estate in the grantor, and the conveyance in present of the vested title of the remainder in the grantee, and that the instrument, accordingly, may take effect as a deed.

In *Nixon v. Frick Coal Co.* (1900) 27 Pa. Co. Ct. 150, an instrument in the form of a deed, containing a reservation to the grantor and his wife, "as a personal privilege not assignable, the western end of the brick mansion house on said land," is held to be a

deed creating a present interest in fee simple.

See *Hall v. Burkham* (1877) 59 Ala. 349, *infra*, III. c. 2, (k); *Jenkins v. Woodward Iron Co.* (1915) 194 Ala. 371, 69 So. 646, *infra*, III. c. 2, (g); *Lewis v. Tisdale* (1905) 75 Ark. 321, 88 S. W. 579, *supra*, II. a, 3; *King v. Slater* (1910) 96 Ark. 589, 133 S. W. 173, *infra*, III. c. 2, (p); *Chandler v. Chandler* (1880) 55 Cal. 267, *supra*, II. a, 4; *Tennant v. John Tennant Memorial Home* (1914) 167 Cal. 570, 140 Pac. 242, *infra*, III. c. 2, (k); *Williams v. Tolbert* (1880) 66 Ga. 127, *supra*, III. c. 2, (d); *Fish v. Sawyer* (1836) 11 Conn. 545, *supra*, II. a, 4; *Bowler v. Bowler* (1898) 176 Ill. 541, 52 N. E. 437, *infra*, III. c. 2, (o); *Kelly v. Parker* (1899) 181 Ill. 49, 54 N. E. 615; *Venters v. Wickens* (1906) 224 Ill. 569, 79 N. E. 946, *infra*, III. c. 2, (o); *White v. Willard* (1908) 232 Ill. 464, 83 N. E. 954, *infra*, III. c. 2, (p); *Calef v. Parsons* (1892) 48 Ill. App. 253, *supra*, II. a, 3; *Timmons v. Timmons* (1911) 49 Ind. App. 21, 96 N. E. 622, *infra*, III. c. 2, (p); *Saunders v. Saunders* (1901) 115 Iowa, 275, 88 N. W. 329, *infra*, III. c. 2, (g); *Phillips v. Thomas Lumber Co.* (1893) 94 Ky. 445, 42 Am. St. Rep. 367, 22 S. W. 652, *infra*, III. c. 2, (g); *Rawling v. McRoberts* (1894) 95 Ky. 346, 25 S. W. 601, *infra*, III. c. 2, (g); *Dudley v. Herring* (1906) 30 Ky. L. Rep. 270, 98 S. W. 289, *infra*, III. c. 2, (g); *Marden v. Chase* (1850) 32 Me. 329, *supra*, II. a, 2, (b); *Wyman v. Brown* (1863) 50 Me. 139, *supra*, II. a, 2, (b); *Drown v. Smith* (1862) 52 Me. 141, *supra*, II. a, 2, (b); *Watson v. Cressey* (1887) 79 Me. 381, 10 Atl. 59; *Brewer v. Hardy* (1839) 22 Pick. (Mass.) 376, 38 Am. Dec. 747, *supra*, II. a, 2, (b); *West v. West* (1892) 155 Mass. 317, 29 N. E. 582, *supra*, II. a, 2, (a); *Reed v. Brown* (1915) 184 Mich. 515, 151 N. W. 592, *infra*, III. c. 2, (s); *Myers v. Viverett* (1915) 110 Miss. 334, 70 So. 449, *infra*, III. c. 2, (r); *Christ v. Kuehne* (1902) 172 Mo. 118, 72 S. W. 537, *supra*, III. c. 2, (b); *Priest v. McFarland* (1914) 262 Mo. 229, 171 S. W. 62, *infra*, III. c. 2, (o); *WIMPEY v. LEDFORD* (reported herewith) *ante*, 7, *infra*,

III. c. 2, (o); *Jackson ex dem. Howell v. Delancey* (1825) 4 Cow. (N. Y.) 427, *supra*, II. a, 2, (b); *Jackson ex dem. Watson v. McKenny* (1829) 3 Wend. (N. Y.) 233, 20 Am. Dec. 690, *supra*, II. a, 2, (b); *Deckenbach v. Deckenbach* (1913) 65 Or. 160, 130 Pac. 729, *supra*, III. c. 2, (d); *Meek's Appeal* (1881) 97 Pa. 313, *infra*, III. c. 2, (w); *TRUMBAUER v. RUST* (reported herewith) *ante*, 10; *Horn v. Broyles* (1900) — *Tenn.* —, 62 S. W. 297, *infra*, III. c. 2, (o); *Caines v. Marley* (1831) 2 Yerg. (Tenn.) 582, *supra*, II. b; *Carpenter v. Haning* (1896) — *Tex. Civ. App.* —, 34 S. W. 774, *infra*, III. c. 2, (o); *Lockridge v. McCommon* (1896) 90 Tex. 236, 38 S. W. 33, *supra*, II. c. 2, (d); *Blanchard v. Morey* (1883) 56 Vt. 170, *infra*, II. c. 2, (f).

And see *Book v. Book* (1883) 104 Pa. 240.

In other cases involving similar instruments, the specific question as to the character of the instrument is not raised, it being assumed, apparently, that the instruments are deeds, and that the only question raised by the clause postponing the taking effect of the instrument is in respect of the extent or nature of the estate created in the grantee, or reserved in the grantor or his wife thereby. It is not intended to go into these various questions of estate here, the cases being set out merely for whatever value they may have upon the question here under discussion.

Where a grantor reserves full and complete control over the property during his life, and the enjoyment of the rents, profits, and issues thereof, and makes the survivorship of the grantee a condition of the grant, it is held in *Earle v. Dawes* (1849) 3 Md. Ch. 230, that the condition is a condition precedent, and, upon the prior death of the grantor, no estate passes by the instrument.

And see *Keliilihune v. Vierra* (1900) 13 Haw. 28, where it is urged that a deed reserving the possession and profits of the land during the grantor's lifetime does not pass a present interest, but where it is held that

it was the intention of the grantors to convey a present interest with a reservation of a life estate.

A deed in which the grantor reserves the management, control, disposition, rents, and profits of the land during his lifetime is held, in *Bombarger v. Morrow* (1884) 61 Tex. 417, to preserve a life estate in the grantor, with the remainder to the grantees upon his death.

So, it is held in *Achorn v. Jackson* (1894) 86 Me. 215, 29 Atl. 989, that, under a deed in which the grantor reserves a portion of the land during his natural life, with all privileges and appurtenances thereof, the grantor is merely a life tenant, and the grantee is remainderman, and that the grantor is liable for waste to the grantee.

In *Chicago, P. & St. L. R. Co. v. Vaughn* (1903) 206 Ill. 234, 69 N. E. 113, the maker of an instrument in the form of a deed, reserving the control, use, and occupation, and rents and profits, during the term of his natural life, is held to have only a life estate in the land, and the grantees are said to have the remainder, subject to the life estate.

In *Planters' Bank v. Davis* (1858) 81 Ala. 626, a deed of gift conveying lands to the grantor's daughter "for her sole and separate use, behoof, and benefit . . . and unto her heirs and assigns forever," and containing a stipulation, on the part of the grantee, consenting that the grantor may "have, use, occupy, and enjoy the before-conveyed premises, . . . free and exempt from payment of rent, impeachment for waste, and all and every other charge for the possession, improvement, or use of the said premises," is held to reserve a life estate in the grantor, with a vested remainder in fee in the grantee.

By an instrument in the usual form of a deed, reserving the use for the life of the grantor, it is held in *Cribb v. Rogers* (1879) 12 S. C. 564, 32 Am. Rep. 511, that "the grantee takes the fee, burdened with a use in favor of the grantor for his natural life."

Where, in *Colby v. Colby* (1855) 23 11 A.L.R.—5.

Vt. 10, a father deeded to his son a piece of land, upon the express condition that "I am to have the use and improvement of the premises during my life, if I have occasion therefor, and shall choose to do so," it is held that the grantor held a life estate in the land, which was extinguishable only by deed; and that a voluntary surrender of possession to the son, without the execution of a deed, was not sufficient to terminate his right.

So, it is held in *Jenkins v. Jenkins* (1817) 1 Mill. Const. (S. C.) 48, that, notwithstanding the reservation in a deed of the use of the premises for the life of the grantor, the life estate created in the grantee vests in present, and the deed is not void.

A reservation of "the use and control of the above-described lands," contained in a deed, is held in *Richardson v. York* (1837) 14 Me. 216, to give the grantor but a life estate in the lands, and to confer upon him no right to cut timber trees therefrom for sale.

See *Rollins v. Davis* (1895) 96 Ga. 107, 23 S. E. 392, where there is no question as to the nature of the instrument conveying the property under consideration, but where the sole question is that of the estate conveyed by an habendum, containing a clause "after the support of" the grantor and his wife "their lifetime." This clause was held to create a life estate in the grantor, and not an obligation of support on the part of the grantees.

Where, in *Sherman v. Dodge* (1855) 28 Vt. 26, the grantor conveys his property on condition that he and his wife shall have the use and possession during their lives, and that the grantee is to have possession at their deaths, and not till then, the court says: "Here the conveyance is, in the most general and unlimited terms, of the whole estate, with what is called, in the deed, a condition; and a condition subsequent, as this is, is something to be performed by the grantee, and if it is not performed, the conveyance is thereby defeated, and becomes inoperative. In the present case, the spirit of the condition is that

the grantee shall suffer the grantor to enjoy the premises during his life, and, if his wife survives him, then suffer her to enjoy the use during her life. And although these are not uses which can be executed under the Statute of Henry VIII. [Statute of Uses], that not being in force here, . . . yet a court of equity will execute them."

In *Gorham v. Daniels* (1851) 23 Vt. 600, the grantor provided that the land conveyed should not come into the possession of the grantee until after the decease of the grantor and his wife. Of the estate created thereby in the wife, it is said: "The most which could be made out of that deed is the reservation of an estate during the life of the grantor and his wife. This would, of course, leave the estate in his personal representative, after his decease. And the only right which the widow could have would be by way of dower."

Where, in *Jackson ex dem. Wood v. Swart* (1822) 20 Johns. (N. Y.) 85, the owner of land and his wife, joined in a conveyance thereof, reserving "to themselves the use of the premises during their natural lives," it is held that, while the deed cannot operate as a reservation or exception on behalf of the grantor's wife, after grantor's death, it is valid and effectual as a covenant to stand seised to the use of the grantor himself during his life, and, after his death, to the use of his wife for life.

In *Emery v. Chase* (1828) 5 Me. 232, involving a reservation of "the improvement of one half of said premises, with necessary wood for family use, during my natural life, and the life of my wife," where the question of the title of the wife after the decease of the husband was raised, it is said: "Taking the whole instrument together, it is apparent that it was the intention of the grantor that the estate should pass, one moiety to the use of the grantee and his heirs in fee, and the other moiety to the use of the grantor and his wife for their lives, and the life of the survivor of them, with remainder in fee to the grantee

and his heirs. Had these uses been declared formally and technically, the statute [of uses] would have executed them, according to the intention of the grantor. There is, in this deed, a want of accuracy and legal precision in the language used, but, as the intention is plain, and the uses manifest, we are of opinion that they may be regarded as executed by the statute, without violating legal principles."

In *Banks v. Marksberry* (1823) 3 Litt. (Ky.) 275, involving a deed of slaves, containing words of present grant and reserving, in a subsequent clause, the enjoyment thereof during the life of the grantor and his wife, it is said that the gift and the reservation are not inconsistent, but that, "if either the reservation or the gift must be void because of their inconsistency, it is obviously much more consonant to general principles that the former should be so than the latter."

In *Howell v. Howell* (1847) 29 N. C. (7 Ired. L.) 491, 47 Am. Dec. 335, the owner of lands, negroes, and chattels conveyed them by unconditional deed to his sons, and at the same time took from his sons a writing providing, under a penalty, that the father was to have possession of the land and chattels during his lifetime. The court says: "There is no doubt that all instruments executed at the same time, and relating to the same subject, may be treated as forming but one, and construed together. But that is not the natural construction, and is only resorted to in order to effectuate the intention, and where the provisions of the two instruments, if put together, will not be incompatible. Where contracts are put into several instruments, each of which has a sensible meaning, and may have full operation by itself, it would be a hazardous assumption to put them together for the purpose of making them mean, as one, differently from what they could in this separate state." The writing given by the sons is held not to be a part of the deed, especially since so doing would render void the conveyance with respect

to the chattels, by reason of the life estate which would be reserved in the father, were the two instruments read together.

And see *Nuckols v. Stone* (1905) 120 Ky. 631, 87 S. W. 799; *Culbreath v. Smith* (1888) 69 Md. 450, 1 L.R.A. 538, 16 Atl. 112; *Waugh v. Waugh* (1877) 84 Pa. 350.

(1) Reservation of right, title, and interest during maker's life.

In *Bunn v. Bunn* (1857) 22 Ga. 472, an instrument in the form of a deed, reciting consideration, containing the usual words of grant and warranty, and providing that the grantor reserves to herself her right to the property during her life, after which the grantee is to have it in fee simple, is held to be a deed. As an additional reason for holding the instrument a deed, the fact that there is a deficiency of witnesses required for a will is pointed out. "If it be true," says the court, "that we are at liberty to strain an instrument, when by straining it we can prevent it from being void, how much more true must it be that we are not at liberty to strain an instrument, when by straining it we render it void."

So, title in *præsent*i is conveyed to the grantee, with a reservation of a life estate in the grantor, it is held in *Sharpe v. Mathews* (1905) 123 Ga. 794, 51 S. E. 706, by an instrument in the form of a deed, attested as a deed, and delivered to the grantee, although it provides, immediately following the description of the land, that "said tract of land is to remain the right and property of said Betsey A. Mathews [grantor] for and during her natural life, and to become the property of the said Daniel L. Mathews [grantee], in fee simple, immediately upon the death" of said grantor; and that, in the event of the survival by the grantor of the grantee, then, "immediately upon the death of . . . [the grantor], said property is to become the property in fee simple of the heirs" of the grantee, and the instrument is not testamentary. The provision that the land is to remain

the property of the grantor for life "indicated the intent of the grantor to convey the fee with the reservation of a life estate," it is said, and "the provision that, if the grantor should survive the grantee, the land should, upon the death of the grantor, become the property, in fee simple, of the heirs of Daniel L. Mathews, simply indicated the intention of the grantor to convey an inheritable estate."

An instrument drafted in the form of a deed, declared in the body thereof to be a deed, and attested as a deed, does not become a will by the inclusion therein of a clause wherein the grantor reserves "title in the above-described land for and during" his natural life, and provides that, at his death, the deed is to be a fee-simple title to the grantees. *Mays v. Fletcher* (1911) 137 Ga. 27, 72 S. E. 408. "Such an instrument is to be construed as a deed passing title in *præsent*i, with the right of possession postponed until the grantor's death."

So, in *White v. Hopkins* (1887) 80 Ga. 154, 4 S. E. 863, an instrument in the form of a deed, in consideration of services to be rendered by the grantee and containing words of grant, habendum, and warranty, is held to be a deed, although it is provided that the title of the land is to remain in the grantor during his lifetime, and "at his death to immediately vest in the said Lewis Hopkins [grantee], in case he and his family faithfully perform their part of the contract; but in case the said Lewis Hopkins and his family . . . fail to carry out their obligation, then . . . title is not to vest in said Lewis Hopkins." The decision of the court is, first, upon the ground that the various parts of the instrument are harmonious, and that the estate created is a fee, upon condition subsequent, with the reservation of a life estate therein. But "if this position should be deemed untenable," the court continues, "we would still hold the instrument a deed, on the ground that these words in the habendum clause would be repugnant to the first part of the deed, or granting clause,"

and that, under the rule relating to deeds, to the effect that, of two inconsistent clauses, the first must prevail, the present, unconditional grant of the granting clause must prevail over the subsequent conditions and reservations of the habendum. In reaching this conclusion, the court seems unaware that it proves the instrument a deed by first assuming it to be one, and then applying to it the rules applicable to deeds. If the instrument were assumed to be a will, and the rules governing the construction of wills were applied, the clause last written would prevail, and an altogether different situation would arise.

See *Sibley v. Somers* (1901) 62 N. J. Eq. 595, 50 Atl. 321, *infra*, III. c. 2, (p).

In other cases involving similar instruments, the specific question as to the character of the instrument is not raised, it being assumed, apparently, that the instruments are deeds, and that the only question raised by the clause postponing the taking effect of the instrument is in respect of the extent, or nature, of the estate created in the grantee, or reserved in the grantor or his wife thereby. It is not intended to go into these various questions of estate here, the cases being set out merely for whatever value they may have upon the question here under discussion.

In *Graves v. Atwood* (1885) 52 Conn. 512, 52 Am. Rep. 610, a deed reserving all the grantor's right, title, and interest during his natural life is held not to be a nullity, but to create an immediate fee in the grantee, subject to a life estate in the grantor.

In *Webster v. Webster* (1856) 33 N. H. 18, 66 Am. Dec. 705, a clause in a deed "reserving all the right, title, and interest in and unto the above-named land and premises, for and during my natural life," is held to be, in legal effect, a reservation of the land for the grantor's life, and to give no right to commit waste.

In *Blanchard v. Morey* (1883) 56 Vt. 170, a deed by the owner of land and her husband provided that the

grantees "are not to have any right or title whatever to the above-described premises, as long as we or either of us live; and the above deed is not to be binding upon us, or either of us, if in any case we should want or need to sell a part or all of said real estate in order to maintain us, and the above deed is to be null and void in such case, and we are to have the entire control of the above premises during our natural lives." After the death of the wife, the husband mortgaged the land in order to raise money to buy necessities. The court says: "We think the grantors' intent in this deed, though clumsily expressed, yet fairly collectable and ascertainable from it as a whole, was to convey the premises in fee, conditioned upon a right of possession and use in the grantors, and the survivor of them, during life, and of being supported, so far as needed, in addition, and suitable to their condition in life, by the grantees. . . . If the condition of the deed had been broken in the life of Bethiah [the wife], she would have had the right to dispose of the estate for their necessities as she saw fit. The failure to perform the condition would have defeated the grant. She died before any breach, and her husband was her heir to all her right and interest. . . . After her decease, the breach occurred by failure to support him. When it occurred, he, as her heir, stood in her right. The condition of defeasance was to continue and operate till the survivor died. After Bethiah's decease, it must operate in favor of her husband, as he was her sole heir. Being the heir, and not a stranger, and being himself in possession when the breach happened, the estate vested in him at once, without any formal act on his part; and he will be presumed, after the breach, to hold for the purpose of enforcing the forfeiture, in the absence of any acts of waiver. . . . He therefore had the estate and the right to mortgage it, when he made the mortgage in question."

See *Rector v. Rector* (1910) 137 Ky.

76, 122 S. W. 518, involving the construction of the following recital in a deed: "This indenture prohibits the sale or renting of the above-described real estate during the life of the parties of the first part, except by their consent, the title to remain with the parties of the first part during their lives, and by this indenture they forfeit none of their rights and privileges therein."

(g) *Provision that instrument is to "take effect" or "operate" at maker's death.*

For cases construing instrument as a will, see *infra*, III. c, § 3 (e).

An instrument in the form of a deed, containing the words, "grant, bargain, sell, and convey," including a covenant of warranty, designated a deed of conveyance by the maker, and executed, delivered, and acknowledged as a deed, is held to be a deed, and not a will, in *Bunch v. Nicks* (1887) 50 Ark. 367, 7 S. W. 563, although it contains a clause saying that "the deed shall go into full force and effect at my death." The court puts its decision on the ground that "we are to construe these words in connection with the whole deed," and that "every part must have effect, if the same can be done consistently with the rules of law. Construed in this way, it is evident the intention of Nicks [grantor] was to give the land, and sell the personal property he had at the time they were executed, to the grantees, and to reserve the use and enjoyment thereof for and during his life."

So, in *West v. Wright* (1902) 115 Ga. 277, 41 S. E. 602, an instrument, otherwise in the form of a deed, but containing a clause providing that "this deed shall take effect at my death," is held a deed, and not a will.

And it is held in *Re Hall* (1906) 149 Cal. 143, 84 Pac. 839, that an instrument in the form of a conveyance in *præsenti*, although providing that it is to remain null and void during the grantor's lifetime, and to become of full force and effect immediately on his decease, without court process of any kind, is a deed.

In *Puukaiakea v. Hiaa* (1885) 5

Haw. 484, an instrument in the form of a deed is held to be a deed, and not a will, notwithstanding a provision contained therein that "this conveyance shall take effect with full power after our death, but while we yet live we have the power of the lands."

A conveyance in the ordinary form, except for a recital that the "deed is to take effect and be in full force on and after the death of this grantor," is a deed, and is not testamentary in character, the only effect of the recital being to reserve a life estate in the grantor. *Kelley v. Shimer* (1898) 152 Ind. 290, 53 N. E. 233.

And an instrument in the form of a warranty deed to land is not rendered testamentary in its character by the insertion, immediately after the description of the land conveyed, of the following clause: "This deed is to go into effect after the death of said" grantor, "she claiming her right to hold the land so long as she lives." *Seals v. Pierce* (1889) 83 Ga. 787, 20 Am. St. Rep. 344, 10 S. E. 589.

It is held in *COLLIER v. CARTER* (reported herewith) ante, 1, that an instrument is a deed, where it is in the form of a warranty deed, is witnessed by an officer authorized to witness deeds, but whose attestation is not necessary to the validity of a will, and is delivered to the grantee, notwithstanding a clause contained therein, stating that it is "to go into effect" at the grantor's death.

Where, in *Jenkins v. Adcock* (1893) 5 Tex. Civ. App. 466, 27 S. W. 21, an instrument, otherwise in the form of a deed, recites that it is "to take effect at my (grantor's) death," and that, "at my death, my entire interest in said land . . . is by these premises conveyed," it is held that such language serves to create a life estate in the grantor, and not to make the instrument testamentary.

And where, in *Wall v. Wall* (1853) 2 Swan (Tenn.) 648, in an instrument in the form of a deed, the grantor provides that the conveyance is "to take effect at the termination of my natural life, I retaining the property of

said slaves during my life," the instrument is held to pass a present title, and to be a deed, and not a will.

In *Fellbush v. Fellbush* (1904) 31 Pa. Co. Ct. 350, the grantor, in an instrument purporting to be a deed, provides: "The full intent and meaning of this conveyance is that Frances Fellbush [grantee] shall enjoy said property for and during the term of her natural life, said life estate to take effect upon the death of the said Fellbush [grantor]." This clause was held to render the instrument testamentary in character. On appeal, however, in (1906) 216 Pa. 141, the decision below was reversed, and the instrument held to be a deed. In reaching this decision, the court is influenced by the form of the instrument, and the fact that it was delivered. This opinion is cited and followed in the later case of *Fellbush v. Egen* (1908) 221 Pa. 420, 70 Atl. 816, in which the same instrument is involved.

So, in *Rogers v. Rogers* (1907) — Miss. —, 43 So. 434, conditionally modified (1907) — Miss. —, 43 So. 946, an instrument in the form of a deed, "to take effect and be of force" after the grantor's death, is held to be a deed, conveying to the grantee the remainder interest after the termination of the grantor's life estate, and not a will.

And in *Wall v. Wall* (1855) 30 Miss. 91, 64 Am. Dec. 147, the instrument in question contained the following clauses: "The deed to take effect, as far as regards the handing over of the property, at my death; and I reserve to myself the right to revoke it at any time during my life. . . . And I do hereby make known and declare that the signing, sealing, and delivery of this deed, and placing the same amongst my papers, is intended by me as a delivery of said property at my death, and to take effect at that time." With respect to the clauses providing for the handing over of the property at the grantor's death, and the reservation of the power of revocation, the court says: "The legal effect of the deed, as an operative con-

veyance, is thus fully recognized, and the only limitations annexed to it are that, as to the right of possession of the property, it should take effect at his death and, the settlement being voluntary, that he reserved the right to revoke it during his life. In all other respects the deed took effect immediately, as a conveyance in *præsenti* of property, to be enjoyed in *futuro*. That the party was aware of the legal consequences of the execution of the instrument . . . is plain from the fact that he reserves the power to revoke it . . . , which would have been unnecessary had he intended merely to make a testamentary bequest of the property . . . , which he could have canceled at any time." Then, "taking that part of the instrument by which the deed was 'to take effect, as far as regards the handing over of the property, at his death,' in connection with the subsequent part, declaring that the execution of the deed, and placing it amongst his papers, was 'intended as a delivery of the property at his death, and to take effect at that time,' the court thinks that "the latter provision must be understood to mean that the instrument, 'as to the delivery of the property,' should take effect at his death, and not that it should not take effect, in any other respect, until his death." The instrument is held to be a deed, and not a will.

In *Forwood v. Forwood* (1902) 24 Ky. L. Rep. 18, 67 S. W. 842, an instrument in the form of a deed, containing the stipulation that this deed "is to take effect at the death" of said grantor, "at which time the party of the second part is to be entitled to possession of said land, and the absolute title thereto," is held to be a deed, and not a will.

In *SHAULL v. SHAULL* (reported herewith) ante, 15, an instrument in the form of a warranty deed, containing the provision: "This deed to take effect immediately on the death of both grantors herein," following the description of the property conveyed, is held to pass a present interest with the enjoyment thereof postponed, in

view of the form of the instrument, and the direction of the maker to record the same, and to deliver it to the grantee.

And upon the authority of the *SHAULL CASE*, it was held in *Leonard v. Wren* (1918) 184 Iowa, 1339, 169 N. W. 621, that a deed was not rendered testamentary in character, or prevented from passing a present interest, by a reservation that "this deed is not to take effect during the life of either of the grantors, but after the death of [grantors], then this deed to vest the title in [grantee]."

And in *Hagen v. Hagen* (1917) 136 Minn. 121, L.R.A.1917C, 964, 161 N. W. 380, the deed contained the following provision: "This deed to be held in escrow . . . until the death of the said Knut O. Hagen [grantor], when it becomes operative." "By the very nature of the transaction," the court says, "a grantor reserves possession during life, or a life estate, when he delivers a deed to a third person for the grantee, with direction to give it to the latter upon the death of the grantor. . . . We find the instrument here undertook to convey and warrant a present interest in the land, and the subsequent statement therein, as to when it should become operative, must be held to refer to the time it operates upon and determines the use and occupation reserved to the grantor." The instrument is held not to be testamentary.

In *Pentico v. Hays* (1907) 75 Kan. 76, 9 L.R.A.(N.S.) 224, 88 Pac. 738, the instrument, held to be a deed, and not a will, was in the usual form of a warranty deed, except that in the habendum clause there was this recital: "Except a lifetime lease on said land, in three days after the said party of the first part [grantor] is deceased, this deed shall be in full force." After holding that the exception of the lifetime lease is to be construed merely as the reservation of a life estate, the court has the following to say with respect to the remainder of the recital: "In the same sentence with this reservation, and separated therefrom only by a comma, is this clause: 'In three days after the

said party of the first part is deceased, this deed shall be in full force.' We think this should be construed as an extension of the life estate, or as defining when the grantee in the deed should be entitled to possession of the land, rather than as a contradiction of the immediate grant of the fee."

Although containing a clause providing that "it is hereby distinctly understood and stipulated that this deed shall take and be in full force and effect immediately after the" grantor's death, "and not sooner," an instrument in the form of a deed, acknowledged as such, and delivered to the grantee, is held in *Lauck v. Logan* (1898) 45 W. Va. 251, 31 S. E. 986, to be a deed, and not a testamentary paper.

Likewise, it is held in *McLain v. Garrison* (1905) 39 Tex. Civ. App. 431, 88 S. W. 484, rehearing denied in (1905) 39 Tex. Civ. App. 440, 89 S. W. 284, on later appeal involving the same point, in (1908) — Tex. Civ. App. —, 112 S. W. 773, that an instrument, otherwise in the form of a deed, is not rendered testamentary by the inclusion of a clause providing that the "deed is to take effect at my death, and not before."

And in *Latimer v. Latimer* (1898) 174 Ill. 418, 51 N. E. 548, an instrument in the form of a deed, but containing a clause providing that it was "to be in force and effect from and after" the decease of the grantor, "and not before," is held to convey an estate in fee, with the reservation of a life estate in the grantor, and not to be a testamentary devise.

And provisions in a quitclaim deed and a warranty deed, reserving a life estate to the grantors and declaring that the deeds shall not take effect in their full entirety until after the death of the grantors, the habendum clauses, employing words of present import, were held, in *Dawson v. Taylor* (1919) — Mo. —, 214 S. W. 852, not to impress a testamentary character upon the instruments, or to prevent them taking effect as deeds of present conveyance.

An instrument attested as a deed, and in all material respects in the

form of a deed, is a deed, and not a will, notwithstanding it contains the words, "to take effect from and after my death . . . and not until then." *Isler v. Griffin* (1909) 134 Ga. 192, 67 S. E. 854.

Where a grantor provides in his deed that the instrument is not to take effect until his death, and that he is to have and keep full possession of the property during his life, and all the proceeds thereof until his death, the effect of the instrument is to pass a present interest to the grantee, subject to a life estate in the grantor, and the instrument is not a will. *Phillips v. Thomas Lumber Co.* (1893) 94 Ky. 445, 42 Am. St. Rep. 367, 22 S. W. 652.

So, a conveyance in the usual form of bargain and sale, with habendum stipulating that the "said deed is not to become operative until the death of the grantors, but the grantors are to retain the possession . . . until their death, at which time the parties or their heirs are to take the . . . land into their possession and control," is held in *Jenkins v. Woodward Iron Co.* (1915) 194 Ala. 371, 69 So. 646, to be "clearly a deed of present conveyance to the grantee, with reservation of possession only in the grantors during their lives."

And a deed is not given a testamentary character by a provision that "this conveyance shall not take effect during the lifetime of the grantors." *Bullard v. Suedmeier* (1920) 291 Ill. 400, 126 N. E. 117.

Where a grantor executes a perfect fee-simple deed, and the only condition prescribed upon its operation is one providing that "this conveyance is not to take effect until after my death, and that, after my death, the title to the foregoing lands is to vest immediately," it is held in *Abney v. Moore* (1894) 106 Ala. 131, 18 So. 60, that the grantor, having failed to secure the attestation of the witnesses, which he is presumed to know to have been necessary to the validity of a will, having delivered the instrument on the date of execution, having reserved in it no power of revocation, and having continued to live on the lands with the grantees during his

life, without attempting any disposition of them, must be viewed as intending by the condition nothing "more than to reserve to himself the use and enjoyment of the property during his lifetime, and that the operation of the gift, so far as possession was concerned, was to be postponed until his death, up to which time the property was to remain not his own, but as his for use and enjoyment." The instrument is held a deed.

In *Phillips v. Phillips* (1914) 186 Ala. 545, 65 So. 49, Ann. Cas. 1916D, 996, involving a deed of land containing a clause that "this deed is not to take until after my death," it is said: "The deed here in question is in form a present grant of the land. It was acknowledged, delivered, and recorded within fifteen days after the recited date of its execution. That it was the grantor's intention to thereby effect a contemporaneous transfer of title to the grantee seems reasonably certain, and the concluding sentence: 'This deed is not to take [effect] until after my death,' was clearly but a clumsy and inartificial mode of reserving to the grantor the possession and enjoyment of the land, so long as she might live. We therefore hold that the instrument was a deed which conveyed the title to *Elijah J. Phillips* [grantee], subject to a life estate reserved to the grantor."

So, a deed, concluding with a statement that "the above obligation [is] to be of none effect until after the death" of the grantor, is held in *Wilson v. Carrico* (1894) 140 Ind. 533, 49 Am. St. Rep. 218, 40 N. E. 50, not to be a testamentary disposition, but the conveyance of a present interest, the enjoyment of which is postponed.

In *Nolan v. Otney* (1907) 75 Kan. 311, 9 L.R.A.(N.S.) 317, 89 Pac. 690, the deed under consideration was in the usual form of a warranty deed, but contained, immediately following the granting clause, the following provision: "This deed is made with the understanding that the same is not to take effect, or be in force, until the death of the grantor, and upon the death of the grantor is to take effect, and at said time to vest in the said

grantee the absolute title in fee simple." This cause is held to have the effect merely of postponing the possession and enjoyment until after the grantor's death, and the instrument is construed to be a deed.

And see, in connection with the preceding case, *Gideon v. Gideon* (1916) 99 Kan. 332, 161 Pac. 595.

"Where a deed has been actually delivered to the grantee in the lifetime of the grantor, even though it contains a provision that it is not to take effect until the grantor's death, it will be sustained as a present grant of a future interest." *Hathaway v. Cook* (1913) 258 Ill. 92, 101 N. E. 227.

An instrument in the form of a warranty deed, attested as a deed and delivered to the grantee, is a deed passing title in *præsenti*, although it contains the words "that this deed is not to go into effect until after the death of the party of the first part, but, at the death of said party of the first part, the party of the second part is to take possession." *Griffith v. Douglas* (1904) 120 Ga. 582, 48 S. E. 129. The instrument here under consideration also affected to pass the personalty remaining on the premises, at the grantor's death, but no notice of that clause is taken by the court.

And an instrument in the form of a deed, conveying land subject "to the occupancy and possession of said real estate for and during the natural life of the grantor," and providing further that the intention of the grantor is that "this deed shall not be in force or take effect until after the death of the grantor," acknowledged, delivered, and recorded as a deed, but not able to be given force as a will, is held in *Saunders v. Saunders* (1901) 115 Iowa, 275, 88 N. W. 329, to be a deed, and not a will. "The statement of intention, that the deed should not be effective until after her death, was," according to the court's opinion, "evidently an attempt more fully and explicitly to set forth the fact that the conveyance was subject to her use and occupancy during life."

In *Hunt v. Hunt* (1904) 119 Ky. 39, 68 L.R.A. 180, 82 S. W. 998, 7 Ann. Cas. 788, an instrument in the form of

a deed, and authenticated as a deed, and not as a will, so that, to be effective at all, it must be as a deed, is held to be a deed, although it contains a clause to the effect that it is not to take effect until the deaths of the grantor and his wife.

And although an instrument in the usual form of a conveyance of land, with a warranty clause, contains a provision to the effect that it is not to go into effect until after the death of the maker, it is nevertheless a deed, it is held in *Merck v. Merck* (1909) 83 S. C. 329, 137 Am. St. Rep. 815, 65 S. E. 347, and conveys a fee with the reservation of a life estate in the grantor.

An instrument written on the usual blank form for deeds, properly acknowledged as a conveyance, and recorded, is a deed, although it contains a clause providing that it is "not to take effect until the death" of the grantor and his wife, where this clause is modified by the stipulation, contained in the same sentence, that the "premises shall be and remain their homestead, and, on the death of either of them, the homestead of the survivor." *Martin v. Faries* (1900) 22 Tex. Civ. App. 539, 55 S. W. 601.

Where an instrument is in the form of a deed, it is not rendered testamentary, it is held in *Rawlings v. McRoberts* (1894) 95 Ky. 346, 25 S. W. 601, by a clause providing that the instrument is to be "put to record, but not to take effect so as to give possession, until after my death, at which time they [grantees] are to divide the same as they see fit and proper." The instrument is construed to be a present conveyance, with possession postponed until after the death of the grantor.

Although a deed contains a provision that it "is to take effect only at the death of the grantor," where it is delivered to the grantee the title to the fee passes at once, subject to a life estate in the grantor, and the instrument is operative as a deed. *Harshbarger v. Carroll* (1896) 163 Ill. 636, 45 N. E. 565.

So, in *TRUMBAUER v. RUST* (reported herewith) ante, 10, a writing in the form of a full warranty deed, duly acknowledged by a husband and wife,

conveys land to the grantor's son, subject to the condition that it is to "go into effect only after the death" of both grantors, the survivor of whom is to have "full possession of the land during his or her natural life only." The grantee also agrees to pay certain sums of money to the other children of the grantors, "within six months after the death of the survivor." The instrument was delivered. The court holds it to pass a present interest, the enjoyment of which is postponed, and to be a deed.

Where the maker of an instrument, containing the usual words of present conveyance, provides in a subsequent clause that the instrument is "to be of no effect whatever" until the grantor's death, it is held in *Alexander v. Burnet* (1851) 5 Rich. L. (S. C.) 189, that, construing the whole of the instrument together so as to give effect to all parts thereof, the instrument is a deed, conveying a present interest, but postponing the enjoyment thereof.

See also *Kokomo Trust Co. v. Hiller* (1917) — Ind. App. —, 116 N. E. 332, *supra*, III. c, 2, (e); *Abbott v. Holway* (1881) 72 Me. 298, *infra*, III. c, 2, (1); *McIntyre v. McIntyre* (1909) 156 Mich. 240, 120 N. W. 587, *supra*, III. c, 2, (e); *Vessey v. Dwyer* (1911) 116 Minn. 245, 133 N. W. 613, *supra*, III. c, 2, (e); *Shackelton v. Sebree* (1877) 86 Ill. 616, *supra*, II. a, 2, (a).

In other cases involving similar instruments, the specific question as to the character of the instrument is not raised, it being assumed, apparently, that the instruments are deeds, and that the only question raised by the clause postponing the taking effect of the instrument is in respect of the extent or nature of the estate created in the grantee, or reserved in the grantor or his wife, thereby. It is not intended to go into these various questions of estate here, the cases being set out merely for whatever value they may have upon the question here under discussion.

Although a grantor specifically provides therein that she is to retain the exclusive use and control of the property during her life, and that the conveyance is not to take effect until her

death, it is held in *Dudley v. Herring* (1906) 30 Ky. L. Rep. 270, 98 S. W. 289, that the instrument creates a remainder in the grantees, subject to a life estate reserved by the grantor.

And the same conclusion is reached in the later case of *Martin v. Stewart* (1908) 33 Ky. L. Rep. 729, 111 S. W. 281.

In *Haines v. Brown* (1915) 114 Me. 320, 96 Atl. 228, a clause in a deed providing that "this deed [is] to take effect at the decease" of the grantor, "and not before," is held to have the effect of reserving a life estate in the grantor, and to convey a vested remainder in the grantee.

And in *Watson v. Cressey* (1887) 79 Me. 381, 10 Atl. 59, the deed in question provides that the grantees are "to come into possession of said property on the decease of me and my wife, and not before," and that "this deed is to take effect and go into operation on the decease of me and my wife, and not before." This instrument is held to be valid, it operating to convey a vested remainder in the grantees, subject to the life estate of the grantor and his wife.

And see *Reynolds v. McFarland* (1889) 10 Ky. L. Rep. 932, 11 S. W. 202, involving a deed containing a clause providing that the instrument is not to take effect until after the deaths of the grantor and the grantor's wife, where it is held that the grantor's wife had a life estate in the land.

See also *Husted v. Rollins* (1912) 156 Iowa, 546, 42 L.R.A. (N.S.) 378, 137 N. W. 462, involving an habendum clause in a deed, providing that "this deed is to take effect at the death" of the grantor, where no claim is made that the instrument is thereby rendered testamentary in character, and the court accordingly treats it as a deed.

See *Powell v. Ott* (1912) — Tex. Civ. App. —, 146 S. W. 1019.

(h) *Conveyance of property belonging to maker at his death.*

For cases construing the instrument as a will, see *infra*, III. c, 3 (f).

An instrument conveying both realty and personalty in trust, and resembling in every other particular a deed,

is not converted into a will by the following clause, referring to the personalty: "Also, stock of all kinds, household and kitchen furniture, and any other species or kind of property in the possession of said Nathan Youngblood, at his demise." *Youngblood v. Youngblood* (1885) 74 Ga. 614. "It is certain that these words restricted the use and possession of the personalty until the grantor's death," it is said, "because his death must occur to ascertain that personalty. It may be, too, that a life usufruct was also reserved to the grantor in the realty, by a fair construction of those words. . . . The title passed when the deed was delivered and recorded, in presenti, and all that the words can be construed to effect is the time of enjoyment by the cestuis que trust."

So, an instrument in the form of a deed, conveying land and personalty, with the habendum, "to have and to hold said tract of land unto him [said grantee] . . . together with all the stock and household and kitchen furniture, . . . together with any other property that may be on the place at the said" grantor's death, is held in *Goff v. Davenport* (1895) 96 Ga. 423, 23 S. E. 395, to be a deed. "It was the evident purpose of this grantor to reserve to himself and his wife, during their natural lives, . . . the right to the enjoyment of this property, with remainder over to John Goff [grantee]. The conclusion that this was the grantor's intention is supported by the fact that, though the deed was made for some time before that event transpired, the grantor, until his death, actually remained upon and in possession of the premises conveyed."

See also *Hershy v. Clark* (1879) 35 Ark. 17, 37 Am. Rep. 1, *infra*, III. c. 2, (1); *Powers v. Scharling* (1902) 64 Kan. 339, 67 Pac. 820, *infra*, III. c. 2, (1); *Ricker v. Brown* (1903) 183 Mass. 424, 67 N. E. 353, *supra*, II. a. 2, (b); *Robertson v. Dunn* (1812) 6 N. C. (2 Murph.) 133, 5 Am. Dec. 525, *infra*, III. c. 2, (v); *Phifer v. Mullis* (1914) 167 N. C. 405, 83 S. E. 582, *infra*, III. c. 2, (m).

And see *Taylor v. Purdy* (1912) 151 Ky. 82, 151 S. W. 45.

(i) *Conveyance of property left after payment of maker's debts.*

For cases construing the instrument as a will, see *infra*, III. c. 3 (h).

Although included in an instrument designated by its maker a will, and although made subject to the payment of certain legacies, to the debts of the maker, and to a life estate reserved in the maker, a clause conveying "a present interest and estate in and to all the estate of which I am now or shall be at the time of my death seised," is held in *Powers v. Scharling* (1902) 64 Kan. 339, 67 Pac. 820, to convey a present remainder, subject to the maker's life estate.

So, a deed given in consideration of the grantees' feeding and clothing and caring for the grantor, during his old age, is not made a will by a clause providing that, after the grantor's doctor bill and funeral expenses are paid, the grantees are to have what he has left. *Whitten v. McFall* (1898) 122 Ala. 619, 26 So. 131.

See *Spencer v. Robbins* (1886) 106 Ind. 580, 5 N. E. 726, *infra*, III. c. 2, (n); *Jacoby v. Nichols* (1901) 23 Ky. L. Rep. 205, 62 S. W. 734; *McGuire v. Bank of Mobile* (1868) 42 Ala. 589, *infra*, III. c. 2, (j).

And see *Bromley v. Mitchell* (1892) 155 Mass. 509, 30 N. E. 83, involving a deed of property in trust to be disposed of in accordance with instructions previously delivered, a portion of which instructions had to do with the payment of the grantor's debts.

(j) *Conveyance in trust for use of maker during his life.*

For cases construing the instrument as a will, see *infra*, III. c. 3 (i).

An instrument in the form of a conveyance, purporting to "give, grant, and convey" all of the grantor's property, real, personal, and mixed, to the grantee, is held in *McGuire v. Bank of Mobile* (1868) 42 Ala. 589, to be a deed, although it provides that the grantee is to hold the property in trust, "and apply the same, and all the profits and income thereof to the support,

comfort, and maintenance of myself, during the term of my natural life, and as I may direct; and, upon my decease, shall pay the necessary expenses attending my illness and the decent interment of my mortal remains; and, after so paying the necessary expenses, shall divide the remainder between my nephews and nieces." The court puts its decision on the ground that, while the grant did not take effect as to the nephews and nieces in present possession, "an immediate and present interest was vested in them on the execution of the deed,—such an interest and estate as could not have been recalled by the maker."

Kyle v. Perdue (1888) 87 Ala. 423, 6 So. 296, involves an instrument in the form of a deed, containing words of bargain, grant, and sale, and reciting a valuable consideration, by which the grantor conveys all of her property, real, personal, and mixed, to grantees in trust to take charge of, collect the rents and profits, and, after expending what is necessary for the upkeep of the property, to pay the residue to the grantor. And it is further provided that, at the death of the grantor, "the property above mentioned shall revert to" the grantees in fee simple. This instrument is construed to be a deed. "Under the instrument," the court says, "Kyle and Henry [grantees] are to take charge of the property, collect the rents, and look after the taxes and repairs—all in the lifetime of Mrs. Perdue [grantor]. This gives to the instrument a large operation during the lifetime of the maker, and stamps it a deed, not a will." After making the provisions set out above, the grantor proceeds to grant, in consideration of valuable services rendered, all her property, real, personal, and mixed, of which she shall die seised or possessed, to the same grantees. The court views this last clause as having reference, not to the property already disposed of, but to profits of the land accruing to her during the trusteeship, and undisposed of during her lifetime, such property not passing by the first grant. Thus, the latter clause is saved from conflict with the former.

An instrument purporting to convey real and personal property in trust to pay the debts of the maker and to pay the income from the rest to the maker during his lifetime, and providing that upon his death the trust shall terminate and the property remaining in the trustee's hands is granted to maker's son and his heirs forever, was held in *Linn v. Campbell* (1919) 289 Ill. 347, 124 N. E. 622, not to be a testamentary instrument, but a deed vesting the fee to the real property in the remaindermen.

So, a written instrument in the form of a deed, conveying personal property to a grantee in trust, and charging him to pay the income therefrom to the grantor as long as she lives, and to make such investments in real estate as the grantor may direct, and, at her death, to distribute the property in equal shares among her children, conveys a present interest to the trustee, and is a deed, and not a will. *Forney v. Remey* (1889) 77 Iowa, 549, 42 N. W. 439.

And a trust deed of personal property, providing that the trustee shall pay the accruing interest on the property to the grantor, and, upon the grantor's death, shall divide the principal between his children, is held in *Smith v. Corey* (1914) 125 Minn. 190, 145 N. W. 1067, not to be testamentary in character.

In *Spangler v. Vermillion* (1917) 80 W. Va. 75, 92 S. E. 449, an instrument in the form of a trust deed to a trustee, providing for the sale of the property by the trustee, and the support, out of the proceeds, of the grantor for life, and the payment of her debts, the residue of such fund to be paid over at her death to certain designated persons, is held to be a deed, and not a will.

It is held in *Tompson v. Browne* (1835) 3 Myl. & K. 32, 40 Eng. Reprint, 13, 5 L. J. Ch. N. S. 64, that an instrument vesting property in trustees for the benefit of the grantor during his life, and, after his death, for the benefit of other persons, and containing a power of revocation, is not testa-

mentary in character, the interest passed by it being a present one.

An instrument purporting to be a deed, using words of conveyance in *præsentî*, founded on a good consideration, warranting the title, sealed and delivered, conveying absolutely to trustees for the use of the grantor during life, and for the use of certain relatives in remainder, is held in *Cumming v. Cumming* (1847) 3 Ga. 460, to be a deed, and not a will.

So, a trust deed reciting a consideration, containing apt words of conveyance, and delivered to the trustee, is a valid deed conveying a present interest, and not testamentary in character, it is held in *Kelley v. Snow* (1904) 185 Mass. 288, 70 N. E. 89, although the grantor reserves the use of the property during her life, with a gift over upon her death, subject to be varied by appointment during her lifetime, upon notice to the trustee.

And a deed to a trustee, on condition that the grantor and his wife be permitted "to possess and enjoy" the property during their natural lives, and providing that, upon their deaths, the trustee shall sell the remaining property, and divide the proceeds among the grantor's children, is held, in *Swiney v. Swiney* (1884) 14 Lea (Tenn.) 316, to be a deed, and not a will.

In *Jackson v. Culpepper* (1847) 3 Ga. 569, an instrument in the form of a trust deed, conveying slaves in trust for the use of certain *cestuis que trustent*, containing the usual clauses of grant, reciting a good consideration, and containing a covenant that the property conveyed shall not be subject to the deeds or contracts of the grantor, is held to be a deed, although the grantor reserves a "lifetime control and interest in the negroes." The court reasons as follows: "The fee-simple title to the negroes vested in the trustee at the time of the execution of the deed by the donor, for the sole use and benefit of Mary Jackson and her increase, to be enjoyed by them after the termination of the life estate of the donor. The donor would

have been estopped in his lifetime, by his covenant contained in the deed, from asserting in himself the *fee-simple title* to the property conveyed to the trustee. The instrument . . . was, in our judgment, operative and binding on the donor, in his lifetime, to pass the *fee-simple title* to the property from himself to the trustee."

A conveyance by an instrument in the form of a deed to a trustee in trust for his daughter, empowering him to manage and control the premises and to rent, sell, and dispose of them, provided they are not sold during the lifetime of the grantor, except with the grantor's consent, is held, in *Freeman v. Jones* (1906) 43 Tex. Civ. App. 332, 94 S. W. 1072, to be a deed taking effect upon delivery, and not a will.

Grantors in *Robinson v. Ingram* (1900) 126 N. C. 327, 35 S. E. 612, provided that the grantees should take and manage the property conveyed, and, out of the proceeds, support the grantor and his wife during their lives, and, after their deaths, divide the property among the grantors' children. It was also provided that, upon violation of the trust by the trustee, the conveyance was to be null and void. The instrument is held to be a deed of trust, and not a will.

In *Nichols v. Emery* (1895) 109 Cal. 323, 50 Am. St. Rep. 43, 41 Pac. 1089, a deed conveying property to a trustee upon trust to sell within ten months after the grantor's death, and containing a reservation of power of revocation, is held to be a deed. This is upon the ground that, under such a trust, the trustee's interest must pass immediately, although the grantor reserves, in effect, a life estate, and retains, under statute applying to deeds of trust, the power of revocation.

See *Robb v. Washington & J. College* (1905) 103 App. Div. 327, 93 N. Y. Supp. 92, modified in (1906) 185 N. Y. 485, 78 N. E. 359, involving an instrument in the form of a declaration of trust, by the terms of which the maker of the instrument declares himself to hold certain property as trustee for

a beneficiary, the trustee to receive and apply the income therefrom to his own individual use during his lifetime. The instrument is held to operate in *præsentî*, and to be a declaration of trust, and not a will.

See *Cribbs v. Walker* (1905) 74 Ark. 104, 85 S. W. 244, *infra*, III. c, 2, (k); *Cross v. Benson* (1904) 68 Kan. 495, 64 L.R.A. 560, 75 Pac. 558, *supra*, III. c, 2, (d).

And see *Re Tolerton* (1915) 168 Iowa, 677, 150 N. W. 1051; *Thom v. Thom* (1905) 101 Md. 444, 61 Atl. 193; *Ritter's Appeal* (1868) 59 Pa. 9.

(k) Reservation of power of revocation during maker's life.

For cases construing the instrument as a will, see *infra*, III. c, 3, (j).

In *Hall v. Burkham* (1877) 59 Ala. 349, an instrument in the form of a deed, which conveys all the property owned by the grantor to a trustee for the benefit of her grandchildren, is held to be a deed, although the grantor reserves possession of the property, and the rents and profits thereof, during her lifetime, and, in addition thereto, reserves the right, should she "at any time think proper so to do, to revoke this deed." With respect to the effect of the reserved power of revocation, it is said: "'And in regard to the power of revocation, the better opinion is that it tends rather to rebut than to sustain the idea that the instrument containing it is of a testamentary character. The insertion of such a clause, so far from indicating an intention to make a will, imparts quite a contrary color to the transaction, as a will wants not an express power to make it revocable.' 1 Jarman, Wills, 17."

So, in *Mays v. Burleson* (1913) 180 Ala. 396, 61 So. 75, the grantor, in an instrument in the form of a deed, reserves to himself the "full possession and control" of the lands conveyed during his lifetime, and further stipulates that, after his death, the lands are to be the property of the grantee, provided "that I do not sell said land during my lifetime; in such event

this deed is to be null and void." The court says: "The fact that the grantor reserved the power to sell the land is a strong indication that he did not intend it to operate as a will. If he intended it as a will, a reservation of the power to dispose of the property, or revoke the instrument, was not necessary, as he had this right, if it was a will, independent of the reservation."

Cribbs v. Walker (1905) 74 Ark. 104, 85 S. W. 244, involved an instrument in the form of a deed of trust, providing that the property should be held in trust for the grantor during his natural life, that the grantor might at any time direct a conveyance, lease, or mortgage of the property, which the trustee was bound to carry out, and reserving a right of revocation of the instrument in the grantor. This instrument is held a deed. The court says: "In our opinion the form and language of the instrument clearly indicate the intention of the grantor to convey the legal title in *præsentî*. It contains apt words of conveyance usually employed in a deed of conveyance, and the reservation to the grantor of the use during his life, and the right to direct a conveyance to be made by the trustee to other parties, and to recall or revoke the trust, all, instead of showing an intention to make the instrument a testamentary paper, to take effect only at his death, imply an immediate passage of the title. If *Cribbs* [grantor] intended the paper to be a will, and retained it in his possession as such, why the necessity of incorporating those reservations in the instrument? If it was not to take effect until his death, the reservation of the life estate and right to direct a sale and to revoke the trust was useless, as, under a will, he possessed those rights and powers, and more, without such express reservation."

In *Kelly v. Parker* (1899) 181 Ill. 49, 54 N. E. 615, an instrument in the form of a deed of trust is held a deed, and not a will, notwithstanding a reservation of the use, control, and en-

joyment of the property conveyed during the grantor's life and, in addition thereto, a reservation of a power of revocation. The deed, the court says, is not a conveyance intended to take effect in the future, but "it purports to convey the premises absolutely to the grantees at the time the deed was executed, subject to certain reservations, conditions, and trusts."

And in *Durand v. Higgins* (1903) 67 Kan. 110, 72 Pac. 567, the instruments in question were a deed conveying on its face an absolute title in fee simple, and a written agreement taken back by the grantor from the grantees, providing that the grantees were not to sell or dispose of the property conveyed during the lifetime of the grantor, without his consent, and that the property should always be his as long as he lived, with the right to convey it as though the deed in question had never been given. "By the entire transaction," the court says, "the grantor intended to convey to the grantees a present interest. . . . The result amounts to nothing more than a conveyance in fee simple to the grantees, with a limitation that the title thus conveyed in *præsenti* goes encumbered with a life estate in the grantor."

Reservation in a deed of the possession, use, and enjoyment of the land, and of the right of revocation of the instrument and of the power of selling the property, does not operate to make the instrument a will, it is held in *Tennant v. John Tennant Memorial Home* (1914) 167 Cal. 570, 140 Pac. 242. "The reservation of the power to revoke did not operate to destroy, or in any wise restrict, the effect of the deed as a present conveyance of a future vested interest," it is said: "It merely afforded the means whereby such vested future estate could be defeated and divested, before it ripened into an estate in possession."

In *Sims v. Brown* (1913) 252 Mo. 58, 158 S. W. 624, the maker of an instrument in the form of a deed conveyed lands to his daughter, and appointed a trustee to act for her in respect of the lands, which trustee is requested

"at any time after my [grantor's] decease," to sell certain portions of the land. The grantor also reserves the right to sell and dispose of the land, if he desires, or necessity requires. The phrase "after my decease" is construed as "nothing more than a postponement of the time when the trustee is to take possession of the land for the purposes of the trust." And the intention to convey a present interest is held not to be overcome by the reserved power of disposition. The instrument is held to be a deed, and not a will.

So, a provision in a deed to the effect that "the second party will deed back to the party of the first part, when called for so to do," is held, in *Stamper v. Venable* (1906) 117 Tenn. 557, 97 S. W. 812, not to have the effect of rendering the instrument ambulatory in character, to take effect upon the death of the maker; and the instrument is held to be a deed, notwithstanding the provision.

It is said obiter in *Lewis v. Curnutt* (1906) 130 Iowa, 423, 106 N. W. 914, that, even if the grantor in that case had reserved the right "to revoke the trust in whole or in part, it is well settled that a power of revocation, reserved to the grantor of a trust, does not prevent the passing of a present interest by the delivery of a deed."

An instrument in the form of a deed, reserving a life estate and the right to sell, lease, or convey the land conveyed, and providing for a reversion of the land to the grantor upon the death of the grantee prior to the death of the grantor, is not testamentary in character, it is held in *Brady v. Fuller* (1908) 78 Kan. 448, 96 Pac. 854, but conveys a present estate. With respect to the clause reserving the right to mortgage or convey, it is said: "If it should be interpreted as a reservation of the power to convey, it would necessarily fail because of repugnance to the preceding grant. If, after conveying the property, the grantor undertook to keep a string upon the land and retain the power to mortgage, control, and convey it, we would . . . be bound to disregard that clause, and

hold that it did not serve to defeat the conveyance of the fee.' However, under a fair interpretation of the clause, it may be given effect and made to accord with the preceding clause, importing the conveyance of a present interest. It will be noticed that the claim follows directly after the reservation of a life estate in the property conveyed, and it is not unreasonable to infer that, in the second reservation, the grantor referred to the control and disposition of the life estate." With respect to the clause providing for the reversion of the land in case of the grantee's prior demise, the court says: "Evidently it was her [grantor's] notion that she could convey the land . . . and retake it . . . in the event that she should outlive the grantee; but, under the authorities cited, it is clear that she could not take back that which had been expressly granted. This clause does not furnish much support to the theory that the instrument was testamentary in character. As will be seen, the provision is not that the gift or transfer shall take effect at the death of the grantor, but that the interest conveyed is to be revested in the grantor, on the death of the grantee, if such should occur before the death of the grantor. Instead of a posthumous effect, the language indicates a purpose that the instrument should take effect at once, and that it should operate as a deed."

And see, in connection with the preceding case, *Daniel v. Veal* (1861) 32 Ga. 589, in which a clause in which the maker reserves to himself "the right of revoking this deed of gift" is held invalid, as being repugnant to the operative portion of the instrument.

In *Price v. Gross* (1918) 148 Ga. 137, 96 S. E. 4, a clause to the effect that if the donor should return from the war, and feel disposed "to sell or settle it [the land], this deed of gift is null and void," was held not to militate against the conclusion that the instrument was a deed.

See also *Nichols v. Emery* (1895) 109 Cal. 323, 50 Am. St. Rep. 43, 41 Pac. 1089, supra, III. c. 2, (j); *Kokomo*

Trust Co. v. Hiller (1917) — Ind. App. —, 116 N. E. 332, supra, III. c. 2, (e); *Wall v. Wall* (1855) 30 Miss. 91, 64 Am. Dec. 147, supra, III. c. 2, (g); *Horn v. Broyles* (1900) — Tenn. —, 62 S. W. 297, infra, III. c. 2, (o); *Colby v. Colby* (1855) 28 Vt. 10, supra, III. c. 2, (e); *Blanchard v. Morey* (1883) 56 Vt. 170, supra, III. c. 2, (f); *Tompson v. Browne* (1835) 3 Myl. & K. 32, 40 Eng. Reprint, 13, 5 L. J. Ch. N. S. 64, supra, III. c. 2, (j).

(1) *Conveyance conditional on survivorship of grantee.*

For cases construing the instrument as a will, see infra, III. c. 3 (k).

It is held in *Thomas v. Williams* (1908) 105 Minn. 88, 117 N. W. 155, that a deed in the usual form is a present conveyance, and not a will, despite the following clause contained therein: "The intent of this deed being to convey to said second party all of said land, in case he survives said first party; otherwise said land to be vested in first party in case he survives said second party." "If, by the terms of the instrument, the right or interest passes at once, subject to a contingency over which the grantor has no control, it is a deed," the court says, "and irrevocable, even though the enjoyment of the thing granted is postponed until his death."

In *Abbott v. Holway* (1881) 72 Me. 298, the grantor in the deed involved provides that the instrument "is not to take effect and operate as a conveyance until my decease, and in case I shall survive my said wife [grantee] this deed is not to be operative as a conveyance, it being the sole purpose and object of this deed to make a provision for the support of my said wife, if she shall survive me." This instrument is held to pass an irrevocable interest, and not to be testamentary in character.

And see *Chavez v. Chavez* (1890) — Tex. —, 13 S. W. 1018, involving an instrument designated by the maker as a last will and testament, in which it is set out that, in consideration of the grantor's prospective marriage with the grantee, the grantor declares

it to be his will that, at his death, the grantee "shall be the absolute owner" of certain land, on "condition that said land shall not be sold by her until after my [his] death," and that, if she fail to survive him, the property shall revert to the grantor. The instrument is held to be a deed, on the ground that the condition set out above would be meaningless, if no interest was passed in the property by it.

Where, in *Bassett v. Budlong* (1889) 77 Mich. 338, 18 Am. St. Rep. 404, 43 N. W. 984, the grantor quitclaimed his farm to his wife in an instrument specifically providing against conveyance or encumbrance thereof by her, during his life, without his consent or joint conveyance, and providing for the reversion of the title to himself in case of his survival of his wife, it is held that no title vested in the wife by the instrument, the husband having survived the wife. "It is evident," the court says, "that, by executing the deed to his wife, he did not intend to part with the title to his real estate, unless the contingency should occur of his dying before his wife died. That event did not occur, and the estate never vested in his wife."

And in *Hershy v. Clark* (1879) 35 Ark. 17, 37 Am. Rep. 1, the grantor conveyed all the property "which he may now have, or which he . . . may have at the time of his death," should he die before the grantee. This instrument is held to convey nothing in *præsenti*, and not to be a deed. Whether or not it is a will is not decided.

See *Sharpe v. Mathews* (1905) 123 Ga. 794, 51 S. E. 906, *infra*, III. c. 2, (f); *Bowler v. Bowler* (1898) 176 Ill. 541, 52 N. E. 437, *infra*, III. c. 2, (o); *Brady v. Fuller* (1908) 78 Kan. 448, 96 Pac. 854, *supra*, III. c. 2, (k); *West v. West* (1892) 155 Mass. 317, 29 N. E. 582, *supra*, II. a. 2, (a); *Leslie v. McKinney* (1896) — Tex. Civ. App. —, 38 S. W. 378, *supra*, III. c. 2, (d).

And see *Jacoby v. Nichols* (1901) 23 Ky. L. Rep. 205, 62 S. W. 734.

11 A.L.R.—6.

(m) *Conveyance conditional upon performance of certain acts by grantee during maker's life.*

The instrument in question in *Savage v. Bon Air Coal, Land, & Lumber Co.* (1902) 2 Tenn. Ch. App. 594, is termed on its face an indenture, and it commences with words used in conveyances, such as "hath given and granted, enfeofed and confirmed, and do give, grant, alien, enfeof, and confirm." Immediately following these words, however, is the clause, "on the express conditions hereinafter to be set forth." Among these conditions, it is provided that the grantees are to "take possession of the farm," cultivate it, and support the grantor and his wife during their lives. It is provided that the instrument is not to be entered on the record until after the death of the grantor and his wife, nor until the foregoing requirements are complied with. "On the above conditions being complied with," the instrument says further, "then, and not until then, the title to the aforesaid land and personal property shall be fully and completely vested" in the grantees. The court says: "Now we do not agree with the contention of the complainant's counsel that this is altogether a testamentary paper, nor do we agree with the contention of defendant's counsel that the paper was at once delivered, and that the title immediately passed and vested in these two sons, but subject to the charges contained in the paper, and possibly subject to a defeasance. In our opinion, when construed according to the apparent and obvious intent of the parties, and, we think, in legal effect, the paper in question amounts to a written contract to convey, or which does convey, . . . the title to pass and the conveyance to become effective on the performance of certain conditions; but these conditions are precedent by the very terms of the instrument."

An instrument following in general the form of a deed, in *Phifer v. Mullis* (1914) 167 N. C. 405, 83 S. E. 582, after conveying specific real estate, provides that the grantors' covenant that they will give and convey to the

grantee "all other property which they may possess, both real and personal, at their death," and it is subsequently stated that the conditions of the agreement are such that, if the grantee cares for the grantors during their natural lives, "then immediately, at our death, she is to have and shall have the above-described land, together with all the personal property of every description which we may at our death have." The instrument is viewed by the court as conveying a present interest, the enjoyment of which is postponed, and as being, therefore, a deed.

See *White v. Hopkins* (1887) 80 Ga. 154, 4 S. E. 863, *supra*, III. c, 2, (f); *Owen v. Smith* (1893) 91 Ga. 564, 18 S. E. 527, *supra*, III. c, 2, (d).

(n) *Provision that property is to be divided among grantees at maker's death.*

For cases construing the instrument as a will, see *infra*, III. c, 3 (m).

In *Watson v. Watson* (1857) 22 Ga. 460, the instrument is in the form of a deed, containing a recital of consideration and the usual words of conveyance, but providing that the property conveyed is to be divided between the grantees at the grantor's death, and that, if any of the grantees marry or come of age during the grantor's lifetime, they are to receive their portions of the estate. On the ground that the words, "at my death," refer to the division and not the vesting of the property, and that the clause with respect to the division upon marriage or the attainment of majority clearly indicates an intention that the instrument shall, or at least may, take effect during his lifetime, the instrument is held to be a deed.

So, in *Egerton v. Carr* (1886) 94 N. C. 648, 55 Am. Rep. 630, the instrument in question provided that the maker leaves certain notes in trust with her son-in-law, "to be equally divided between" the maker's daughters, after her death. The instrument is held to be a deed of conveyance, operating at once, and not a testamentary disposition of the fund.

And an instrument embodying all the requisites of a statutory deed is

held, in *Spencer v. Robbins* (1886) 106 Ind. 580, 5 N. E. 726, not to be converted into a will by a clause following the description of the land, providing: "To be equally divided between them at my decease, and after the payment of all my funeral and burial expenses by them fully settled; and they are to pay all taxes and other expenses of repairs and improvements on the same during my natural life, and then the title to vest in them absolutely." "The most that can be said of the recitals is," the court says, "they manifest an awkward and probably successful attempt to reserve to the grantor a life estate in the land. . . . The conveyance, . . . in our view, vests a present estate in fee simple in the grantees."

See *Rawlings v. McRoberts* (1894) 95 Ky. 346, 25 S. W. 601, *supra*, III. c, 2, (g).

And see *supra*, III. c, 2, (j), generally.

(o) *Provision that title is to vest or pass upon maker's death.*

For cases construing the instrument as a will, see *infra*, III. c, 3 (n).

An instrument possessing all the essentials of a deed is held in *WIMPEY v. LEDFORD* (reported herewith) *ante*, 7, not to be given a testamentary character by a clause providing that "this deed is made with the understanding that the aforesaid Samuel Ledford and Nancy Ledford shall have all controlling power of the above-described premises during their lifetime, and at their death the title is to pass to parties of the second part." The court reasons as follows: "In the absence of any reservation, implied or expressed, against the vesting of the interest in the grantees upon the execution and delivery of the instrument, the words last quoted [the part of the clause reserving the controlling power] may reasonably be held to preserve in the grantors the right to use and enjoy the property during their lives. The language employed does not admit of a more extended meaning. The closing phrase of the limitation provides that, 'at their [grantors'] death, the title is to pass to the par-

ties of the second part [the grantees].’ The word ‘title’ may be used synonymously with ownership or the right to possession, dependent upon the context.”

So, where the grantor expressly reserves a life estate in the land conveyed, a further provision that, “at and after my death, . . . this deed shall become absolute and fully vest the title in fee” in the grantees, is held in *Priest v. McFarland* (1914) 262 Mo. 229, 171 S. W. 62, to be intended merely to recite the legal effect of the reservation of the life estate, and not to have the effect of postponing the present operation of the instrument, and the instrument is construed to be a deed.

And in *Venters v. Wickens* (1906) 224 Ill. 569, 79 N. E. 946, a deed warranting and conveying to the grantor’s grandson a farm, in which the grantor reserves the use and occupation, and rents and profits of the farm during his lifetime, and provides that the grantee is to live with the grantor and care for him, and that the title and interest are to vest absolutely in the grantee at the grantor’s death, is held not to be a testamentary instrument, but a deed, vesting title in the grantee subject to the life estate reserved, and merely postponing his right of possession. The court says that, by the reservation of the use and possession, the grantor all but conclusively showed “that he understood that, but for the reservation, the title, at the delivery of the deed, would be fully vested in the grantee.” With respect to the clause referring to the vesting of the title and interest at the grantor’s death, it is said: “It is obvious that the grantor did not regard this as testamentary. Had he so regarded it, there would have been no reason for the language in the earlier part of the deed, reserving the life estate. . . . He provided that the grantee’s ‘title and interest should not vest’ until the death of the grantor and his wife. . . . The clause containing those words was evidently intended, either to aid in creating a condition precedent, or to safeguard the life interests reserved by the instrument.”

An instrument in the form of a deed in *Horn v. Broyles* (1900) — Tenn. —, 62 S. W. 297, contains the following stipulations: “The said George G. Broyles [grantor] and his wife are to keep possession of the said lands, . . . during their lifetime, and at their [the] death . . . then the absolute title and possession in and to all of said land is to be vested in Matthias J. and George W. Broyles, . . . the said George G. Broyles may, if [he] think it more to the interest of his said sons . . . sell said land to any other person . . . if he should sell or trade said land, or any part thereof, then in such case the said . . . [grantees] are to have the proceeds of said sale or investment in the same manner that they are to have the lands herein conveyed, —that is, after the death of the [grantor].” “This language,” the court says, “must be taken in connection with the previous clause, purporting to convey the land to the two sons just mentioned. Bearing this in mind, it is seen that the instrument conveys a present interest in the land, but postpones the period of enjoyment to the date of the death of the donor and his wife.” The instrument is held a deed, and not a testamentary paper.

Although the granting clause contains the words “after my death,” and it is further provided that “the object and intention of this deed” is to give the grantor “possession and control of said real estate during the lifetime” of the grantor, and that “the title to the same is not to vest” in the grantee until after the death of the grantor, and it is specifically provided that, upon the death of the grantee prior to the death of the grantor, the instrument shall be null and void, an instrument, otherwise in the form of a deed, is held in *Bowler v. Bowler* (1898) 176 Ill. 541, 52 N. E. 437, to pass a present interest in the remainder, with the reservation of a life estate in the grantor, the instrument not being executed in conformity to the Statute of Wills, and the law not favoring an interpretation of the instrument which will render it a nullity.

And although containing a clause

providing that the estate conveyed is "not to vest . . . until the death" of the grantor, "she reserving in herself a life estate therein," and another clause reciting that the grantees are "to have and to hold" the lands, "after the death" of the grantor, an instrument, otherwise in the ordinary form of a deed, is construed in *Love v. Blauw* (1900) 61 Kan. 496, 48 L.R.A. 257, 78 Am. St. Rep. 334, 59 Pac. 1059, reversing on other grounds in (1899) 9 Kan. App. 55, 57 Pac. 258, to pass a present estate in remainder, with the reservation of a life estate in the grantor, and not to be testamentary in character.

A deed executed by a mother to her son, referring to a power of appointment conferred upon her by the will of her husband, was held in *McCormick v. Security Trust Co.* (1919) 184 Ky. 25, 211 S. W. 196, to convey a present interest, and merely to postpone the possession or enjoyment of the property, notwithstanding a provision therein that the title is "to vest in second party not until the death of the first party, and the party of the first part particularly reserves the right to all the rents and profits arising from said real estate during her life," and the habendum clause is followed by the phrase, "according to the limitations set out herein."

In *Hitchcock v. Simpkins* (1894) 99 Mich. 198, 58 N. W. 47, an ordinary warranty deed was made subject to the condition that the grantor was to have full possession, control, and occupancy of the premises during his life, and that he was to receive a certain specified sum every year from the grantee. And it was provided that, "at the death of the said party of the first part, the title shall be, and is hereby declared to be, in said party of the second part," subject to the limitation that, upon failure to pay such sums, the deed shall be void. The instrument is held to pass a present interest, and to be a deed.

So, an instrument, designated in the body thereof as a deed, in the form of

a deed, and containing throughout the words of a deed, is held, in *Dick v. Miller* (1908) 150 N. C. 63, 63 S. E. 176, to be a deed, although containing the following clause: "The purpose and intent of this deed is to convey the above property to the aforesaid Ben Miller, but title is vested in Henry Dick [grantor] during his natural life, then title passes to Ben Miller." "It is clear," the court says, "that the intent here was to convey a present interest, reserving a life estate in the grantor."

In *Jones v. Caird* (1913) 153 Wis. 384, 141 N. W. 228, Ann. Cas. 1914A, 88, an instrument in the form of a deed, but containing a clause providing that "this deed is given upon the express condition that the title and possession of the property conveyed is not to pass during the life of the party of the first part, but is to be absolute at his death," is held to be a deed, and not a will. In its decision, the court is apparently influenced by the fact that the instrument would be void, for lack of proper execution, as a will. "The question," says the court, "is rather, What is the legal effect which the grantor intended, and the instrument tends to support? and, in arriving at the answer, it is a fair presumption that he intended something valid and effectual, rather than something void and useless."

And in *Carpenter v. Hannig* (1896) — Tex. Civ. App. —, 34 S. W. 774, the instrument, otherwise in the usual form of a deed, contained as its final clause a provision that the property was to remain in the possession of the grantor, "he to have and enjoy all the rents and profits and usufructs arising therefrom, during his natural life; then the said property to pass immediately into the possession of the said . . . [grantee], in absolute fee." The instrument is held to be a deed.

See *Kinsler v. Clark* (1844) 1 Rich. L. (S. C.) 170, supra, II. a, 2, (a); *Lockridge v. McCommar* (1896) 90 Tex. 236, 38 S. W. 33, supra, III. c, 2, (d); *Colby v. Colby* (1855) 28 Vt. 10, supra, III. c, 2, (e); *Donnelly v. Eastes*

(1896) 94 Wis. 390, 69 N. W. 157, *infra*, III. c, 2, (p).

And see *Krell v. Codman* (1891) 154 Mass. 454, 14 L.R.A. 860, 26 Am. St. Rep. 260, 28 N. E. 578.

(p) *Conveyance to "become absolute" on death of maker.*

In *King v. Slater* (1910) 96 Ark. 589, 133 S. W. 173, an instrument in the form of a deed is held a valid deed, although it provides that the grantor, in "consideration that the said Henry N. Slater [grantee] is to allow me to use and occupy the land herein conveyed during my lifetime, and in case I leave the land he is to pay me \$85 per year, and at death this deed shall be absolute, and at such time I do hereby grant, bargain, sell, and convey" the premises in question.

And an instrument headed "warranty deed" and referred to in the body thereof as well as in the acknowledgment as a "deed," was held in *Sutton v. Sutton* (1919) 141 Ark. 93, 216 S. W. 1052, to be a deed and not a will, notwithstanding the provision of the habendum clause to the effect that "this deed is inoperative prior to the death of the said grantors, but subsequent to their demise or death, this deed is to become absolute without question." The court observed that the apparent conflict between the granting and habendum clauses may be eliminated, by referring the transfer of the legal title to the granting clause and the transfer of possession to the habendum clause; in other words, purpose and effect may be given to each clause, and the instrument upheld as a deed by saying that the title passed through the operation of the granting clause, but that the possession was reserved to the grantors during their lives, through the operation of the habendum.

So, in *White v. Willard* (1908) 232 Ill. 464, 83 N. E. 954, a clause in a deed reserving "the use and absolute control" of the premises conveyed, and providing that the title of the grantees "shall become absolute only on the death" of the grantor, is held to have "no other effect than to reserve a life estate in the grantor." "The use of

the word 'absolute,' in reference to the title that the grantees are to have, seems to imply," the court thinks, "that the grantees were to take a title presently, but that such title would not be perfect, but would become so on the death of the grantors." The instrument is held not to be testamentary.

And an instrument designated an "agreement," and following the form of a deed, is held in *Sibley v. Somers* (1901) 62 N. J. Eq. 595, 50 Atl. 321, to pass a present interest, and not to be testamentary, notwithstanding the reservation of a "lifetime right" in the property by the grantor, "the true intent and meaning of this instrument being," according to the following clause, "to give her [grantee] the same now, to become hers absolutely at my death."

A deed containing a reservation of the "rents and profits, and full control of the land," during the grantors' natural life, and providing that, at the death of the grantors, the land is "to be the absolute property in fee simple" of the grantee, conveys a present interest, and is not a testamentary instrument. *Timmons v. Timmons* (1911) 49 Ind. App. 21, 96 N. E. 622. "The reservation of a life estate is inconsistent with the intention to reserve any other or any greater estate," the court says. As to the clause providing that the land is to be the property of the grantee in fee simple, at the grantors' death, it is said: "This recital contains nothing implying that said land would not be the property in fee simple of the son [grantee] at an earlier date than the death of the grantors, nor does it say that his title in fee simple shall not vest until that time."

In *Donnelly v. Eastes* (1896) 94 Wis. 390, 69 N. W. 157, a deed in the usual form contained a provision that, upon the death of the grantors, the absolute title in fee simple to the land should vest in the grantee, provided she had fulfilled all the conditions of the deed, but that, in case of failure so to perform, the deed should be null and void, and all rights conveyed thereby should revert to the grantors. The instru-

ment was held to create a condition subsequent. In this case, there was no question raised with respect to the instrument being testamentary in character.

And in the similar case of *Drew v. Baldwin* (1879) 48 Wis. 529, 4 N. W. 576, the deed included the following clause: "This conveyance is not to become absolute until the decease of us both [grantors] . . . and then only on this condition, to wit: That the said Orissa . . . shall deliver to us and either of us, annually, during our or either of our natural lives, the one-third product of said" land. "We think it the better construction to hold this a grant upon condition subsequent," says the court. "It will be observed that it is declared the conveyance shall not become *absolute* until the death of the grantors, and then only upon the performance of the conditions named. This language implies that an estate was intended to pass by the conveyance; if this were not so, it would seem inconsistent to state that the conveyance should not be absolute until these conditions were performed."

See *Spencer v. Robbins* (1886) 106 Ind. 580, 5 N. E. 726, supra, III. c. 2, (n); *Jones v. Caird* (1913) 153 Wis. 384, 141 N. W. 228, Ann. Cas. 1914A, 88, supra, III. c. 2, (o); *Forwood v. Forwood* (1902) 24 Ky. L. Rep. 18, 67 S. W. 842, supra, III. c. 2, (g); *Priest v. McFarland* (1914) 262 Mo. 229, 171 S. W. 62, supra, III. c. 2, (o).

(q) *Provision that maker remains owner, or that he holds the property as his own during his life.*

In *Nowakowski v. Sobeziak* (1915) 270 Ill. 622, 110 N. E. 809, a deed providing that the grantors are to remain "owners" of the conveyed premises until their deaths, and that, after their deaths, the land "becomes the property" of the grantees, is held not to be a testamentary devise, where delivery of the instrument has been made. "The delivery of a deed in the grantor's lifetime changes the effect of an instrument which might, but for the delivery, be of a testamentary character," it is said.

So, where a formal conveyance in

fee of real estate contains, in the granting clause, a reservation that the land is "to remain the property" of the grantor as long as she lives, but there is no reservation in the habendum, and extrinsic evidence shows the object of the grantor to be the compensation of the grantee for services rendered, or to be rendered, it is held in *Auspach v. Lightner* (1906) 31 Pa. Super. Ct. 218, that the instrument passes a present interest, and is a deed, and not a testament.

And where an instrument in the form of a deed, by which a father, in consideration of natural love and affection, conveys by present words of gift several negroes and other property to his daughter and her children, contains a clause stating that "the condition of the above-named gift is to take place at my death; until then, the property is to remain as my own," it is held in *Elmore v. Mustin* (1856) 28 Ala. 309, that the instrument is a deed. "We think it clear that it was intended by the makers to pass a present interest," the court says. "This is shown by the language employed, which, in the concluding clause, is susceptible of no other construction. It is, indeed, as strong in this aspect as words can make it. The last clause reads as follows: 'The condition of the above-named gift is to take effect at my death; until then, the property is to remain as my own.' By this, when taken in connection with the words which precede it, we understand that the operation of the gift, so far as possession was concerned, was to be postponed until the death of the donor, up to which time the property was to remain not his own, but 'as' his own. The word 'as,' in our opinion, is the qualifying word of the clause, and shows that the donor did not intend to hold the property, absolutely, up to the period to which he had postponed the enjoyment of the interest he had given. We cannot, on any other construction than the one we have given to this clause, reconcile it with the preceding part of the instrument, the words of which so evidently evince the intention to pass a present interest. The language of the condition or

proviso is, at least, doubtful; and it would not be in accordance with sound rules of construction to make the certain and definite yield to the uncertain and doubtful."

In *Steel v. Steel* (1862) 4 Allen (Mass.) 417, involving a deed containing a clause stating that the grantor does not intend to convey until his decease and that of his wife, and that he holds the property as his "own lawful property and estate, to remain [his] estate during [his] natural life," it is said that "whether this provision is to be considered as the reservation of a life estate to the grantor and his wife, or as an exception from the conveyance, its effect is, in either case, to postpone the right of the grantees to have possession of the estate conveyed until after the death of the grantor and his wife." There is no question of the testamentary character of the instrument here involved.

See *Durand v. Higgins* (1903) 67 Kan. 110, 72 Pac. 567, *supra*, III. c. 2, (k).

(r) *Provision that grantee is to become owner upon maker's death.*

For cases construing the instrument as a will, see *infra*, III. c. 3 (r).

In *Myers v. Viverett* (1915) 110 Miss. 334, 70 So. 449, the deed provides that "it is nevertheless distinctly understood and agreed that the said first parties are to hold possession and exercise control and ownership to and over said lands, . . . during their natural lives, and at their deaths the said second parties are to be the sole owners thereof, with the personal property of which they may die seised and possessed." This is held not to be a will, but "a deed by which the land was conveyed to appellants [grantees], subject to a life estate reserved to the grantors."

See *Nowakowski v. Sobeziak* (1915) 270 Ill. 622, 110 N. E. 809, *supra*, III. c. 2, (q); *Chavez v. Chavez* (1890) — Tex. —, 13 S. W. 1018, *supra*, III. c. 2, (l); *Chrisman v. Wyatt* (1894) 7 Tex. Civ. App. 40, 26 S. W. 759, *supra*, III. c. 2, (e); *Wright v. Giles* (1910) 60 Tex. Civ. App. 550, 129 S. W. 1163, *supra*, III. c. 2, (e).

(s) *Postponement of payment of consideration till maker's death.*

In *Reed v. Brown* (1915) 184 Mich. 515, 151 N. W. 592, a deed reserving to the grantor "all the use, benefits, and control of said land, during the life" of the grantor and his wife, and providing that "it is a part of the consideration of this conveyance that the second party pay to each of his five sisters, or their legal heirs, the sum of \$50 on coming into possession of said land," is held not to be testamentary in character. "Immediately upon delivery of the instrument," the court says, "a vested estate passed, and the fact that the performance of the condition was postponed until the death of the grantors could not have the effect of converting a deed absolute into a testamentary disposition."

An instrument otherwise in form of a deed, with covenants of title, was held, in *Watts v. Lawrence* (1919) — Wyo. —, 185 Pac. 719, rehearing denied (1920) — Wyo. —, 188 Pac. 84, to pass a present interest or estate and therefore not to be testamentary in character, notwithstanding a provision therein that the grantee shall pay certain sums to specified persons, and upon filing receipts from such persons," then this deed shall be of full force and effect, otherwise to be null and void."

See *Meyer v. Shortenbecker* (1917) — Iowa, —, 165 N. W. 456, *supra*, III. c. 2, (e); *Meck's Appeal* (1881) 97 Pa. 313, *infra*, III. c. 2, (w).

(t) *Provision against recording of instrument till after maker's death.*

The recital, "This deed to be null and void if recorded before my death," contained in a deed making a present grant of land, is held in *Elliott v. Cheney* (1914) 183 Mich. 561, 150 N. W. 163, not to indicate a testamentary intent on the part of the grantor.

See also *Savage v. Bon Air Coal, Land, & Lumber Co.* (1902) 2 Tenn. Ch. App. 594, *supra*, III. c. 2, (m).

(u) *Conveyance "commencing upon death" of maker.*

In *O'Day v. Meadows* (1905) 194 Mo. 588, 112 Am. St. Rep. 542, 92 S. W. 637, the deed was executed by the grantor

and his wife, and conveyed an estate "commencing upon the death of the said John O'Day (grantor), and continuing so long as the said Clymena Alice O'Day shall live." This instrument is held to be operative and effective to convey a present interest in the life estate, and to be a deed, and not an instrument testamentary.

(v) *Grantees to "be possessed" after maker's death.*

In *Robertson v. Dunn* (1812) 6 N. C. (2 Murph.) 133, 5 Am. Dec. 525, the instrument is in the usual form of a deed, and makes conveyances to several persons, each of whom is "to be possessed after" the grantor's death. In the final clause it is provided that "all the rest of my [grantor's] estate that I may die possessed of" is to be divided among certain persons. This instrument is held to be a deed, and not a will. In reaching its decision, the court is influenced by the fact that the grantor called upon a party to write her a deed of gift, and that the person who wrote it considered it to be such.

(w) *Provision that maker's executors shall convey after maker's death.*

For cases construing the instrument as a will, see *infra*, III. c, 3 (x).

Articles of agreement wherein the owner of land grants and agrees that, in consideration of sums of money to be paid after his death, his executors shall "immediately after the death of himself and his wife, . . . convey and assure" certain lands to the other party to the instrument, and which provide that the owner of the land "reserves the right to live on the said premises for himself and his wife during their lifetime," is held in *Meck's Appeal* (1881) 97 Pa. 313, not to be a will, but a deed.

So, in *Fletcher v. Fletcher* (1844) 4 Hare, 67, 67 Eng. Reprint, 564, 14 L. J. Ch. N. S. 66, 8 Jur. 1040, the maker of a voluntary deed of trust covenanted with the trustees that, in case either of his sons survived him, his [maker's] executors should, within twelve months after his death, pay a certain sum to the trustees upon trust for the sons. The testator retained the

deed in his possession until his death, and did not communicate it, either to the trustees or the beneficiaries. On the ground that the maker of the instrument did not make a specific reservation therein of a right to deal with the property notwithstanding the instrument, it is held to be a deed.

And where in *Jeffries v. Alexander* (1860) 8 H. L. Cas. 594, 11 Eng. Reprint, 562, 31 L. J. Ch. N. S. 9, 7 Jur. N. S. 221, 2 L. T. N. S. 768, a deed of covenant was executed, whereby the maker covenanted that he would in his lifetime, or that his executors should within twelve months after his decease, invest a sum of money in consols, in the names of trustees, to be held upon certain charitable trusts, the instrument is held to be a deed, and not a will, notwithstanding that it remained in the custody of the covenantor, and was not communicated to the covenantees.

3. *Language construed as will.*

(a) *"At my death," contained in granting clause.*

For cases construing instrument as passing a present interest, see *supra*, III. c, 2 (a).

An instrument providing that, "in consideration of natural love and affection for my son. . . . I do give unto him the following property . . . , after my death and the death of my wife, to have and to hold the said property forever," is held in *Hester v. Young* (1847) 2 Ga. 31, to be a will, and not a deed. The question in this case is, "When did William Womack intend that his son . . . should take possession of this property? *After his death?* It is evident from the face of the paper, the words, '*after my death,*' coming before the habendum, and tenendum before the limitation." It is also pointed out in confirmation that all of the grantor's property, both real and personal, is conveyed.

And where a written instrument in the general form of a warranty deed conveys land by a granting clause, limited by the phrase "at our death," and provides, with respect to the person-

alty conveyed by it, that the possession shall be postponed until the death of the grantors, it is held in *Blackstock v. Mitchell* (1881) 67 Ga. 768, that, as to the land, the instrument is testamentary in character.

So, an instrument denominated a deed, granting property after the maker's death, and making other provision for the grantee should the property in question be sold by the maker during his lifetime, is held in *Thorold v. Thorold* (1809) 1 Phillim. Eccl. Rep. (Eng.) to be a will, and not a deed, the intention of the maker being to pass title at his death.

Supplying the words "I give," in an instrument reading: "Know all men by these presents, that . . . after my death [I give]" certain property to a certain person and his heirs, "but, in case he should die without bodily heirs, the whole" of the property "to return to my estate," it is held in *Welch v. Kinard* (1843) Speers, Eq. (S. C.) 256, that the instrument is intended to operate only upon the testator's death, and that it is a will.

In *Re Belcher* (1872) 66 N. C. 51, an instrument in the form of a deed, containing the words "I . . . do give at my death," and proved to have been written by a layman, at the request of the maker for a will, is held to be a will.

Where the maker of an instrument having some of the characteristics of a deed provides therein that "I do hereby, on and after the day of my death, by this will, grant, convey, and assign" certain property, it is held in *Miller v. Holt* (1878) 68 Mo. 584, that the instrument is a testamentary disposition of the property.

And where the owner of slaves executes a paper, by which, in consideration of love and affection and the sum of \$1, it is stated that he has given unto his niece's daughter and the heirs of her body, at his decease, certain negroes, to have and to hold at his decease forever, the instrument is a will, and not a deed, it is held in *Johnson v. Sirmans* (1882) 69 Ga. 617, there being intended "no passing a

present title, with a reservation of a life estate in the grantor."

Johnson v. Yancey (1856) 20 Ga. 707, 65 Am. Dec. 646, involves an instrument in the following language: "Due, at my death, to Haney Johnson, the sum of \$2,500, from the general fund of my estate as a gift." The maker's signature follows, and then the instrument continues: "The condition of the above bond or obligation is such, that whereas, for the fidelity and obedience . . . that I have for my daughter . . . , I donate, in the above manner, what I design for her at my death." On the ground that the paper "purports palpably, upon its face, to be the mode adopted by Lewis Yancey, of giving to Haney Johnson what he designed for her 'at his death,' and which he directed to be paid 'out of the general fund of his estate,' " the instrument is held to be a testamentary paper, and not a deed.

In an instrument not using words of grant, but purporting to be a "testamentary agreement," in *Re Diez* (1872) 50 N. Y. 88, a husband and wife "hereby determine that, upon the death of one or the other of them, the surviving husband or wife shall receive the entire property of the one having died first." This instrument is held to have no present effect in operation, and to be a will.

See *Habergham v. Vincent* (1793) 2 Ves. Jr. 204, 30 Eng. Reprint, 595, 4 Bro. Ch. 353, 29 Eng. Reprint, 931, where the maker of an instrument, called a deed poll, does not expressly postpone the taking effect of the conveyance till after his death, but where he does refer in the instrument to his will and a power of disposition reserved therein, and proceeds to make a disposition in accordance with the power. Although not in the form of a will, it is held to be intended to operate only from the death of the grantor, and to be testamentary in character.

And see *Williams v. Claunch* (1906) 44 Tex. Civ. App. 25, 97 S. W. 111, involving an agreement in which the one party declares it to be her "aim and purpose . . . to will and bequeath" certain land to the other, at her death,

in consideration of the agreement of the other to take charge of and to cultivate the land. The instrument is not in the usual form of a deed, and is held testamentary.

See also *Ellis v. Pearson* (1900) 104 Tenn. 591, 58 S. W. 318, *infra*, III. c. 3, (j).

(b) "*At my death,*" contained in *habendum*.

For cases construing instrument as passing a present interest, see *supra*, III. c. 2 (b).

An instrument is testamentary in character, which provides that "I . . . for the consideration of \$1 . . . do hereby assign and set over to my daughter . . . all of my property, both personal and real, to have the same after my death." *Robinson v. Brewster* (1892) 140 Ill. 649, 33 Am. St. Rep. 265, 30 N. E. 683.

So, where the maker of an instrument in the form of a deed inserts an *habendum* reading "to have and to hold . . . from and after the death of" the grantor, and subsequently in the instrument specifically states that "the intention of the grantor by this deed is to convey said property to . . . [grantee], to take effect upon his death," it is said in *Goodale v. Evans* (1914) 263 Mo. 219, 172 S. W. 370, that the "language cannot be tortured into meaning that any right, title, or interest in or to the real estate . . . was conveyed to or was vested in the grantees, prior to the death of the grantor." The instrument is held to be testamentary, and void.

An instrument in the form of a deed, containing words of present conveyance, is held in *Sperber v. Balster* (1881) 66 Ga. 317, to be a will, where the *habendum* provides the "said deed of gift to be of full effect at my death, together with all the live stock, cattle, hogs, mules, poultry, and all other live stock that may be found on said premises, together with all said premises," and it is further provided that the grantee shall have all the furniture brought into the house during the future. "These words," the court says,

"show the intention of the maker to convey what would be on the premises at his death, and to have his gift of the land to go into effect at the same time." In this case, the court has some difficulty in avoiding the improper rule laid down in *Johnson v. Hines*, (1861) 31 Ga. 720, *supra*, III. c. 2, (b), to the effect that, under the rules of construction applicable to deeds, the clause first appearing must control, and that, accordingly, a limitation in the *habendum*, when in conflict with the words of present conveyance in the granting clause, is of no effect. That rule, however, is avoided by the fact that there are three different *habendums* in the paper in question, the court holding that the rule in the earlier case was not meant to apply to papers so crudely and inartistically drawn.

Ferris v. Neville (1901) 127 Mich. 444, 54 L.R.A. 464, 89 Am. St. Rep. 480, 86 N. W. 960, involves the following instrument: "This is good to Miss Rubie Ferris for \$800, as payment for care and attendance rendered by her to me in my last sickness; this \$800 is to be collected out of my estate after my death, providing, however, I die a bachelor." The court says: "It is a will, and not an acknowledgment of a debt. If it were a duebill or an acknowledgment of a debt, it could not have been defeated by the marriage of the testator. It was to take effect only at the death of the testator."

And see *Johnson v. Sirmans* (1882) 69 Ga. 617, *supra*, III. c. 3, (a); *Turner v. Scott* (1866) 51 Pa. 126, *infra*, III. c. 3, (e).

(c) *Specific reservation of life estate.*

For cases construing instrument as passing a present interest, see *supra*, III. c. 2, (d).

In *Ragsdale v. Booker* (1826) 2 Strobb. Eq. (S. C.) 348, note, an instrument in the form of a deed, in which the grantor conveys certain slaves to be divided among his grantees, and reserves to himself a life estate therein, is held to be a will, and not a deed.

And see *Seay v. Huggins* (1915) 194

Ala. 496, 70 So. 113, *supra*, III. c. 3, (e).

(d) *Reservation of use, possession, enjoyment, and control during maker's life.*

For cases construing instrument as passing a present interest, see *supra*, III. c. 2, (e).

Where the maker of an instrument provides that she gives all her property to a certain person, but that she is "to have the use of all" so long as she lives, and that, after the maker's death, the donees are to "have full and free use" of the property, it is held in *Kisecker's Estate* (1899) 190 Pa. 476, 42 Atl. 886, that the intention of the maker is to pass an interest, to take effect on her death, and that such is especially true where the evidence shows that the instrument was retained by the maker, and never delivered.

So, in *Crain v. Crain* (1858) 21 Tex. 790, earlier appeal (1856) 17 Tex. 81, instruments purporting to be deeds, but reserving the possession and control of the property to the grantor for his lifetime, are held to be intended to take effect after the death of the grantor, and to be testamentary.

And in *Jones v. Loveless* (1884) 99 Ind. 317, a deed reserving to the grantor "the right to hold, and use, and dispose of the rents and profits of said real estate during the term" of his life is held not to be intended to take effect until after the grantor's death, and to be an attempted testamentary disposition, without the requisite formalities of a will.

Where, in an instrument, the maker, in consideration of being supported for life, "doth hereby make over" all her right and title to certain slaves, and further sets out the provision that the slaves are "still to be under her [grantor's] power during her lifetime, but at her decease to be the property" of the grantee, it is held in *Crawford v. M'Elvy* (1848) 2 Speers, L. (S. C.) 225, that the instrument is not a deed, but, at most, a will.

In *Dunn v. Bank of Mobile* (1841) 2 Ala. 152, a deed, conveying land and

slaves to the grantor's daughter, and to her children then in life, and to those thereafter to be born, contained a provision that "I am to retain the possession and use of said land and negroes, and the profits of them, if I choose, during my life; with this reservation, the deed in all other respects, and for every purpose, to be established and final." The court says that if an instrument in the form of a deed of gift is "only to be consummated by death, and not to operate during life, probate will be granted of it as a will."

Shepherd v. Nabors (1844) 6 Ala. 631, involves an instrument in the form of an indenture, giving a certain negro to the heirs of the body of the maker's daughter. After setting out that he has given the slave to such heirs, and warrants and defends the right to the negro from his heirs, the maker states that "nevertheless I . . . doth keep the said negro in my possession my lifetime, and at my decease the negro is in full possession of the heirs of Winney Shepherd's body." The court views it as a will, on the ground that it is testamentary in its nature. In reaching a contrary conclusion in a later case (*Adams v. Broughton* (1848) 13 Ala. 731, *supra*, III. c. 2, (e)), the court attempts to harmonize that case with *Shepherd v. Nabors* (Ala.) *supra*, on the ground that "there, although the form of the deed was quite similar, there was no grantee in esse at the time of its execution, and it may be inferred from the report that there was no evidence of its delivery to anyone as a deed." And in *Wilk v. Greer* (1848) 14 Ala. 437, *supra*, III. c. 2, (e), it is again said: "In each of those cases, the instrument could not take effect as deeds vesting a *present* interest or title in the donees; for, in the first case named (*Dunn v. Bank of Mobile*), the deed was made to Mrs. Dunn and to her children then in life, *and to those thereafter to be born*, and was to take effect after the death of the donor; and, in the last case (*Shepherd v. Nabors*), the donees were not in esse at the time of the gift, so that they could take. It is manifest then, as there could have been no delivery,

either actual or constructive, of the property, the gifts could not take effect as deeds, and the court prevents a failure of the interest by holding them good as testamentary papers."

See *Epperson v. Mills* (1857) 19 Tex. 65, involving an instrument in the form of a deed, which is limited to take effect at the grantor's death, in which the grantor disposes of the whole of his estate, together with such other property as he may acquire during his lifetime, reserving, during his life, the right to act as trustee for the grantees, and, as such, to control the property and to dispose of it for the benefit of the grantees. While not called upon to decide whether the instrument is a deed or a will, the court is inclined to the opinion that it is testamentary.

And see *Walker v. Jones* (1853) 23 Ala. 448, *infra*, III. c, 3, (e); *Mosser v. Mosser* (1858) 32 Ala. 551, *infra*, III. c, 3, (e); *Crocker v. Smith* (1891) 94 Ala. 295, 16 L.R.A. 576, 10 So. 258, *infra*, III. c, 3, (e); *Seay v. Huggins* (1915) 194 Ala. 496, 70 So. 113, *infra*, III. c, 3, (e); *Cravy v. Rawlins* (1850) 8 Ga. 450, *infra*, III. c, 3, (s); *Symmes v. Arnold* (1851) 10 Ga. 506, *infra*, III. c, 3, (s); *Nichols v. Chandler* (1875) 55 Ga. 369, *infra*, III. c, 3, (h); *Dye v. Dye* (1899) 108 Ga. 741, 33 S. E. 848, *infra*, III. c, 3, (e); *Arnold v. Arnold* (1899) 62 Ga. 628, *infra*, III. c, 3, (e); *Reed v. Hazleton* (1887) 37 Kan. 321, 15 Pac. 177, *infra*, III. c, 3, (n); *Cunningham v. Davis* (1884) 62 Miss. 366, *infra*, III. c, 3, (e); *Boon v. Castle* (1908) 61 Misc. 474, 115 N. Y. Supp. 583, *infra*, III. c, 3, (n); *Turner v. Scott* (1866) 51 Pa. 126, *infra*, III. c, 3, (e); *Hannig v. Hannig* (1898) — Tex. Civ. App. —, 24 S. W. 695 (held will, upon construction in light of evidence not set out in case), *supra*, III. b, 9, (a); *Roberts v. Coleman* (1892) 37 W. Va. 143, 16 S. E. 482, *infra*, III. c, 3, (x).

(e) *Provision that instrument is to "take effect" or "operate" at maker's death.*

For cases construing instrument as passing a present interest, see *supra*, III. c, 2 (g).

It is held in *Donald v. Nesbit* (1892) 89 Ga. 290, 15 S. E. 367, that an instrument in the form of a deed, conveying an undivided one half of certain premises to one person, in consideration of love and affection, and the other undivided one half of the same premises to another, in consideration of services rendered and to be rendered, is a will, where it provides that "in no event is this deed to go into effect until after my death."

So, it is held in *Coulter v. Shelmadine* (1902) 204 Pa. 120, 53 Atl. 638, that an instrument containing a clause providing that "this assignment shall not be of any effect until after my (grantor's) death" is testamentary, and that the grantee does not take any present interest in the land.

And an instrument otherwise in form of a deed, with a clause to the effect that it is understood that "this deed is not to be delivered, or become operative, except in case of the death of the party of the first part," is testamentary in character, and, if executed with the formalities required by the Statute of Wills, may be admitted to probate as a will. *Re Broffee* (1919) — Mich. —, 172 N. W. 541.

In *Morgan's Goods* (1866) L. R. 1 Prob. & Div. (Eng.) 214, 35 L. J. Prob. N. S. 98, 14 L. T. N. S. 894, 14 Week. Rep. 1022, a decedent made three deeds of gift, conveying all of his property to trustees for the benefit of his children, each of the instruments containing a clause directing that the conveyance was not to take effect until after the maker's death. These instruments are held to be intended to operate only upon the death of the maker, and they are construed to be testamentary.

In *Turner v. Scott* (1866) 51 Pa. 126, the indenture provided that the "entire use and possession" of the conveyed premises was reserved to the grantor during his life, and that the conveyance was "in no way to take effect until after the decease of" the grantor. The habendum was to have and to hold the premises "after the decease" of the grantor. These clauses the court deems as giving the

instrument a revocable effect, and it is held a will.

Seay v. Huggins (1915) 194 Ala. 496, 70 So. 113, involves an instrument containing words of present grant, bargain and sale, and the usual covenants of warranty. The instrument conveyed realty and all of the grantor's personalty, owned or to be owned by him. At the end of the instrument the grantor inserted the following clauses: "Provided, however, this deed shall not take effect until after my death and the death of my . . . wife It is expressly understood that I hereby reserve a life estate in said lands for myself and wife, with the right to use the rents, incomes, and profits therefrom the term of my natural life; and I reserve the right to sell or otherwise use said personal property as I see fit, during my natural life." In view of extraneous facts, such as various references to the instrument by the maker thereof as his will, and his retention of it for several years, the court pronounces the instrument a will.

In *Baxter v. Chapman* (1917) 147 Ga. 438, 94 S. E. 544, the instrument in question provided that "this deed of conveyance is not to take effect until after my death, but that, as long as I live, the said William S. Arnold [grantee], upon paying me reasonable rents for the same, is to merely occupy the premises by these presents conveyed; as my tenant, . . . and upon my death I direct W. K. Hopper, to whom I intrust this instrument, to deliver the same to the said W. S. Arnold." The grantee died before the grantor, and delivery was never made to him. The instrument is held to be a will, and not a deed.

Under the Georgia Code, providing that "if the intention be to convey an interest, accruing and having effect only after his [grantor's] death, it [the instrument] is a will," an instrument in the form of a deed, containing a clause providing that "this deed is not to go into effect until after the death" of the testator, is held in *Bright v. Adams* (1874) 51 Ga. 239, to be a will, and not a deed.

The instrument in *Cunningham v.*

Davis (1884) 62 Miss. 366, conveyed certain real estate and all of the maker's personal property that he owned or might own at the time of his death, and was upon the condition that "I reserve the right to alter, change, or entirely abolish this deed, if I so desire, during my life, and that I retain all of the said property during my life, and have the control of the same, and that this deed do not take effect until after my death, and that, after my death, my wife . . . pay all of my debts, and the remainder over paying my debts to be hers." The court says: "The provision in these words: 'And that this deed do not take effect until after my death,' coupled with the direction that the object of the bounty of the maker of the instrument should pay all his debts, and have only the remainder of his property, convinces us that the paper was testamentary in its character."

An instrument which, though called a "contract," purports to bargain, sell, and convey real estate, there being, however, a provision that "this conveyance is not to take effect until the death of the first party, at which time it shall be in full force and effect," is not effective as a conveyance of a present interest in the property. *Kelly v. Covington* (1918) 119 Miss. 658, 81 So. 485.

In *Givens v. Ott* (1909) 222 Mo. 395, 121 S. W. 23, an instrument providing that "this conveyance [is] not to take effect till our death, and that of the survivor of us," is held to pass no present interest, and to be testamentary in character.

And on the authority of the preceding case and other Missouri cases, in *Terry v. Glover* (1911) 235 Mo. 544, 139 S. W. 337, an instrument in the form of a deed, providing, "this deed not to go into effect until after the death" of the grantor, is held to be testamentary.

If the words: "This deed not to take effect until after my death," contained in an instrument in the form of a deed, are not conclusive that the instrument is a will, it is said in *De Bejligethy v. Johnson* (1900) 23 Tex. Civ. App. 272, 56 S. W. 95, that, con-

strued in the light of the express testimony of the maker that he had requested the scrivener to write a will, the court below was justified in finding the instrument to be a will, and not a deed.

So an instrument purporting, in consideration of \$1 and love to the grantee, to sell and convey to him certain property, which declares all instruments previously made, testamentary or otherwise, to be of no effect, provided, however, that "not until after my death shall this deed be of effect," and that if the grantee should die before the grantor, then the land should revert to the latter, was held in *Ihihi v. Kahaulelio* (1920) — C. C. A. —, 263 Fed. 817, to be of a testamentary character, and not a deed.

An instrument in the form of a deed, containing a provision that "this is to take effect only after the death" of the maker, is held in *SIMPSON v. MCGEE* (reported herewith) ante, 4, to evince an intention on the part of the maker that the instrument is not to take effect, for any purpose, until after the maker's death, and to be, accordingly, testamentary in character.

So, an instrument providing that "this deed shall take and be in effect on and after the death of myself and wife" is held in *COX v. REED* (reported herewith) ante, 5, following the preceding case, to pass no present interest and to be testamentary.

By instrument in the form of a deed, in *Armstrong v. Armstrong* (1874) 4 Baxt. (Tenn.) 357, all of the grantor's estate, both real and personal, is conveyed. By a clause in the conveyance, it is provided that the instrument is "to have effect from and after my death." The court is of the opinion that "the clearly expressed intention that it is to take effect upon the death of Armstrong conclusively fixes the character of the writing, and shows it to be a testamentary paper."

So, a deed, which, by its terms, is made "with the full understanding, and upon the condition, that the same shall take effect from and after the death of the said grantor," is construed in *Sappingfield v. King* (1907)

49 Or. 102, 8 L.R.A.(N.S.) 1066, 89 Pac. 142, affirmed on rehearing (1907) 49 Or. 109, 90 Pac. 150, to be testamentary in character, and revocable.

And, although in the form of a deed, an instrument providing that it is "to take effect and be in full force, from and after" the death of the grantor, is testamentary in character. *Pinkham v. Pinkham* (1898) 55 Neb. 729, 76 N. W. 411.

Where, in *Lincoln v. Felt* (1902) 132 Mich. 49, 92 N. W. 780, proponent was offering for probate a lost instrument in the form of a deed, which, it appeared from the testimony, contained a clause providing that it was to take effect after the maker's death, it is held that "if the deed was in form a deed to take effect after the death of the grantor, it is clear that . . . proponent was entitled to the probate of it as a will."

In *Ransom v. Pottawattamie County* (1915) 168 Iowa, 570, 150 N. W. 657, the deed involved contains a clause providing that "this indenture [is] to be effective after my death, on the condition that Pottawattamie county, Iowa, pay any debts that I may be owing at that date, and pay my funeral expenses." In holding that the instrument creates no interest in the grantee in *præsent*, it is said: "She [grantor] attached conditions to the gift, to be performed after her death, the burden of which could not be determined until after her death, and upon the performance of which the instrument became effective. We think there was an intent on the part of the grantor that the instrument should not become effective as a conveyance until after her death, and until the performance of the conditions named, which could not be ascertained, or known, or performed, until after her death." The same instrument is further discussed in *Re Bybee* (1917) 179 Iowa, 1089, 160 N. W. 900.

In *Arnold v. Arnold* (1879) 62 Ga. 628, an instrument resembling a deed, and purporting to convey certain shares of stock, contained a clause reserving the control thereof, and the dividends, during the grantor's life,

and providing that, "immediately on his death, this transfer is to take effect, and the transfer and delivery so intended, to be perfected and completed." The purpose of the grantor, the court says, "was to make as full and complete a transfer as he could, consistently with postponing the actual and effective passing of the title until his death. He wanted to retain the stock in his own name, and for his own use while he lived, and then for his illegitimate children to have it through a regular transfer. . . . There is no substantial difference between such a scheme and the ordinary bequests in a will. In either case, the owner of the property holds on until death shakes him loose, and he appoints beforehand who is to succeed him." The instrument is held to be a will.

In *Ackman v. Potter* (1909) 239 Ill. 578, 88 N. E. 231, involving a deed containing a clause providing that the instrument is to take effect at the time of the grantor's death, and that the grantee takes only the remainder after the grantor's death, it is said that "a deed of land which is not to take effect until the death of the grantor is void, as being an attempt to make a testamentary disposition of property, without complying with the Statute on Wills."

A writing under seal in the form of a deed, executed by a husband and wife, and purporting to convey to their children by the words: "Have given, granted, and bestowed, and by these presents, do give, grant, and bestow," all the real and personal property constituting the wife's separate estate, is held to be a will, and not a deed, where the grant is "under the following restrictions, reservations, and conditions, viz.: All the foregoing property, both real and personal, is to be held, owned, and enjoyed by the said Belinda [grantor], during her natural life, and at her death, the foregoing gift is to take effect," and "it is further by these presents distinctly understood that the foregoing gift is not by any means to take effect until the death of the said Belinda, who reserves a life estate in all of the said

property," and the grantor reserves the right to select any portion of the property conveyed, for the purpose of bestowing it upon after-born children, and also of selling the real estate upon a certain contingency, and goes finally to the extent of designating an executor. *Mosser v. Mosser* (1858) 32 Ala. 551.

So, an instrument purporting on its face to be a deed, conveying by present words of gift certain slaves to various grantees, in consideration of natural love and affection, but reserving the right of ownership and use until the grantor's death, at which time it is declared that "this deed shall take effect," is a will, and not a deed. *Walker v. Jones* (1853) 23 Ala. 448.

And, although in the form of a deed, an instrument is a will, where it conveys "all manner of property I now or may hereafter own," and contains no covenants of warranty, where it reserves not only the lifetime enjoyment of the property, but also enough of the property itself to pay the grantor's debts, and where it provides further that the instrument is "to take effect absolutely at my death, and to be valid and conclusive." *Crocker v. Smith* (1891) 94 Ala. 295, 16 L.R.A. 576, 10 So. 258.

In *Dye v. Dye* (1899) 108 Ga. 741, 33 S. E. 848, an instrument reciting a consideration, and containing the usual granting and habendum clauses, is held to be testamentary in character, where it contains a final clause in which the grantor reserves the control of the land, the right to the rents and profits, and the right of revocation, and in which it is stated that the instrument is "to have full force and effect at the death" of the testator.

And in the case of *Ward v. Campbell* (1884) 73 Ga. 97, where an instrument in the form of a deed conveys realty, and "also all the live stock, household and kitchen furniture, and all moneys due that I may have at my death, after the payment of my just debts and funeral expenses," and provides that "this deed of gift" is "to take effect at my

death," it is held that the instrument is testamentary in character.

Where it is provided in an instrument, otherwise in the form of a deed, that the "intention of this instrument of writing is such that Mrs. Ann Ellison relinquishes her entire right at her death, then this deed is to come immediately into effect, but not until then," it is held in *Murphy v. Gabbert* (1901) 166 Mo. 596, 89 Am. St. Rep. 733, 66 S. W. 536, that "the words in the deed . . . are such an emphatic declaration that the deed was to come immediately into effect upon the death of the grantor, but not till then," that the instrument must be deemed as passing no present interest, but as being testamentary in character.

The words, "this deed is not to be operative until after the death of the parties of the first part," contained in a deed, "cannot be said to apply simply to the enjoyment and possession of the property, but to the entire force and effect of the instrument, and are repugnant to the creation of a present interest." *Leonard v. Leonard* (1906) 145 Mich. 563, 108 N. W. 985. The instrument is held testamentary and revocable in character.

And in the subsequent cases of *Re Dowell* (1908) 152 Mich. 194, 115 N. W. 972, and *Moody v. Macomber* (1910) 159 Mich. 657, 134 Am. St. Rep. 755, 124 N. W. 549, involving similar provisions, the preceding case is cited and followed.

See *Niccolls v. Niccolls* (1914) 168 Cal. 444, 143 Pac. 712, *infra*, III. c, 3, (f); *Leaver v. Ganss* (1883) 62 Iowa, 314, 17 N. W. 522, *infra*, III. c, 3, (q); *Goodale v. Evans* (1914) 263 Mo. 219, 172 S. W. 370, *supra*, III. c, 3, (b); *Epperson v. Mills* (1857) 19 Tex. 65, *supra*, III. c, 3, (d).

But see *Trawick v. Davis* (1888) 85 Ala. 342, 5 So. 83.

(f) *Conveyance of property belonging to maker, at his death.*

For cases construing instrument as passing a present interest, see *supra*, III. c, 2 (h).

An instrument under seal in the form of a deed of gift in consideration of the grantor's affection for the

grantee, who is his grandson, and the present payment of \$5, conveying "\$1,500 in cash, to be paid to him out of my estate at my death, by my executor or administrator," is held in *Kinnebrew v. Kinnebrew* (1860) 35 Ala. 628, to be a will, inasmuch as there is nothing in the grant to prevent the grantor from disposing of the whole of his estate during his lifetime, and thus defeating the grant. "If there had been a conveyance of all the property which the maker of the instrument might, at his death, leave, it would have been clearly testamentary," the court says. "The character of the instrument cannot be changed because it is a charge upon all the property, instead of a conveyance of the property itself." The question is not affected, it is said, by the fact that the same instrument disposes of a slave by a present deed of gift, and is construed, so far as it relates to the slave, to be a deed.

So, an instrument reciting a consideration, and containing words of grant and conveyance, is held in *Hall v. Bragg* (1859) 28 Ga. 330, to be a will, and not a deed, where the granting clause confers on the grantees "all the property that he, the said George Bragg, owns and is possessed of at his death;" and this is deemed the case, whether the phrase, "at my death," is viewed as relating to the words, "owns and is possessed of," or as referring back to the words of granting and conveyance.

And an instrument which does not purport to convey any property within the ownership of the maker at its date, but gives "the one half of all the property of that he . . . may die seised or possessed of," is, although in the form of a deed, testamentary in character, and operates only as a will. *Watkins v. Dean* (1837) 10 Yerg. (Tenn.) 321, 31 Am. Dec. 583.

In *Re Lautenshlager* (1890) 80 Mich. 285, 45 N. W. 147, instruments in the form of warranty deeds of land, containing the words, "Also one half of all the personal property and money left at my death," are held to be wills, having been signed in the

presence of two competent witnesses, who signed in the maker's presence, and at his request, and having been retained by the maker until his death.

In holding a conveyance of "all the real and personal estate that I shall own at my decease" to be testamentary in character, the court, in *Ison v. Halcomb* (1910) 136 Ky. 523, 124 S. W. 813, says: "Nothing that the grantor owned at the time the deed was made passed under the deed. All the property that he then had remained his, and subject to his disposition, just as it was before. The only thing that the deed operates upon is the real and personal property which he shall own at his death. . . . The operation of the deed is wholly contingent upon his having the property at his death. It therefore passed, at its delivery, no interest in any property he then owned, and would be operative in no way until his death."

In *Roth v. Michalis* (1888) 125 Ill. 325, 17 N. E. 809, an instrument in the form of a deed of trust conveying an undivided half of the real and personal property which the grantor might leave at the time of his death, after the payment of his just debts, is held to pass no present estate or interest, and to be void as a deed. The instrument is not found to be a will, because of the lack of the proper execution as such, and not because the language is not sufficient for that purpose.

And in *Brewer v. Baxter* (1870) 41 Ga. 212, 5 Am. Rep. 530, an instrument in the form of a deed, conveying all the property that the maker thereof "may die possessed of," is viewed as conveying no present interest, and is held to be a will.

Niccolls v. Niccolls (1914) 168 Cal. 444, 143 Pac. 712, involves an instrument purporting to be a trust deed, and containing a statement that it is to take effect only upon the death of one of the grantors, and upon the property that the grantors may have and own at the time of the death of the said grantor. The court says: "Clearly this did not convey any pres-

ent interest in the property of the trustors. It only related to the property which they should possess at the time of the death of Robert [grantor]. It purported to convey no interest in any property owned by them, at the date of its execution, and the mere fact that they possessed the same property then which was theirs when Robert Niccolls died is a coincidence which in no manner alters the purpose or effect of the instrument. While it is competent to create a trust which shall take effect after the death of a grantor, nevertheless there must be some interest or estate which passes at the time of the execution of the deed." The instrument is held testamentary in character, and not a deed.

In *Robinson v. Schly* (1849) 6 Ga. 515, an instrument in the form of a deed, disposing of the real and personal property of which the grantor "may be possessed" at her death, is held to be a will, and not a deed.

It is held in *Poore v. Poore* (1895) 55 Kan. 687, 41 Pac. 973, that an instrument, in writing, denominated on its face a will, which purports to "give and bequeath all our real estate and personal property, of which we die possessed" to a certain person, "to hold and own and possess forever," is testamentary in character, no present interest being intended to pass thereby.

See *Gage v. Gage* (1841) 12 N. H. 371, in which the testamentary character of an instrument in the form of a deed, but purporting to convey all the personal property of which the maker shall die seised, is conceded.

And see *Nichols v. Chandler* (1875) 55 Ga. 369, *infra*, III. c. 3, (h); *Sperber v. Balster* (1881) 66 Ga. 317, *supra*, III. c. 3, (b); *Ward v. Campbell* (1884) 73 Ga. 97, *supra*, III. c. 3, (e); *Tuttle v. Raish* (1902) 116 Iowa, 331, 90 N. W. 66, *infra*, III. c. 3, (h); *Cunningham v. Davis* (1884) 62 Miss. 366, *supra*, III. c. 3, (e); *Evans v. Evans* (1910) 69 Misc. 86, 125 N. Y. Supp. 960, *infra*, III. c. 3, (h); *Shingler v. Pemberton* (1832) 4 Hagg. Eccl. Rep. (Eng.) 356, *infra*, III. c. 3, (i).

See also *Kyle v. Perdue* (1888) 87

Ala. 423, 6 So. 296; *Kaufman v. Ehrlich* (1894) 94 Ga. 159, 21 S. E. 377; *Henry v. Ballard* (1816) 4 N. C. (2 Car. Law Repos.) 595.

(g) *Conveyance of property which may come into maker's ownership during his life.*

In *Harper v. Reaves* (1902) 132 Ala. 625, 32 So. 721, a clause in an instrument in the form of a deed, describing the property conveyed as that which "I now possess or may come into the possession of during my natural life," is held not to be inconsistent with the construction of the instrument as a deed.

See also *Gillham v. Mustin* (1868) 42 Ala. 365, *infra*, IV. c, 5; *Crocker v. Smith* (1891) 94 Ala. 295, 16 L.R.A. 576, 10 So. 258, *supra*, III. c, 3, (e); *Seay v. Huggins* (1915) 194 Ala. 496, 70 So. 113, *supra*, III. c, 3, (e); *Sperber v. Balster* (1881) 66 Ga. 317, *supra*, III. c, 3, (b); *Epperson v. Mills* (1857) 19 Tex. 65, *supra*, III. c, 3, (d).

(h) *Conveyance of property left after payment of maker's debts.*

For cases construing instrument as passing a present interest, see *supra*, III. c, 2 (i).

Where an instrument in the form of a deed conveys a tract of land and certain personal property, "after burial expenses and all my just debts are paid, only reserving to myself the use and control of said property during my natural life," and provides, further, that, in addition to the personal property specified, the grantees are to have "all other property that I may be possessed of at my death," it is held in *Nichols v. Chandler* (1875) 55 Ga. 369, that, although the instrument, standing alone, may be doubtful of interpretation, when it is construed in the light of the failure of the grantor to deliver it to the grantees, and of her placing of it in the hands of one of the witnesses, to keep until her death, or until she shall call for it, all doubt is removed, and it is clearly a will.

So, in *Tuttle v. Raish* (1902) 116 Iowa, 331, 90 N. W. 66, an instrument providing that, in the event of the maker's death without children, after

the payment of all just debts and funeral expenses and the cost of a monument, the maker does "hereby make and constitute my wife . . . the sole owner in her own right of all our property . . . that we may be possessed of," is held to be testamentary in character. In light of the fact that the maker retained possession and control until his death, "no very careful analysis of the terms of this writing is needed," in the opinion of the court, "to show that the intent to provide for the wife . . . was sought to be effected through an instrument which was to go into effect only upon the decease of the grantor, and that during his life she took nothing."

Barnes v. Stephens (1899) 107 Ga. 436, 33 S. E. 399, involves an instrument containing three clauses, the first of which, in the form of a deed of gift, purports to convey title to land, the second of which declares that the grantee shall have and hold the land, together with certain described personal property not referred to in the first clause, "the burial expenses and just debts of" the maker "to be paid first," and the third clause of which declares that all the maker's other property of every kind shall be divided among his heirs, calls this disposition of his property a "division," and then declares all other "wills and conveyances" to be null and void. The instrument is held to pass no present title, and to be a will.

In *Evans v. Evans* (1910) 69 Misc. 86, 125 N. Y. Supp. 960, an instrument in the form of a deed conveyed the grantor's real estate and the personality that the grantor owned at the time of execution, "or that may take the place thereof at the time of my death." The transfer was made subject to the payment by the grantee of the grantor's debts, his funeral expenses, and certain sums to persons designated. The instrument is held to be testamentary.

And see *Crocker v. Smith* (1891) 94 Ala. 295, 16 L.R.A. 576, 10 So. 258, *supra*, III. c, 3, (e); *Ward v. Campbell* (1884) 73 Ga. 97, *supra*, III. c, 3, (e); *Roth v. Michalis* (1888) 125 Ill.

325, 17 N. E. 809, *supra*, III. c, 3, (f); *Ransom v. Pottawattamie County* (1915) 168 Iowa, 570, 150 N. W. 657, *supra*, III. c, 3, (e); *Cunningham v. Davis* (1884) 62 Miss. 366, *supra*, III. c, 3, (e).

(i) *Conveyance in trust for use of maker during his life.*

For cases construing instrument as passing a present interest, see *supra*, III. c, 2 (j).

A deed of trust executed by a husband and wife, wherein the trustee is directed to sell the trust property, pay the grantor's debts, purchase other property with the surplus, and pay the income to the grantor and his wife during their lives, is held, in *Gingrich's Appeal* (1889) 1 Monaghan (Pa.) 301, 17 Atl. 33, to be testamentary and revocable as to the children, in whom, by the terms of the deed, the property is to vest "immediately after the death of the survivor."

So, where the maker of an instrument in the form of a trust deed, reserving to himself the use of the property during his life, together with a power of revocation, and raising certain trusts therein at his death, subsequently makes a will confirming the trusts, it is held in *Atty. Gen. v. Jones* (1817) 3 Price, 368, 146 Eng. Reprint, 291, that the two instruments are to be construed together, and are both to be taken as testamentary. This case, however, is criticized in *Tompson v. Browne* (1835) 3 Myl. & K. 32, 40 Eng. Reprint, 13, 5 L. J. Ch. N. S. 64, *supra*, III. c, 2, (j).

And in *Knight's Goods* (1829) 2 Hagg. Eccl. Rep. (Eng.) 554, an instrument in the form of a deed, conveying property to trustees for the use of the grantor and his wife, and, upon the death of the survivor, to be divided among certain persons, is admitted to probate, it being urged that the instrument was testamentary in effect, not being intended to operate until after the death of the maker.

In *Shingler v. Pemberton* (1832) 4 Hagg. Eccl. Rep. (Eng.) 356, an indenture by which the maker conveyed the personal estate which he then had or should be entitled to at his death, upon trust for his own use during his

life, and to other persons at his death, was admitted to probate as testamentary.

See *Peacock v. Monk* (1748) 1 Ves. Sr. 127, 27 Eng. Reprint, 934, involving an instrument designated as a deed, which conveys a sum of money to a trustee, who is bound to pay the maker an annuity for life, and afterwards to make disposition of the principal and the income to other designated persons. The maker made a will on the same day upon which he executed the deed. This fact, taken together with the consideration that revocation might be effected through collusion with the trustee, leads the court to view the instrument as testamentary.

And see *Hixon v. Wytham* (1675) 1 Ch. Cas. 248, 22 Eng. Reprint, 784, *Finch*, 195, involving an instrument in the form of a trust deed to a trustee of property on trust to sell after the maker's decease, the proceeds to be divided among designated persons, where the defendants, who at first claimed the instrument to be a deed, yielded the point.

See also *Milnes v. Foden* (1890) L. R. 15 Prob. Div. (Eng.) 105, 59 L. J. Prob. N. S. 62, 62 L. T. N. S. 498; *Johns v. Bowden* (1914) 68 Fla. 32, 66 So. 155, *infra*, III. c, 3, (j).

(j) *Reservation of power of revocation during maker's life.*

For cases construing instrument as passing a present interest, see *supra*, III. c, 2 (k).

A conditional deed of gift of all money due or to become due to the grantor is held in *Gillham v. Mustin* (1868) 42 Ala. 365, to be a will, not a deed, although the evidences of the debt, together with the conveyance, were delivered to the grantees, where the deed contains the following qualification: "And in the event I shall die or be killed in the casualties of the war, whither I am now going, then all such moneys are to become the property of my said four sisters, to be equally divided between them; but if I should survive and return, then this instrument is to be null and void." "Where there is a general reservation," the court says, "or something

like a reservation, of the maker's right to deal with the property as his own, notwithstanding the instrument, and no conclusive effect can be given to it until the death of the maker, the law regards the instrument as testamentary."

So, a trust deed reserving to the grantor the use, possession, and profits during his life and, in addition thereto, the right of directing conveyances thereof to any person desired, is held in *Johns v. Bowden* (1914) 68 Fla. 32, 66 So. 155, not to convey a vested right in the beneficiaries named in the deed, "but a contingent interest, subject to the right of the grantor to direct a conveyance of the entire property to others at any time during the grantor's life," and to be in the nature of a testamentary disposition. The court says that, "in effect, the entire beneficial interest and right in the specific property remained in the grantor, and could not pass at all, without his consent, till after his death, thus making the trust deed not an absolute conveyance of a vested right, in *præsenti*, of the property."

In *Ellis v. Pearson* (1900) 104 Tenn. 591, 58 S. W. 318, the maker of the instrument gives to his wife, "after my [his] death," certain land, and reserves the right "to sell or dispose of the above-described land till my [his] death," providing that, when he so sells or conveys the land, "this gift is of no effect." The court says: "He [grantor] retains full dominion over the property, with the power to defeat his gift by deed or will, properly executed. It is only after his death, it remaining undisposed of by him to that time, that the wife's right or estate becomes effectual. This being so, the paper is testamentary in character, and not a deed."

An instrument filled out on a printed form of a deed of conveyance, reciting a consideration, containing words of present grant, habendum and tenendum clauses, and a covenant of warranty, signed, acknowledged, delivered, and recorded, is not a deed vesting a present estate, but a will, it is held in *Wren v. Coffey* (1894) —

Tex. Civ. App. —, 26 S. W. 142, where the interest conveyed is "all of our right, title, and interest in and to our homestead . . . , should we not sell or dispose of the same before death." The language of the instrument, it is said, "is not a mere reservation of the right to use and occupy during the lifetime of the makers, but is an express retention of the power of alienation during their lifetime. It was, in effect, a declaration of intention that the conveyance should not have the effect to divest title out of the makers, . . . during the lifetime of such makers."

In *Lacy v. Comstock* (1895) 55 Kan. 86, 39 Pac. 1024, involving an instrument in the form of a deed, reserving the rents and profits of the land conveyed for the grantor's lifetime, and also the right of disposition of the premises during the grantor's lifetime, it is said obiter, by the court, that "it is urged with much plausibility that the instrument is testamentary in its character."

See *Mosser v. Mosser* (1858) 32 Ala. 551, *supra*, III. c. 3, (e); *Seay v. Huggins* (1915) 194 Ala. 496, 70 So. 113, *supra*, III. c. 3, (e); *Dye v. Dye* (1899) 108 Ga. 741, 83 S. E. 848, *supra*, III. c. 3, (e); *Cunningham v. Davis* (1884) 62 Miss. 366, *supra*, III. c. 3, (e); *Roberts v. Coleman* (1892) 37 W. Va. 143, 16 S. E. 482, *infra*, III. c. 3, (x); *Thorold v. Thorold* (1809) 1 Phillim. Eccl. Rep. (Eng.) 1, *supra*, III. c. 3, (a).

(k) *Conveyance conditional on survivorship of grantee.*

For cases construing instrument as passing a present interest, see *supra*, III. c. 2 (l).

The instrument, otherwise in the form of a deed, under discussion in *Aldridge v. Aldridge* (1906) 202 Mo. 565, 101 S. W. 42, contains the following provisions: "On this condition, however, that if I . . . outlive the said Amelia J. Aldridge [grantee] the land reverts back to me in fee: That if I should die first, then the said Amelia J. Aldridge shall have this land." The instrument is held to be testamentary.

In *Pelley v. Earles* (1900) 107 Ky. 640, 55 S. W. 550, an instrument giv-

ing a sum of money to a certain woman, "to support her if she should be the longest lived," and providing that "this obligation is not to be sold nor assigned, nor no attempt [made] to collect it in my lifetime," is held to be testamentary, and subject to probate.

A provision in a warranty deed that it shall be void in case the grantee dies before the grantor renders the instrument testamentary in character and inoperative for want of witnesses, notwithstanding that it was executed shortly after the grantor had suffered a stroke, and in consideration of the care and kindness of the grantee. *Chaplin v. Chaplin* (1919) 105 Kan. 481, 184 Pac. 984.

And see *Thomas v. Byrd* (1916) 112 Miss. 692, 73 So. 725.

See also *Hershy v. Clark* (1879) 35 Ark. 17, 37 Am. Rep. 1, supra, III. c, 2, (l); *Bigley v. Souvey* (1881) 45 Mich. 370, 8 N. W. 98, infra, III. c, 3, (o); *Welch v. Kinard* (1843) *Speer's Eq. (S. C.)* 256, supra, III. c, 3, (a).

(l) *Conveyance conditional on maker's failure to attain majority.*

A written instrument bearing the form of a deed, but containing words of gift only, and not of grant or conveyance, and giving to the guardian of the grantor all the money belonging to him in the guardian's hands, provided the grantor does not live to be twenty-one years of age, is held in *Daniel v. Hill* (1875) 52 Ala. 430, to be a will, and not a deed. "The death of the testator alone can operate to create any interest in the donee, and it is, of consequence, a will," is the reason given by the court.

(m) *Provision that property is to be divided among grantees at maker's death.*

An instrument in the form of a trust deed, providing that, in a certain contingency, the property conveyed shall revert back to the grantor, and that, after the grantor's death, it shall then be divided between certain persons, is held in *Mallery v. Dudley* (1848) 4 Ga. 52, to be a will, and not a deed, the interest conveyed to the last-men-

tioned persons not passing until after the grantor's death.

See *Barnes v. Stephens* (1899) 107 Ga. 436, 33 S. E. 399, supra, III. c, 3, (h).

(n) *Provision that title is to vest or pass upon maker's death.*

For cases construing instrument as passing a present interest, see supra, III. c, 2 (o).

The instrument in *Boon v. Castle* (1908) 61 Misc. 474, 115 N. Y. Supp. 583, although in the form of a deed, contained the following clause: "This conveyance is made and delivered upon the express understanding and agreement that no title to or interest in any of the foregoing described property shall pass from the grantor . . . to the grantee . . . until the death of said grantor . . . and all of the rents and income of said property shall belong to and be the property of said [grantor] for and during his entire lifetime, and said [grantor] shall have the exclusive control, management, and care of all of said described real estate until his death, and, upon the death of . . . grantor, said grantee shall become . . . the absolute owner in fee simple of all of the foregoing described real estate and property, subject to any and all encumbrances and taxes, . . . and also subject to all the debts and funeral expenses of said grantor." The instrument is held of testamentary character.

Reed v. Hazleton (1887) 37 Kan. 321, 15 Pac. 177, involves a writing not in the form of a deed, and not containing words of present grant or conveyance. It provides that the maker will, during his lifetime, "retain full and peaceful possession," that the grantee shall have his home with the grantor, and that after the grantor's death, the right to the land shall vest in the grantee. The instrument is held to be testamentary, there being no provision with respect to the passing of title which has a present operation. The decision in this case is approved and adhered to in a later case in (1891) 46 Kan. 73, 26 Am. St. Rep. 86, 26 Pac. 450.

The instrument in *Wheeler v. Durrant* (1851) 3 Rich. Eq. (S. C.) 452,

while containing words of present gift, resembled a will in that gifts were made in different clauses to a number of donees. In the final paragraph trustees were appointed, "with the full understanding that the above property does not vest in another [any] of the parties until my death." The instrument is held to be testamentary.

In *Glover v. Fillmore* (1913) 88 Kan. 545, 129 Pac. 144, a widow entered into an "agreement for maintenance," by which she was to furnish her land for the joint use of herself and a relative, she having the right to live upon the land during her life, the relative agreeing to occupy and cultivate the land, keep the premises in repair, pay the taxes, and maintain and support the widow. In the agreement she covenants that, "at and upon her death, this instrument shall stand for, convey, and vest in the said [relative] the fee-simple title and estate," in the same manner as if a good warranty deed, upon sufficient consideration, had heretofore been made. She retains the option to terminate the contract, upon the failure of the relative to carry out his part thereof, in which event she was to be returned to possession of the land. The instrument is held to be testamentary in character.

A conveyance providing that "this conveyance is placed in escrow, and shall be valid to pass title to said lands upon its delivery to said grantee at or after my decease," is held, in *Wilson v. Carter* (1906) 132 Iowa, 442, 109 N. W. 886, not to pass a present interest in the land.

(o) *Provision that property shall continue as maker's during his life.*

In *Bigley v. Souvey* (1881) 45 Mich. 370, 8 N. W. 98, an instrument in the form of a deed contained the condition that "the conveyance of land herein named shall be and continue the property of the first party during his lifetime, and the remainder to said second party immediately at the death of said first party. But, in the event of the death of the second party before the said first party, then the estate herein shall go to said first party as before."

The instrument is held to be testamentary, and to pass no title whatever.

A clause, reading: "N. B.—The said Abner Lee [grantor] holding in reserve all the within-named estates, both real and personal, during the natural life of the said Abner Lee," has the effect, it is held in *Carlton v. Cameron* (1880) 54 Tex. 72, 38 Am. Rep. 624, of rendering an instrument a will, although in the form of a deed.

(p) *Provision that property shall not be disposed of during maker's life.*

Where, in *Siler v. Jones* (1908) 33 Ky. L. Rep. 317, 110 S. W. 255, the instruments in question contain the provision that the property shall not be disposed of during the life of the grantor, except with her consent, it is said that "the very language used in drafting the writings shows that the grantor regarded them as testamentary."

(q) *Provision that grantee shall have no interest during maker's life.*

A conveyance in the usual form, purporting to convey real estate, but containing clauses providing that the effect thereof is "to commence after the death of both of said grantors," and that it is agreed "that the grantee shall have no interest in the said premises as long as the grantors or either of them shall live," does not pass any present interest, it is held in *Leaver v. Gauss* (1883) 62 Iowa, 314, 17 N. W. 522, and is testamentary in character. "A declaration that the grantee takes no interest during the life of the grantor is equivalent," the court thinks, "to a declaration that no estate is created."

(r) *Provision that grantee is to become owner upon maker's death.*

For cases construing instrument as passing a present interest, see *supra*, III. c, 2 (r).

In *Tuttle v. Raish* (1902) 116 Iowa, 331, 90 N. W. 66, an instrument providing that, in the event of the maker's death without children, after the payment of all just debts and funeral expenses, and the cost of a monument, the maker does "hereby make and constitute my wife . . . the sole owner in her own right of all our property

. . . that we may be possessed of," is held to be testamentary in character.

(s) *Provision that property is to become that of grantee at maker's death.*

Where grantor conveys, in consideration of love and affection, and by an instrument in the form of a deed, the title to certain slaves, the instrument is nevertheless a will, where it includes a clause which provides that the grantor "hath the full use of the said negroes" during her natural lifetime, and that, at the time of her death, "the said negroes and their increase shall rise and be the property of the said" grantee. *Cravy v. Rawlins* (1850) 8 Ga. 450. "If the negroes were to be the property of Elizabeth G. Cravy during the lifetime of Elizabeth Paramore [grantor]," the court says, "it is difficult to perceive how they and their increase could rise and become her property at the time of the death of the latter."

In *Symmes v. Arnold* (1851) 10 Ga. 506, an instrument in the form of a deed, purporting to convey certain property named therein, is held a will, and not a deed, where the grantor reserves to herself "the use of all the property during my natural life, then to go to the above-named persons, and from thenceforth to be their property absolutely, without any manner of condition." "If an estate in remainder was created," the court asks, "and a present interest in the property was intended to have been conveyed to the donees in the instrument, at the time of its execution, why declare that, after the termination of the natural life of the donor, it should 'thenceforth be their property' absolutely, without any manner of condition? The words, 'absolutely, without any manner of condition,' were merely strong expressions employed by the donor, as indicative of her intention that the donees should have the unrestricted right and title to the property, after her death."

In *Meek v. Holton* (1857) 22 Ga. 491, the court, after pointing out a possible ground of distinction between the case under consideration, and the cases of *Symmes v. Arnold* and *Cravy v. Raw-*

lins (Ga.) *supra*, says that these two cases are in conflict with *Robinson v. Schley* (1849) 6 Ga. 515, *supra*, III. c. 2, (d), and *Jackson v. Culpepper* (1847) 3 Ga. 569, *supra*, III. c. 2, (j); and states that it considers the latter to be correct.

See *Thomas v. Byrd* (1916) 112 Miss. 692, 73 So. 725.

See also *Bigley v. Souvey* (1881) 45 Mich. 370, 8 N. W. 98, *supra*, III. c. 3, (o); *Crawford v. M'Elvy* (1843) 2 Speers, L. (S. C.) 225, *supra*, III. c. 3, (d).

(t) *Provision that property is to go into grantee's possession at maker's death.*

Jordan v. Jordan (1880) 65 Ala. 301, involves an instrument, properly executed as either a will or a deed and delivered to one of the beneficiaries, and recorded as a deed. By its terms, in consideration of natural love and affection, the maker gives, grants, and conveys all her personal estate to certain persons, giving each particular articles of personalty and a specified sum of money, and the maker's sons were directed to "take charge of all the . . . property herein and elsewhere deeded, and that they proceed to place the owners thereof in possession of the same, with the least delay and expense possible after my death." The instrument is held a will, the court being of the opinion that an irrevocable disposition of the money and personalty was not intended. It is said: "Nor can it be supposed that it was the intention, if from any cause the identical money on hand at the execution of the instrument should have been lost or converted, and at her death there were other moneys sufficient to meet the dispositions of the instrument, that the right of the donees should not attach to such moneys—that their rights were confined and limited to the identical money in the hands of the donor when the instrument was executed. Yet, if it is a deed, speaking and taking effect from its execution, that would be the consequence. . . . 'Again, the disposition is of all the personal property of the donor; and, if it be a deed, it strips her of all right and interest therein, except possession during her

life. It is evident, portions of this property must be consumed in the use, and much of it was of that kind which may be designated perishable." In addition to these considerations, the court is influenced also by a provision granting to one beneficiary "a horse to be selected of her own choice, out of my stock of horses," and a clause containing directions with respect to the grantor's burial.

And see *Babb v. Harrison* (1856) 9 Rich. Eq. (S. C.) 111, 70 Am. Dec. 203, where, upon the construction of the whole of an instrument, in which a mother gave, made, and bequeathed certain slaves to her son, to go into his possession at her death, it is held to be a will.

See also *Lannig v. Hannig* (1893) — Tex. Civ. App. —, 24 S. W. 695, supra, II. g, where the jury held the instrument to be a will, upon construction of it in connection with evidence not set out in the case.

(u) *Provision that property is to be delivered at maker's death.*

An instrument, in the form of a deed, conveying a slave for a valuable consideration, to be delivered at the death of the seller, is held in *McGlawn v. McGlawn* (1855) 17 Ga. 234, to be a deed containing a reservation of a life estate in the slave, and not a will.

(v) *Provision that maker shall retain possession of instrument during lifetime.*

In *Kelly v. Richardson* (1892) 100 Ala. 584, 13 So. 785, an instrument in the form of a deed, granting, bargaining, and selling a lot of land, but reserving the "use, occupation, and enjoyment and control of the same" for the grantor's life, and providing that he is "to retain possession of this conveyance" during the term of his natural life, is held to be a will, and not a deed.

So, it is held in *Griffin v. McIntosh* (1903) 176 Mo. 392, 75 S. W. 677, on later appeal (1905) 188 Mo. 327, 87 S. W. 455, that an instrument in the form of a deed is testamentary, as conveying no present interest, where it contains a clause providing that the

maker and his wife are to live on the land conveyed, until their deaths, as members of the grantee's family, and reciting that the deed is to be held in the possession of the maker and his wife until their deaths, at which time it is to be delivered to the grantee.

Where a grantor, in an instrument in the form of a deed, provides that the deed shall be delivered to the grantee at his death, at which time her title shall become absolute upon the performance of certain conditions, it is said in *Culy v. Upham* (1903) 135 Mich. 131, 106 Am. St. Rep. 388, 97 N. W. 405, that "it is quite apparent that the grantor, in this deed, intended that title should remain in him until after he died, and that it should then pass to defendant [grantee], if she had performed the conditions. This intent was testamentary in character, and could not be consummated by a deed."

(w) *Conveyance to wife "during her widowhood."*

While admitting, in *Sartor v. Sartor* (1861) 39 Miss. 760, that the natural import of the language used in a deed, in which the grantor gives all of his property to his wife, "during her widowhood," is an immediate vesting of title in the wife with a postponement of enjoyment, it is held that, in view of the fact that such a construction will have the effect of stripping the grantor of his entire estate, real and personal, and of the improbability that the grantor intended it to have such effect, the instrument should be regarded as a will.

(x) *Provision that maker's executors shall convey, after maker's death.*

For cases construing instrument as passing a present interest, see supra, III. c, 2 (w).

An instrument designated a bond, reciting that the owner of lands retains full possession of them during his lifetime, and reserves the right to make conveyance of them, but providing that, in case he does not convey the land during his lifetime, this instrument "is to be construed as a conveyance" to a certain person, is held in *Roberts v. Coleman* (1892) 37 W.

Va. 143, 16 S. E. 482, to be a will, and not a deed. The court says that it "reserves, not simply possession of the land during Coleman's [maker's] life, but also power to dispose of and convey it as he might choose, thus diverting it from the beneficiary under it, and directs his executors after his death to convey it, thus unequivocally manifesting an intent that it take effect only after his death. True, it does say that, if he should not convey it during life, this instrument is to be deemed a conveyance; but it is not to so operate until after his death."

A paper, signed by decedent, purporting to give his home to his housekeeper, and ordering his executor, referred to by name, to execute and deliver a deed therefor after his death, was held in *Losche's Estate* (1919) 264 Pa. 58, 107 Atl. 375, to be testamentary in character so that no suit for specific performance could be maintained thereon. The court observed that the deed vested no present interest, but only appointed what was to be done after the death of the maker, and that that was the test of its character.

IV. Conveyance as both will and deed.

In holding it proper to construe one portion of an instrument to be a deed, and another portion of the same instrument to be a will, the court, in *Robinson v. Schly* (1849) 6 Ga. 515, says: "Must a conveyance be necessarily homogeneous? Or can it not be a deed in part, and a will as to another part? What is there to prevent a person, in the same instrument, to sell or give a piece of property to one, and to will another piece to the same individual? A, in consideration of love and natural affection, or \$500 paid him by B, gives or sells to B a negro by the name of Jim, and wills and bequeaths at his death the rest of his estate, real and personal, to the said B. Can legal ingenuity suggest a plausible reason for not construing this instrument a deed of gift, or bill of sale, as to Jim, and a will as to the residue of A's property?"

So where, in *Powers v. Scharling* (1902) 64 Kan. 339, 67 Pac. 820, the maker of an instrument designated a

will included therein a conveyance of a present interest in her estate, subject to a life estate therein, it is said that, if "the testator intended that the grant should take effect upon the execution of the instrument as to certain of his property then in possession, and as to certain other of his estate not until his death, the instrument, having been properly executed, would be a contract, and irrevocable as to that part in possession and to which it was intended to vest the title, and testamentary as to the residue."

And where, in *Kinnebrew v. Kinnebrew* (1860) 35 Ala. 628, an instrument in the form of a deed of gift is construed as a deed of gift with respect to a slave of which it makes disposition, and as a testamentary instrument with respect to a sum of money of which it disposes, it is held proper to construe one part of the instrument as a deed, and another as a will. This is true, the court says, "in reference to an instrument which employs variant and distinct terms in reference to different articles, clearly indicating the intent to give the one a testamentary and the other a present operation."

It is said in *Thompson v. Johnson* (1851) 19 Ala. 59, that "one and the same instrument cannot be both a will and a deed;" but, referring to that case, it is said in *Kinnebrew v. Kinnebrew* (Ala.) supra, that "this remark may be correct in reference to the instrument which was then before the court; but it cannot be true, as the authorities show, in reference to an instrument which employs variant and distinct terms in reference to different articles, clearly indicating the intent to give the one a testamentary, and the other a present, operation." Apparently, the language used in the earlier case meant nothing more than that, with respect to the same article, an instrument cannot be viewed both as a will and a deed.

After holding, in *Kyle v. Perdue* (1888) 87 Ala. 423, 6 So. 296, that one portion of the instrument under consideration is a deed, the court, in discussing the effect of a subsequent

clause in the same instrument, says: "The clause of the instrument, in reference to such remaining income and profits, can, probably, take effect only as a testament."

It is said obiter in *Craft v. Moon* (1917) — Ala. —, 75 So. 302, that "a written instrument may sometimes operate, both as a will and as a deed; that is, partly as a deed, and partly as a will."

See *Mallery v. Dudley* (1848) 4 Ga. 52, where, without raising a question as to the propriety of such action, an

instrument in the form of a deed is held a will as to a part of the property disposed of, and a deed as to the remainder.

And see *Kaufman v. Ehrlich* (1894) 94 Ga. 159, 21 S. E. 377, where, after holding the instrument under consideration to be a deed as to the property in question, it is said that, as to other property disposed of therein, "it may be testamentary," but that that is immaterial, as none of that property is involved in the controversy.

E. L. D.

E. J. DILLEHAY, Appt.,

v.

W. H. MINOR.

Iowa Supreme Court — January 20, 1920.

(— Iowa, —, 175 N. W. 838.)

Landlord and tenant — common stairway — effect of absence of tenants.

1. A landlord maintaining a stairway leading to rooms which are usually occupied by several persons, on the second floor of his building, is not absolved from the duty of having it in safe condition by the fact that all rooms except one had become vacant.

[See note on this question beginning on page 109.]

Appeal — directed verdict — construction of evidence.

2. Upon appeal from a directed verdict for one party the other party is entitled to the benefit of the most favorable construction of which the testimony is reasonably susceptible.

Landlord and tenant — use of unsafe passage — effect.

3. A tenant occupying a room on the second floor of a building is not negligent as matter of law in attempting to use a stairway to reach his room, which he knows to be old and dilapidated, in preference to a safer one which has been provided for him.

[See 16 R. C. L. 1049.]

APPEAL by plaintiff from a judgment of the District Court for Dickinson County (De Land, J.) in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by his negligence. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Francis & Owen, for appellant:

Where a landlord leases portions of his property to different tenants, retaining control of a portion thereof for their common use and convenience, the law imposes upon him the duty to use reasonable care to keep in safe condition the portion over which he retains

control, and if he be negligent in this regard, and a personal injury results to a tenant by reason of a defect due to such negligence, he is responsible in damages therefor.

Bailey v. Kelly, L.R.A.1916D, 1226, note; *Mesher v. Osborne*, 48 L.R.A. (N.S.) 920, note; *Shipley v. Fifty Associates*, 101 Mass. 254, 3 Am. Rep. 346;

Looney v. McLean, 129 Mass. 35, 37 Am. Rep. 295; Sawyer v. McGillicuddy, 81 Me. 318, 3 L.R.A. 459, 10 Am. St. Rep. 260, 17 Atl. 124; Dollard v. Roberts, 130 N. Y. 269, 14 L.R.A. 242, 29 N. E. 104; Siggins v. McGill, 3 L.R.A. (N.S.) 316, and note, 72 N. J. L. 263, 111 Am. St. Rep. 666, 62 Atl. 411, 19 Am. Neg. Rep. 385; Flaherty v. Nieman, 125 Iowa, 546, 101 N. W. 280, 17 Am. Neg. Rep. 54; Burner v. Higman & S. Co. 127 Iowa, 580, 103 N. W. 802; Morse v. Houghton, 158 Iowa, 279, 136 N. W. 675; Starr v. Sperry, 184 Iowa, 540, 167 N. W. 531.

Messrs. Heald & Cook for appellee.

Weaver, Ch. J., delivered the opinion of the court:

The defendant is the owner of a two-story building in the town of Milford. The first story is occupied and used by him as a pool hall. The second story is divided into rooms to let. Some of these rooms are reached only by a flight of stairs at the rear of the building. Access to the other rooms, several in number, is provided by a flight of stairs leading up the side of the building from the front, and another leading up the same side from the rear and landing on a common platform at the level of the second floor. From this platform there is an entrance which serves all the second-floor rooms except those at the rear already mentioned.

In April, 1917, the defendant employed plaintiff to take charge of the pool hall, for which service plaintiff was to receive a stipulated weekly wage and to have the use of one of the rooms on the second floor to which access was had by the two stairways and platform to which we have just referred. Plaintiff took possession of the room assigned to him, and, as the two flights of stairs leading to the entrance platform were both open, he used either, as happened to be most convenient, for the purposes of ingress and egress. In May, 1917, when he had been in the defendant's service about six weeks, plaintiff left the pool hall to go to his room by way of the stairs leading up from the sidewalk in front to the landing platform. In so

doing the fourth or fifth step from the bottom gave way, causing him to fall back to the sidewalk and suffer bodily injury of more or less serious character.

Later this action was brought at law to recover damages on account of such injury, which it is alleged was occasioned by the defendant's negligence in permitting the stairs to become and remain in a rotten, decayed, and unsafe condition.

Answering this claim, defendant admits that the stairway was old, decayed, and unsafe, and that plaintiff fell thereon, but denies that he was injured, and denies that defendant is chargeable with any negligence with respect to said stairway or with respect to the plaintiff's fall or alleged injury.

It is further pleaded that plaintiff knew the condition of the stairway; that the other flight of stairs to the platform was safe to the knowledge of the plaintiff; that access to his room by the safe way just mentioned was as convenient as by the unsafe way, and plaintiff, having used the latter with full knowledge and appreciation of its dangerous condition, assumed the risk of such use, and for like reasons is also chargeable with contributory negligence.

The issues so joined were tried to a jury. At the close of the evidence, both parties having rested, the defendant moved for a directed verdict in his favor, on the following grounds:

(1) That it conclusively appears that the defect in the stairs was open and visible, and that another and safe way was provided for plaintiff's entrance to his room, and plaintiff, having taken the dangerous way with full knowledge of the conditions, assumed the risk.

(2) That as a matter of law plaintiff should be held guilty of contributory negligence.

(3) That, plaintiff being in the sole possession of the rooms served by these stairways, the defendant, as landlord, was under no duty or

obligation to make the entrance or stairs safe for plaintiff's use.

This motion was sustained generally, and from that ruling and from the judgment entered upon the directed verdict the plaintiff appeals.

I. In argument to this court counsel on both sides give principal attention to the third or last proposition above mentioned, relating to the duty, if any, resting upon a landlord to provide or maintain a reasonably safe entrance to leased premises.

It seems to be conceded by appellant that, where the landlord leases the entire premises to a tenant, without any promise or covenant to repair or keep in repair, the tenant takes the premises as he finds them and assumes the risk of their safety.

It is insisted, however, this rule does not extend to entrances, stairways, platforms, corridors, and the like, in which the tenant is granted no more than the right to use in common with the landlord, or with other tenants of the landlord, and that in such case the latter is chargeable with negligence if he fails to exercise reasonable care to keep the common passages in proper condition, and he is liable to the tenant for injury so occasioned to him.

The appellee does not seriously question the correctness of this position, but denies that plaintiff has made a case for an application of the conceded principle, because, say counsel, the plaintiff at the time of his injury was the only tenant in any of the rooms served by this stairway, and he is therefore not within the rule which charges the landlord with any responsibility for the condition of a stairway or entrance used in common.

Giving to the plaintiff, as we are required to upon this record, the benefit of the most favorable construction of which the testimony is reasonably susceptible, the jury could have found that plaintiff was not the lessee of all the rooms served by this stairway or entrance; that one or

more of the rooms were occupied by other tenants of the defendant, when plaintiff took possession of his room, and, although vacant at the time of the accident, they were nevertheless under the control of the defendant himself, with full power and authority to let them to other tenants without the consent of the plaintiff. As a witness in his own behalf, the defendant describes the premises let to the plaintiff as follows: "I told him I had those rooms upstairs there, and I wasn't going to rent and would have no use for until I rebuilt those steps and fixed the rooms up, and I told him he could have one of them if he wanted it."

Plaintiff denies that defendant said anything to him about the front stairs being unsafe, but says: "The room he let me have is the second room from the west end on the second floor."

There is also, as already stated, evidence from which it could be found that some of the other rooms were occupied by other tenants when plaintiff moved in, though these tenants had vacated the premises before the accident. If these things be true, and their truth was for the jury to pass upon, the plaintiff was never leased or given exclusive possession of more than one of the rooms having their entrance and exit over the common platform. The fact that the other rooms had become vacant does

not, in our judgment, operate to discharge the defendant from his

obligation to look after the safety of the stairs upon which he himself and all of his tenants in that part of the building depended, in common with plaintiff, for the beneficial use of the premises. The reciprocal duties and obligations of the landlord and tenant with reference to ways or passages enjoyed in common are to be tested by their contract, and do not fluctuate or disappear and reappear according as the other rooms or apartments to which the common passages are appurte-

Appeal—
directed verdict
—construction
of evidence.

Landlord and
tenant—common
stairway—effect
of absence of
tenants.

nant may or may not be filled with tenants.

The general subject of the liability of the landlord for the condition of entrances and hallways in buildings leased by him has been considered by this court on several occasions. *Burner v. Higman & S. Co.* 127 Iowa, 588, 103 N. W. 802; *Morse v. Houghton*, 158 Iowa, 282, 136 N. W. 675. See also *Watkins v. Goodall*, 138 Mass. 533; *Looney v. McLean*, 129 Mass. 33, 37 Am. Rep. 295; *Starr v. Sperry*, 184 Iowa, 540, 167 N. W. 531; *Peil v. Reinhart*, 127 N. Y. 381, 12 L.R.A. 843, 27 N. E. 1077; *Siggins v. McGill*, 72 N. J. L. 263, 3 L.R.A.(N.S.) 316, 111 Am. St. Rep. 666, 62 Atl. 411, 19 Am. Neg. Rep. 385; 18 Am. & Eng. Enc. Law, 2d ed. 220; 24 Cyc. 1116—all holding to the rule as contended for by the appellant.

The law as laid down by these authorities has the general approval of the courts. With the rule thus settled, the question left in the case is one of fact on which there appears to be a conflict of evidence, the determination of which is for the jury.

There was no such state of facts developed on the trial as would justify the court in holding the plaintiff chargeable with assumption of risk as a matter of law. The defendant testifies that he notified plaintiff of the unsafe condition of

the stairs, and that plaintiff knew their condition to be such that he could not safely use them, but this the plaintiff denies. If a jury should accept plaintiff's story in this respect, there was no assumption of risk. The same may be said upon the question of contributory negligence. Even if plaintiff did know that the stairs were old and dilapidated, —use of unsafe passage—effect.

or that the other stairway afforded a safer passage, it does not follow conclusively that he was negligent in using the front stairs; for if, as a reasonably prudent person, he had the right to believe and did believe that he could make the ascent in safety by exercising proper care, then a finding by the jury that he was not negligent should be upheld. *Kendall v. Albia*, 73 Iowa, 241, 34 N. W. 833; *Nichols v. Laurens*, 96 Iowa, 388, 65 N. W. 335; *Norris v. Cudahy Packing Co.* 124 Iowa, 751, 100 N. W. 853, 17 Am. Neg. Rep. 48.

It follows, we think, that the peremptory direction of a verdict for defendant is not sustainable upon any of the grounds assigned for it, and the judgment appealed from must be reversed, and cause remanded for a new trial.

Ladd, Gaynor, and Stevens, JJ., concur.

ANNOTATION.

Landlord's liability for condition of common entrance or stairway which, at the time of the letting or the injury, served but one tenant.

In connection with the subject under consideration, it is to be remembered that by the great weight of authority the landlord is generally absolved from liability for personal injuries to the tenant, due to defects in the leased premises over which the landlord surrenders control at the time of the letting. 16 R. C. L. p. 555. On the other hand, where the landlord leases premises which are occupied by different tenants, and he reserves control over the entrances, stairways,

halls, etc., for the common use of the different tenants, the law imposes on him the duty of exercising reasonable care to keep this portion of the premises in repair, and he is liable for personal injuries to the tenant or the tenant's privies, due to defects in the premises ascribable to the negligence of the landlord in keeping them in repair. 16 R. C. L. p. 557. The reported case (*DILLEHAY v. MINOR*, ante, 106) raises the question as to which of these rules is to apply where the en-

trance to the leased premises is for the benefit of more than one tenant, but at the time of the letting, or the time of the injury, the premises are occupied by only one tenant. Upon this point no other case has been found. The reported case holds that the liability of the landlord is not affected by the fact that at the time of the letting the premises were occupied only by the tenant who was injured. A similar question was presented in *Flanagan v. Welch* (1915) 220 Mass. 186, 107 N. E. 979. In that case it was claimed that because there were only

two tenants being served the rule holding the landlord liable should not apply. The court, however, denied this contention, and said that the liability of the landlord was not affected by the fact that the stairway or steps were used by only two tenants in common, rather than a great number of tenants; adding, that the rule, being founded in practical considerations, should not be limited by nice distinctions, and should apply in case of common stairways used by a few as well as where used by many.

A. G. S.

BELLE SCHOOLEY, Appt.,

v.

EUGENE B. SCHOOLEY.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, Garnishee.

Iowa Supreme Court — December 11, 1917.

(184 Iowa, 835, 169 N. W. 56.)

Exemption — wages — judgment for alimony.

1. An exemption of the earnings for personal service of a debtor head of a family protects the wages for such services of a divorced man who has remarried and is the head of a family, from seizure under execution upon his first wife's judgment for alimony.

[See note on this question beginning on page 123.]

— debt — judgment for alimony.

2. A judgment for alimony is a debt within the meaning of exemption laws.

[See 11 R. C. L. 537.]

Contract — judgment for alimony.

3. An obligation for alimony which

(Salinger, Stevens, and Ladd, JJ., dissent.)

has been fixed by judgment is a debt by contract.

Exemption — purpose of laws.

4. Exemption laws are intended not simply for the protection of the debtor, but primarily for the protection and support of his family.

[See 11 R. C. L. 491, 492.]

APPEAL by plaintiff from a judgment of the District Court for Woodbury County (Sears, J.) granting a motion to discharge the garnishee in an action brought to reach and subject to the payment of a judgment for alimony, wages earned by defendant in the service of the garnishee company. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Kass Brothers and Foster G. Iddings for appellant.

Mr. George G. Yeaman, for appellee:
Exemption laws are to be liberally

construed in favor of those claiming their benefit.

Kaiser v. Seaton, 62 Iowa, 463, 17 N. W. 664; Lames v. Armstrong, 162

(184 Iowa, 835, 169 N. W. 56.)

Iowa, 327, 49 L.R.A. (N.S.) 691, 144 N. W. 1, Ann. Cas. 1916B, 511; Sterman v. Hann, 160 Iowa, 356, 46 L.R.A. (N.S.) 287, 141 N. W. 934; Union County Invest. Co. v. Messix, 152 Iowa, 412, 132 N. W. 823.

The head of a family, within the meaning of the Exemption Law, is the one who conducts, supervises, and manages the affairs of the household.

Blair v. Fritz, 162 Iowa, 716, 144 N. W. 611.

And if the husband is under no disability as a matter of law, he is the head of the family.

Van Doran v. Morden, 48 Iowa, 186.

Property which cannot be levied upon is not subject to a judgment lien, though the provision forbidding levy is found in other than the regular exemption statutes.

Turrill v. McCarthy, 114 Iowa, 681, 87 N. W. 667; Loring v. Small, 50 Iowa, 271.

The decree of divorce was a finality as to the rights of plaintiff as against the property of defendant.

Cole v. Cole, 139 Iowa, 609, 117 N. W. 988; Kwentsky v. Sirovy, 142 Iowa, 385, 121 N. W. 27; Roberts v. Playle, 150 Iowa, 279, 129 N. W. 945.

Plaintiff took a general judgment for so much money, and with an execution issued thereon, she can levy upon nothing which would not be subject to levy by any other money creditor.

Byers v. Byers, 21 Iowa, 268.

The judgment is but a debt, and the plaintiff thereunder is not entitled to precedence or greater rights than would be the holder of any other judgment.

Whitcomb v. Whitcomb, 52 Iowa, 715, 2 N. W. 1000; Warner v. Cammack, 37 Iowa, 642; Johnson v. Butler, 2 Iowa, 535; Rodman v. Munson, 13 Barb. 197; New Jersey Ins. Co. v. Meeker, 37 N. J. L. 300; Dunsmoor v. Furstenfeldt, 88 Cal. 522, 12 L.R.A. 508, 22 Am. St. Rep. 331, 26 Pac. 518.

Messrs. Sargent, Strong, & Struble, James C. Davis, and George E. Hise for garnishee.

Weaver, J., delivered the opinion of the court:

The plaintiff, Belle Schooley, and the defendant, were formerly wife and husband. On January 9, 1912, in an action brought by the plaintiff against said defendant, and then pending in the district court of Woodbury county, a decree of divorce was entered. In the same pro-

ceeding the plaintiff secured judgment against defendant for a stated sum as alimony, payable in installments during her life or, until she marry again. She has not in fact contracted any marriage since the divorce. In December 10, 1913, the defendant married another woman, with whom he has ever since lived and maintained family relations in Woodbury county. Certain installments of the judgment for alimony are past due and unpaid. For several years the defendant has been and still is employed in the service of the Chicago & Northwestern Railway Company at a stated salary or wages, payable monthly. In August, 1914, plaintiff caused an execution to issue upon such judgment for alimony, under which writ the railway company was garnished as a supposed debtor of the defendant; the purpose of such garnishment being to reach and subject to the payment of such judgment the wages earned by him in the company's service. Defendant appeared in such proceeding and moved to discharge the garnishee on the ground that his wages were exempt to him as a married man and head of a family. On the hearing upon this motion the court sustained the claim of exemption because of his status as a married man and head of a family, and ordered the discharge of the garnishee. In August, 1916, plaintiff caused another execution to issue and the railway company to be again garnished thereunder. The railway company answered, showing that at the date of the garnishment it was indebted to defendant in the sum of \$166.91 for wages earned by him within the period of ninety days preceding. Again defendant appeared and moved to discharge the garnishee upon the same ground of exemption. This motion was also sustained, and the garnishee ordered discharged, and from such order and from judgment this appeal has been taken.

The foregoing sufficiently indicates the one question presented for our consideration: May a divorced

husband who has married again, and thus becomes the head of a family, avail himself of the exemption provided by Code, § 4011, against an execution issued upon a general judgment for alimony rendered in favor of his first wife? Counsel for appellant take the negative of the proposition, and in support of their position have filed a very well-prepared brief, marshaling the authorities on which they rely, and discussing very lucidly the principles which they believe to be applicable to the undisputed facts in this record. That some of the precedents cited do appear to hold substantially as counsel claim is to be admitted, but that they should be accepted by us as controlling authority we are not ready to concede. Taking the country over, there are perhaps no two states in which the exemption statutes are so nearly identical that the construction and effect given to one in one jurisdiction may be said to be satisfactory precedent for the construction and effect of another in another jurisdiction. Again, there is no uniform policy of the courts in general with respect to these laws. In some they are construed and applied with great liberality in favor of the debtor and his family, while in others the tendency is to the opposite extreme, and the debtor gets little which is not assured to him by the strict and technical letter of the statute. Exemptions being strictly creatures of the statute, the question when the right exists, and the scope of such right, resolves itself, in final analysis, into one of construction of the legislative language, and in such matters the courts of each state ordinarily adhere to their own views of the expressed legislative intent. Our exemption statute (Code, § 4008) first provides that, "if the debtor is a resident of this state and the head of a family, he may hold exempt from execution" certain specified items of personal property, varying to some extent as it shall

appear that the debtor is a farmer, mechanic, lawyer, or teamster, etc. Code sections 4009 and 4010 exempt pension money and homes bought with pension money. Section 4011 of the Code is as follows: "The earnings of a debtor, who is a resident of the state and the head of a family, for his personal services, or those of his family, at any time within ninety days next preceding the levy, are exempt from liability for debt."

In the case before us the divorce had effect to restore the husband and wife to the status of unmarried persons, with full and unrestricted right to each to marry again the same as if their marriage relation had never existed. So long as he retained that status defendant's wages were, of course, subject to garnishment, because he was not one of the protected class, for while he was a resident of the state, he was not the head of a family. But when he married, as he legally might, a woman having the legal right to take him as her husband, and established their home in the county, he became literally and undisputably the head of a family and a resident of the state, and his right to the exemption of his wages is too clear for argument, unless he is to be excluded therefrom upon the theory advanced by counsel and to which we shall now give attention.

Exemption—
wages—
judgment
for alimony.

The point so made is that the language of the statute is that "the earnings of a debtor who is a resident of the state and the head of a family, for his personal services, . . . are exempt from liability for debt," and it is argued that this does not include exemption from liability for payment of a judgment for alimony, because an allowance of alimony is not in a legal sense a "debt." Cases are cited which do draw a distinction between a claim for alimony and debt, but very few will be found holding that a claim for alimony which has been reduced

to final judgment is not the debt of him against whom it is rendered. the contrary, the great weight of authority is decidedly the other way. Speaking of the entry of a decree for alimony, the Supreme Court of the United States says: "When this is done it becomes a debt of record." Barber v. Barber, 21 How. 595, 16 L. ed. 230. Speaking of absolute and limited divorces, the Massachusetts court says: "The judgment for alimony in either case creates a debt of record in favor of the wife." Chase v. Chase, 105 Mass. 388. A debt is something due or payable from one person to another, and may be created by contract or judgment. Summit Silk Co. v. Kingston Spinning Co. 154 N. C. 421, 70 S. E. 820, Ann. Cas. 1912A, 897; Arbaugh v. Shockney, 34 Ind. App. 268, 71 N. E. 232, 72 N. E. 669; Anniston v. Hurt, 140 Ala. 394, 103 Am. St. Rep. 45, 37 So. 220; Lothrop v. Parke, 202 Mass. 104, 88 N. E. 666; Ex parte Kinsolving, 135 Mo. App. 631, 116 S. W. 1071; Re Van Orden (D. C.) 96 Fed. 88; Mertz v. Berry, 101 Mich. 32, 24 L.R.A. 789, 45 Am. St. Rep. 379, 59 N. W. 445. Our own cases are quite in harmony with this view. See Whitcomb v. Whitcomb, 52 Iowa, 718, 2 N. W. 1000. In this last-cited case, the wife obtained a general judgment for alimony and afterwards sought to enforce it against the husband's homestead. This was denied, the court saying: "The judgment is but a debt, and the plaintiff thereunder is not entitled to precedence or greater rights than would be the holder of any other judgment." See also Byers v. Byers, 21 Iowa, 268. Indeed, we think we need look no further than to the statute itself to see that the words "debt" and "debtor" are used in their more general and less technical sense, and that the statute provides for exemption from execution issued upon every and any general judgment against the head of a family for the payment of money. In Code, § 4008, which is the section providing the general list of exemp-

11 A.L.R.—8.

tions, the word "debtor" is repeatedly employed. The exemptions are expressly made in favor of the "debtor," if a resident of the state. It is the "debtor's" wearing apparel, trunks, shotgun, family Bible, portraits, church pew, burial lot, tools, implements, team, etc., which are secured from seizure under execution or attachment, and if the appellant's theory be correct that a judgment rendered against a litigant upon any other claim than that of a debt by contract, in its restricted technical sense, is not a debt within the meaning of this statute, then the door is opened to stripping the impoverished debtor and his family of every earthly possession, save perhaps the clothes upon their backs, in favor of any person who may happen to recover judgment against him upon any cause of action not originating in contract. We feel very sure that such is not the legislative intent. One against whom a judgment for the payment of money is rendered is universally known and spoken of as a "judgment debtor," and the claim against him is recognized as a "judgment debt." It is, to use the language of the cases already cited, a "debt of record," or, as called by some, "a judicial debt of record." It is a debt—a binding obligation to pay a stated sum of money fixed by judicial determination. If before judgment the plaintiff's claim was unliquidated, and the obligation to pay was imperfect, that condition ceased with the judgment entry. What was before uncertain is now certain. A writ of execution is nothing less or more than a process by which such debt may be enforced against the judgment debtor's property, if any he has, which is subject to seizure, and property so levied upon is taken for that purpose, i. e., for the payment of his debt. The protection against such seizure which the Statute of Exemption provides is in favor of residents of the state who are married and are heads of families. Mr. Bouvier says that debts arise or are proved by matters of record (as judgment debts), by bonds, and by simple con-

tract. "The word 'debt' is of large import, including not only debts of record or judgments, and debts by specialty, but also obligations arising under simple contract. To a very wide extent, and in its popular sense, it includes all that is due to a man under any form of obligation or promise." *Gray v. Bennett*, 3 Met. 526. "Debt" means a liability to pay a sum certain, and it makes no difference how the liability arises, whether by contract or whether it be imposed by law without contract. *Rhodes v. O'Farrell*, 2 Nev. 61. See also *Webster's Int. Dict.*; *Rapalje & L. Law Dict.* The Constitution of North Carolina provides for the exemption of homesteads from sale under execution for any debt, and this has been held to include exemption from levy under execution on a judgment rendered in an action ex delicto. *Dellinger v. Tweed*, 66 N. C. 210. The proposition would also seem to have been finally settled for this court as far back as the case of *Johnson v. Butler*, 2 Iowa, 535-545. There the plaintiff sued at law upon a judgment rendered in Illinois in an action ex delicto. The suit was brought and an attachment sued out in this state, on the theory that the action on the judgment was ex contractu. The trial court ruled in effect that the action upon the judgment must be treated as partaking of the nature of the original action, that is, ex delicto. This court overruled the trial court, saying: "But when a judgment has been recovered for tort, it then is fixed and certain. It is a debt as much as if it were recovered upon a promise." The same proposition is reiterated in *Warner v. Cammack*, 37 Iowa, 642. Other authorities of like character could be multiplied quite indefinitely. If the plaintiff were now standing in court, asking an allowance of alimony, it could well be admitted that her action in that respect was not ex contractu, or rather that such claim is not a debt in the restricted meaning of that word.

And yet marriage is a civil contract between the parties, a contract

which implies an obligation for support, and it is in recognition of such implied contract that alimony is allowed. It remains unliquidated, however, until the court has fixed it by judgment, but thereafter it would seem that it must be regarded as a debt by contract as well as by judgment.

Contract-judgment for alimony.

Much is said in argument of the injustice of such results in cases like the one at bar, and that defendant ought not to be allowed to clothe himself with such right of exemption by marrying again. If it should be admitted that the statute could well have been made to accord with appellant's contention of absolute justice, it is sufficient to say that it was not so made. The marriage relations of the parties were severed at the option of the plaintiff. It was in accordance with her prayer that the divorce was granted, and she was given her freedom from the bonds of matrimony with a general judgment for a specified amount of alimony. She ceased to be a member of his family, and the only relation thereafter existing between them was that of judgment creditor and judgment debtor, and as a judgment creditor she became vested with the same rights to enforce collection of her claim which the law gives to all other creditors of that class.

It is not to be overlooked that the Exemption Laws are not intended simply for the protection of the debtor, but primarily for the protection and support of his family, and to that end the statute will be liberally construed. The defendant is the head of a family of which the plaintiff is not a member. The woman who married him is his lawful wife, and it would be a law of at least doubtful justice which would deprive her of the protection of the statute for the benefit of the former wife, who, in accepting a general judgment in her favor, must be held to have impliedly consented to take it subject to all legal limita-

Exemption-purpose of laws.

tions upon her right to enforce it. The statute, so far, at least, as relates to the exemption of the debtor's earnings, is too clear and certain to permit of construction. To repeat, the defendant is a resident of the state, a married man, and the head of a family, and is, therefore, within the literal description of the exempt class. The statute provides no exception from its terms. The earnings garnished were within the ninety-day period. The trial court could not have done otherwise than it did without repealing the statute by judicial construction, or by ingrafting thereon an exception for which the legislative language affords no foundation whatever.

The judgment appealed from is affirmed.

Preston, Ch. J., and Evans and Gaynor, JJ., concur.

Salinger, J., dissenting (October 25, 1918):

I. In my opinion, the fact that the statute gives exemption to no one but a "debtor" does not decide this case. That none but debtors have an exemption is a limitation upon who may claim exemption, rather than a declaration that all debtors may claim it. I think that all accomplished by limiting exemption rights to "debtors" is that, if an alimony judgment is not a "debt," there is no exemption as to such a judgment, and that using the word "debtor" does not settle whether such judgment is or is not a debt. If it is not a debt, then, as exemptions bar nothing but the collection of "debt," there is here no exemption.

Concede it is a general rule that a judgment is "a debt of record," no matter what the basis of the judgment is, yet such concession does no more than meet one of the arguments of appellant, to wit, that "debt" is created by contract only. But, though a judgment is ordinarily "a debt of record" without reference to its basis, the courts may look into the record behind the judgment to ascertain whether it is an allowance of alimony. Wetmore

v. Markoe, 196 U. S. 68, 49 L. ed. 390, 25 Sup. Ct. Rep. 174, 2 Ann. Cas. 265; Boynton v. Ball, 121 U. S. 457, 30 L. ed. 985, 7 Sup. Ct. Rep. 981. It is permitted to show that the judgment itself lacks some essential attribute of "debt." One such attribute is certainty as to amount and maturity. The order at bar provides a monthly allowance. The total and the maturity depend upon how long appellant shall live, when, if at all, she remarries, and how long the minor child shall live. Thus, both amount and maturity are uncertain. It is held in Dunbar v. Dunbar, 190 U. S. 340, 47 L. ed. 1084, 23 Sup. Ct. Rep. 757, that a discharge in bankruptcy is no bar to enforcing an agreement to pay an annuity to a divorced wife during her life, or until she remarries, because there is a substantial impossibility of estimating the value of the contingency of a remarriage. Unlike most judgments, certainty is lacking, because the alimony order remains in court, and is subject to being canceled or changed at any time. Wetmore v. Markoe, supra; Barclay v. Barclay, 184 Ill. 375, 51 L.R.A. 351, 56 N. E. 636; Audubon v. Shufeldt, 181 U. S. 575, 45 L. ed. 1009, 21 Sup. Ct. Rep. 736; Andrew v. Andrew, 62 Vt. 495, 20 Atl. 819. In the Audubon Case, the Supreme Court of the United States approves Alexander v. Alexander, 13 App. D. C. 352, 45 L.R.A. 806, in holding that "the allowance of alimony is not in the nature of an absolute debt. It is not unconditional and unchangeable. It may be changed in amount even when in arrears, upon good cause shown to the court having jurisdiction."

1a. Passing that there is no debt, because the requisite certainty is lacking, I next contend that the treatment of alimony allowances by the courts demonstrates that such an allowance is not a "debt," because:

(a) It is universally held that such a judgment is not a debt within prohibitions of imprisonment for debt. Bronk v. State, 43 Fla. 461,

99 Am. St. Rep. 119, 31 So. 248; *Barclay v. Barclay*, 184 Ill. 375, 51 L.R.A. 351, 56 N. E. 636; *Ex parte Grace*, 12 Iowa, 208, 79 Am. Dec. 529; note in *Ann. Cas.* 1913E, 1087, and cases; *Bates v. Bates*, 74 Ga. 105; *Mahoney v. Mahoney*, 59 Minn. 347, 61 N. W. 334; *Lockwood v. Krum*, 34 Ohio St. 1. The allowance may be enforced by proceedings in contempt, and the recalcitrant punished by fine and imprisonment. In *Foster v. Foster*, 130 Mass. 189, the court held that "a husband may be lawfully arrested on an execution issued upon a decree for alimony." In England "the court may require him to give security for its payment," or "direct him to make a transfer of money to a trustee for the convenient payment to the wife." *Ringrose, Marr. & Div.* p. 26. Of course, no court can do this in giving a naked judgment for debt, or in enforcement of such a judgment.

(b) Such a judgment is not a provable debt within the meaning of the Bankruptcy Act (Act July 1, 1898, chap. 541, 30 Stat. at L. 544, Comp. Stat. §§ 9585-9656, 1 Fed. Stat. Anno. 2d ed. p. 509; 1 *Loveland, Bankr.* 594 to 596, 612 to 614; 5 *Cyc.* 397, and cases; *Audubon v. Shufeldt*, 181 U. S. 575, 45 L. ed. 1009, 21 Sup. Ct. Rep. 735; *Dunbar v. Dunbar*, 190 U. S. 340, 47 L. ed. 1084, 23 Sup. Ct. Rep. 757; 8 *Am. & Eng. Enc. Law*, 2d ed. 995, 999; Bankruptcy Act, 1883; *Wetmore v. Markoe*, 196 U. S. 68, 49 L. ed. 390, 25 Sup. Ct. Rep. 172, 2 *Ann. Cas.* 265.

(c) Though the courts will not subject the homestead to an ordinary debt, they do subject it to the satisfaction of an allowance for alimony. *Winter v. Winter*, 95 Neb. 335, 50 L.R.A.(N.S.) 697, 145 N. W. 710; *Blankenship v. Blankenship*, 19 Kan. 159; *Daniels v. Morris*, 54 Iowa, 371, 6 N. W. 532, distinguishing the *Byers Case*, 21 Iowa, 268.

(d) In *Tully v. Tully*, 159 Mass. 91, 34 N. E. 79, pension money was subjected to an alimony judgment, though the Federal Exemption Stat-

ute was invoked. Why, with reference to exemptions, pension money differs from earnings, is not readily perceivable.

(e) The authorities hold enforcement of such award is not the collecting of a debt, but a sequestration, akin to specific performance decree and to partition; that, in analogy to marriage settlements, alimony is a setting aside of part of the joint estate for the purpose of avoiding the family becoming a public charge. *Daniels v. Morris*, 54 Iowa, 371, 6 N. W. 532; *Winter v. Winter*, supra; *Cochran v. Cochran*, 42 Neb. 612, 60 N. W. 942; *Anderson v. Norvell-Shapleigh Hardware Co.* 134 Mo. App. 188, 113 S. W. 733; *Earle v. Earle*, 27 Neb. 277, 20 Am. St. Rep. 667, 43 N. W. 118. This categorical formulation, it seems to me, conclusively demonstrates that a judgment ordering a payment for the support of wife and child neither is, nor is it based upon, a "debt." But the reasoning of the cases cited is more convincing than any summary of their holdings.

1b. The argument that the obligation to support wife and child "is of the nature of an ordinary indebtedness, and that the decree [ordering such payment] in no way differs from an ordinary decree for the payment of money," is said in *Andrew v. Andrew*, 62 Vt. 495, 20 Atl. 819, to be an erroneous view. In *Barclay v. Barclay*, 184 Ill. 375, 51 L.R.A. 351, 56 N. E. 636, and *Wightman v. Wightman*, 45 Ill. 167, it is held that the decree may be enforced by attachment for contempt because the allowance is not a debt, and in the *Wightman Case* it is said that this is so because prohibition of imprisonment for debt refers to an obligation founded upon contract. It is ruled in *Ex parte Perkins*, 18 Cal. 60, that this allowance is not technically a debt, that the husband owes the wife no specific amount of money, and that the judgment, instead of evidencing a debt, is the making definite an imperfect obligation,—that of support—is a compelling the husband to perform a

duty. And *Adams v. Adams*, 80 N. J. Eq. 175, 83 Atl. 190, Ann. Cas. 1913E, 1083, declares that these holdings are sustained by the great weight of authority, and upon very full investigation I have found no dissent, except in Nebraska and Missouri.

The enforcement of such a decree or award may not be had at law—is not suable at law—and resort must be had to the chancellor to enforce the award. *Audubon v. Shufeldt*, 181 U. S. 575, 45 L. ed. 1009, 21 Sup. Ct. Rep. 735; *Andrew v. Andrew*, supra; *Nary v. Braley*, 41 Vt. 180; *Allen v. Allen*, 100 Mass. at 374; *Wetmore's Case*, 196 U. S. 68, 49 L. ed. 390, 25 Sup. Ct. Rep. 172, 2 Ann. Cas. 265. Its enforcement is in the nature of a decree compelling specific performance of the obligation of the husband to support wife and family. "Alimony does not arise from any business transactions, but from the relation of marriage. It is not founded on contract, express or implied, but on the natural and legal duty of the husband to support the wife." *Audubon v. Shufeldt*, supra, approved in the *Wetmore Case*, supra. It is a penalty imposed for a failure to perform a duty. *Barclay v. Barclay*, 184 Ill. 375, 51 L.R.A. 351, 56 N. E. 636. The policy of law imposed this obligation upon the husband. *Wetmore v. Markoe*, 196 U. S. 68, 49 L. ed. 390, 25 Sup. Ct. Rep. 174, 2 Ann. Cas. 265. To the same effect is *Romaine v. Chauncey*, 129 N. Y. 566, 14 L.R.A. 712, 26 Am. St. Rep. 544, 29 N. E. 826. In reasoning why such an award is not within the prohibition of imprisonment for debt, it was said in *State ex rel. Cook v. Cook*, 66 Ohio St. 566, 58 L.R.A. 625, 64 N. E. 567: "It seems manifest that, so far as the obligation of the husband enters into the consideration and affords the basis for the court's action, it is not a debt in the sense of a pecuniary obligation. It arises from a duty which the husband owes as well to the public as to the wife, but it is not upon any specific contract. . . . The liability

originates in the wrongful act of the husband, against the consequences of which the public as well as the wife has the right to be protected." The decree is an admeasurement by which the court makes specific a general duty to support, created by the marital relation and by public policy. *Audubon v. Shufeldt*, supra; *Daniels v. Lindley*, 44 Iowa, 567; *Romaine v. Chauncey*, 129 N. Y. 566, 14 L.R.A. 712, 26 Am. St. Rep. 544, 29 N. E. 826; *Fickel v. Granger*, 83 Ohio St. 101, 32 L.R.A. (N.S.) 270, 93 N. E. 527, 21 Ann. Cas. 1347; *State ex rel. Cook v. Cook*, supra; *Noyes v. Hubbard*, 64 Vt. 302, 15 L.R.A. 394, 33 Am. St. Rep. 928, 23 Atl. 727. And it is held in *Winter v. Winter*, 95 Neb. 335, 50 L.R.A. (N.S.) 697, 145 N. W. 709, that a court of equity will compel the performance of marriage obligations.

Another reason for holding that an alimony allowance is not a debt is, in essence, that the judgment of the court is a sequestration and division of the property made on a consideration of the circumstances of the family. See *Daniels v. Morris*, 54 Iowa, 369, 6 N. W. 532. It is setting aside money of the marital partnership to be devoted to the support of the wife. *Ex parte Perkins*, supra. The allowance bears some analogy to marriage settlements. It is a sequestration, rather than a judicial order, making the husband the debtor of his wife and children. According to *Cochran v. Cochran*, 42 Neb. 612, 60 N. W. 942, the enforcement of the order is an invoking of the general equity powers of the court to appropriate property of a nonresident within the jurisdiction to the maintenance of the wife and child. *Mahoney v. Mahoney*, 59 Minn. 347, 61 N. W. 334, holds that an allowance of alimony to the wife out of the property of the husband is a sequestration, and that, "in providing for the division and adjustment of property in case of divorce, the law proceeds upon the theory that the wife has an interest in the property of her hus-

band," and that therefrom it follows that exemptions have no place against enforcement of the allowance, and an exemption statute "has no more application that it would have in an ordinary suit for partition." It is said in *State ex rel. Cook v. Cook*, *supra*: "Beyond this, the provision for alimony is an allowance. It is in the nature of a partition, recognizing the right of the wife to participate in the accumulations which are presumably the result of their joint efforts and joint economies."

The wife is awarded a just, equitable proportion of the whole, and this allowance may be in money payable in gross, or in future instalments. In modern practice, the allowance is one made to a woman, on divorce, for support out of her husband's estate. *Anderson v. Norvell-Shapleigh Hardware Co.* 134 Mo. App. 188, 118 S. W. 733. The case of *Wightman v. Wightman*, 45 Ill. 167, puts it that, if the defendant remain contumacious, the court may, in addition to attachment for contempt, sequester his real and personal property as a means of enforcing performance of the decree. Finally, it is said in *Audubon v. Shufeldt*, 181 U. S. 575, 45 L. ed. 1009, 21 Sup. Ct. Rep. 736, approved in the *Wetmore Case*, that permanent alimony is regarded rather as a portion of the husband's estate to which the wife is equitably entitled, than as strictly a debt; alimony from time to time may be regarded as a portion of his current income or earnings.

After the divorce, it still remains the duty of the father to provide for his children, and that they are given into the custody of the mother does not relieve him from that duty. Therefore, the court is authorized to decree to the wife so much of the estate of the husband, or such sum of money paid in lieu thereof, as the court deems just. It is an assignment of property which the court undertakes to put her in possession of, and the money is to be paid her in lieu of a part of his estate. The

decree is in its nature specific. *Andrew v. Andrew*, 62 Vt. 495, 20 Atl. 819. It is not a debt, but is an allotment of a part or proportion of his estate, vested by the court and appropriated to her, and is similar to an ordinary decree for specific performance. *Lyon v. Lyon*, 21 Conn. 185. Permanent alimony is regarded rather as a portion of the husband's estate to which the wife is equitably entitled, than as being in strictness a debt. *Audubon v. Shufeldt*, *supra*. "The court does not decree alimony as a debt to the wife, or as damages to be paid to her by her late husband, but as a part of the estate standing in his name in which she has a right to share, fixed by the court in its discretion, and thus appropriated to her, and to which she thereupon becomes legally entitled." *State ex rel. Cook v. Cook*, *supra*. And all this does not mean in strictness a severing, allotment, or partition of property at the time decree is passed. Alimony from time to time may be regarded as a portion of the husband's current income or earnings. *Audubon v. Shufeldt*, *supra*. In other words, the future income and earnings are impressed with an equitable lien, and subject to future severance. This, no doubt, is one of the reasons upon which the Massachusetts court held pension money to be subject to an alimony judgment.

If a judgment which plaintiff has is not a debt, then her former husband is not her debtor, and for that reason can plead no exemption statute. If it be perchance a debt in some aspects, and the means to satisfy such debt have been allotted, sequestered, or have had a lien impressed upon them by the court of equity, no exemption statute can make those means a free asset, and no new wife or family can have a part or lot in what is the property of another.

II. The next question is whether, though an alimony judgment be a debt, the Exemption Statute should not be so construed as not to apply

to such a debt. The answer involves the familiar rule of construction that no statute be given a literal interpretation, if such interpretation will lead to absurdity or to consequences that the legislature could not in reason have intended, unless the words used clearly indicate that the legislature desires to discard reason and public policy. The so-called debt arises from a duty which the husband owes to the public, as well as to the wife, and the liability originates in the wrongful act of the husband, against the consequences of which the public, as well as the wife, has the right to be protected. *State ex rel. Cook v. Cook*, supra. And it is said in *Murray v. Murray*, 84 Ala. 363, 4 So. 239, that the duty to provide maintenance for the wife is much more binding than mere contractual obligation, and is not only a duty to her, but is as well an obligation to protect the public against being burdened with a charge. It is the policy of exemption statutes to protect the family as a whole, to avoid the making of any member a public charge. *Murray v. Murray*, and *Mahoney v. Mahoney*, supra.

It is unquestionable that the same policy underlies the providing of alimony; and in *Winter v. Winter*, 95 Neb. 335, 50 L.R.A. (N.S.) 697, 145 N. W. 709, we find the pertinent inquiry why exemption statutes should not be construed to be a protection of the family against the husband, as well as a protection of his property against creditors, and a declaration that the rights of the holder of the alimony decree rest on the reasoning which permits the homestead to be sold for the support of the family, though a creditor may not sell it. We held in *Daniels v. Morris*, 54 Iowa, 369, 6 N. W. 532, that the homestead might be sold to satisfy an allowance of alimony, and put it upon the ground that the homestead is not for the husband alone, but for the benefit of the family. That is the ground upon which *Winter v. Winter*, supra, proceeds. And it is said in *Best v.*

Zutavern, 53 Neb. 604, 74 N. W. 64, that "the Homestead Law is a family shield, and cannot be employed by either spouse to wrong the other." As was said in the *Wetmore Case*, 196 U. S. 68, 49 L. ed. 390, 25 Sup. Ct. Rep. 172, 2 Ann. Cas. 265: "The Bankruptcy Law should receive such an interpretation as will effectuate its beneficent purposes, and not make it an instrument to deprive dependent wife and children of the support and maintenance due them from the husband and father, which it has ever been the purpose of the law to enforce."

And nothing in *Whitcomb v. Whitcomb*, 52 Iowa, 715, 2 N. W. 1000, or *Byers v. Byers*, 21 Iowa, 268, which the *Whitcomb Case* distinguishes, is in conflict with any of this. In the *Whitcomb Case* the husband had obtained a divorce, and in that proceeding the wife was allowed alimony. She had the decree of divorce set aside. So by her own act she restored the husband to the status of head of the family. Upon the very reasoning that the homestead is not for the benefit of either husband or wife alone, it had to be ruled that one might not take the homestead from the other so long as they remained married to each other. For all that appears in the record, the husband was occupying this homestead with the children of the parties; and in the *Byers Case*, in which the wife had obtained the divorce, she was not permitted to seize the homestead, because the husband occupied it with their children.

The attitude of law to the decree for alimony is further made plain by holdings that such decree makes its owner a creditor only as against an attempt to take property from the family. *Andrew v. Andrew*, 62 Vt. 495, 20 Atl. 819; *Livermore v. Boutelle*, 11 Gray, 217, 71 Am. Dec. 708. In *Romaine v. Chauncey*, 129 N. Y. 566, 14 L.R.A. 712, 26 Am. St. Rep. 544, 29 N. E. 826, it is held that a court of equity will not lend its aid to subject an appropriation of

alimony to debts contracted by the wife before the decree allowing alimony was entered. In *Tully v. Tully*, 159 Mass. 91, 34 N. E. 79, it was held, against a plea of the Federal Exemption Statute, that pension money could be subjected to an alimony judgment, because such money "is designed in part to enable the pensioner to support his wife and family," and that therefore the statute "should not be strained to enable him to avoid this duty." We should not strain the Exemption Statutes, which were enacted to effectuate public policy, into destroying that very policy, merely because no express limitations are attached to the use of the word "debtor" in the Exemption Statute. Whenever it fairly appears that a literal construction will defeat what is confessedly the legislative policy, then the word should yield to the spirit. It is universally held that well-known public policy should not thus be made ineffective, unless the language of the statute compels a holding that the legislature intended to defeat legislative purpose and to abandon sound public policy.

2a. If our statute expressly declared, as is done in some other jurisdictions, that the allowance of alimony was or was not a debt within the meaning of the statute, there would be nothing to construe. We have no such definiteness. The most that can be claimed is that, since the word "debtor" is used without limitation in terms, a literal interpretation gives an exemption against any and all debts. But the statute is certainly not broader than if it said that the earnings should be exempt from "any debt." If that were the language used, it would not follow that there must be a literal construction. Courts may even reject clauses, and substitute one word for another, in a will, provided that is "imperatively demanded in order to carry out the intention of the testator." *Taylor v. Taylor*, 118 Iowa, 410, 92 N. W. 71. They may "arbitrarily expunge or alter words in a will," if it be necessary to carry

out such intention. *Denn v. Woodward*, 1 Yeates, 318. The "rule of reason" may be applied in dealing even with words like "any person." See *Hodgkin v. Atlantic & P. R. Co.* 5 Abb. Pr. N. S. 74; *State v. Smiley*, 65 Kan. 240, 67 L.R.A. 903, 69 Pac. 199. And it may not readily be perceived why "any debt" is more controlling or all-including than "any person." It has been decided over and again that the words "any person" shall not be literally construed, if so doing would result in absurdity or in contravention of conceded public policy. A four-year-old child is "a person." *Sutton v. State*, 122 Ga. 158, 50 S. E. 61. In the statute prohibiting and punishing rape, there is no limitation of who may commit it. But it would not be contended that a four-year-old child or the husband of complainant is within the statute. We have a statute prohibiting the resort by any person for the purposes of "prostitution." But we held in *State v. Gardner*, 174 Iowa, 748, L.R.A.1916D, 767, 156 N. W. 747, Ann. Cas. 1917D, 239, that, since females only may be prostitutes, a male cannot resort for the purpose of "prostitution." Though an indictment for seduction did not disclose the sex of the alleged seducer, we held in *State v. Olson*, 108 Iowa, 668, 77 N. W. 332, that in reason the charge must be construed to refer to a male person. The Constitution of the United States makes "any person or persons" liable to punishment for misprision of treason, and it was held that, though these words are broad enough to include every human being, they must necessarily be confined to a person or persons owing allegiance to the United States.

The statute invalidates "every disposition of property" which suspends the absolute power of controlling the same for a longer period than, etc. Nothing could be more all-inclusive than the words "every disposition of property." But we held in *Re Cleven*, 161 Iowa, 295, 142 N. W. 986, and in *Wilson v. First Nat. Bank*, 164 Iowa, 402, 145

(184 Iowa, 886, 109 N. W. 66.)

N. W. 948, Ann. Cas. 1916D, 481, that this statute did not apply to charities, because "the rule of public policy which forbids estates to be indefinitely inalienable in the hands of individuals does not apply to charities," for the reason that charities are established for lasting and permanent benefit. In *State v. Grimmell*, 116 Iowa, 596, 88 N. W. 342, we had to deal with a statute which in terms makes *every* communication to a physician privileged. But we declared that the statute does not shield a physician charged with murder by abortion. No such limitation can be found in the statute, so far as words go. But we restricted the sweeping words, because we would not impute to the legislature the purpose of shielding criminals. Cases too numerous for citation hold that, though statutes permit "any person" to recover for injury suffered by the act of some corporation, such as a carrier, one who, himself in fault, or in the absence of a statute abolishing the fellow servant rule, is injured by the act of a fellow servant, may yet not recover. See *Dowell v. Vicksburg & M. R. Co.* 61 Miss. 529; *Carle v. Bangor & P. Canal R. Co.* 43 Me. 271, 15 Am. Neg. Cas. 305; *Sala v. Chicago, R. I. & P. R. Co.* 85 Iowa, 679, 52 N. W. 664; *Miller v. Coffin*, 19 R. I. 164, 36 Atl. 8; *Sullivan v. Missouri P. R. Co.* 97 Mo. 118, 10 S. W. 854; *Atchison, T. & S. F. R. Co. v. Farrow*, 6 Colo. 505; *Lutz v. Atlantic & P. R. Co.* 6 N. M. 496, 16 L.R.A. 819, 30 Pac. 913; *Proctor v. Hannibal & St. J. R. Co.* 64 Mo. 112; *Connor v. Chicago, R. I. & P. R. Co.* 59 Mo. 292. Such holdings are put upon the ground that statutes will not be strained to overturn acknowledged principles of justice and sound public policy, unless the words of the statute indicate that the legislature desires to abandon such principles and such policy. See *Dixon v. Western U. Teleg. Co. (C. C.)* 68 Fed. 631; *Jewell v. Sumner Twp.* 113 Iowa, 49, 84 N. W. 973.

In my opinion the case at bar may be decided for the appellant with

much less strain than was required to give reasonable meaning to such words as "any person." It is said in the *Wetmore Case*: "Unless positively required by direct enactment, the courts should not presume a design upon the part of Congress, in relieving the unfortunate debtor, to make the law a means of avoiding enforcement of the obligation, moral and legal, devolved upon the husband to support his wife and to maintain and educate his children."

And *Dunbar v. Dunbar*, 190 U. S. 340, 47 L. ed. 1084, 23 Sup. Ct. Rep. 757, approved in the *Wetmore Case*, declares: "We think it was not the intention of Congress, in passing a Bankruptcy Act, to provide for the release of the father from his obligation to support his children, by his discharge in bankruptcy." And that: "As the defendant would still remain liable for the support of his minor children, even if discharged from this contract under the act, and he would remain liable for past support, why should it be held that Congress intended that such a contract, to do what the law enjoins upon him as a duty, should be released? There is no language in the act which plainly so provides, and we ought not to infer it."

The *Dunbar Case* approves the holding of *Re Hubbard*, 98 Fed. 710, which says with reference to a decree providing for the maintenance of a bastard that "the Bankruptcy Act was passed to relieve persons bringing themselves within its provisions from the incubus of hopeless indebtedness; but it was not intended to, nor does it, subvert the higher rule, which casts upon a parent the care and maintenance of his offspring"—a duty whose performance is required by the welfare of the state, as also every principle of law, statutory, natural, and divine.

The divorce, with its incidental allowance of alimony, simply continues the duty of the husband beyond the decree, without changing its nature. *Romaine v. Chauncey*, 129 N. Y. 566, 14 L.R.A. 712, 26 Am. St. Rep. 544, 29 N. E. 826; *Fickel v.*

Granger, 83 Ohio St. 101, 32 L.R.A. (N.S.) 270, 93 N. E. 527, 21 Ann. Cas. 1347; Lockwood v. Krum, 34 Ohio St. 1; State ex rel. Cook v. Cook, 66 Ohio St. 566, 58 L.R.A. 625, 64 N. E. 567. But assume that divorce terminates all relations to the former wife; is not the father under the underlying reason and purpose of exemption laws, and with reference to the children, as much "the head of the family" as he ever was? Is not every duty cast upon him? With reference to those children, is not every duty which led to the making of exemption laws still his duty? Those laws were made so that the father could avoid the making of public charges out of his children. Does the divorce end the desire of the law that children shall not be made paupers as long as the father can earn money? For that matter, as has been seen, it is universally held that the divorce does not terminate the duty to support the wife, to the extent of paying the alimony which the court has provided for her, and it is self-evident that the divorce does not terminate the relation of parent and child. If this be sound reasoning, the most that can be said is, that if the man remarry, and thereby create a double strain upon his resources, and if this does him an injury, it is self-invited, because the new marriage was voluntarily entered into in the light of the knowledge that a double burden would result. See *Anderson v. Norvell-Shapleigh Hardware Co.* 134 Mo. App. 188, 113 S. W. 734, in which case, it is said that the hardship of being required, on remarrying after divorce and award of alimony, to support two families, is immaterial on a judicial construction of the statute, because the injury is self-invited. In *Winter v. Winter*, 95 Neb. 335, 50 L.R.A. (N.S.) 697, 145 N. W. 709, there was failure to pay a monthly allowance, and it is said: "If the defendant can create a condition with which to successfully defend himself against the decree of the court, then it may well be doubted whether

the decree is of any use," and further said that no mere rule of law interposed by defendant will permit a derelict husband to escape the burden of supporting his wife and children; that when the legislature passed a statute providing for exemptions for the "head of a family," it certainly did not contemplate that a man could fail in duty to provide for wife and children in defiance of the decree of the court, and that "the law ought not to permit him to construct a shield that will protect him in his marital and domestic recklessness by getting married again; he ought not to be permitted to relieve himself of the burden of supporting the child that he caused to come into the world," and that the duty of the husband to comply with that decree is as strong as "the duty which binds him to the wife in Omaha," who is of a class concerning which it is said in *Best v. Zutavern*, 53 Neb. 604, 74 N. W. 64, that the judgment for alimony is an advance warning to. Against an assertion by a divorced husband for an exemption in a homestead, in resistance of a judgment for alimony, it was said in *Cochran v. Cochran*, 42 Neb. 612, 60 N. W. 942, that the divorce laws may not be used to enable designing husbands to escape the performance of their marriage contracts.

Whosoever goes part way must be prepared to go all the way. If divorce and remarriage bar enforcement of the alimony judgment, then it is immaterial which party gets the divorce, and immaterial that it was granted for the misconduct of the party who now pleads the exemption. It follows that a party to the marriage is, for all practical purposes, at liberty to relieve himself at any time from the duty of supporting either wife or children. He may indulge in misconduct so gross as to compel the wife to obtain a divorce, and so conduct himself for the very purpose of being able to remarry and use the second marriage to make his former wife and his children public charges. Whosoever

asserts that this is the right construction of our Exemption Statute must be prepared to maintain that, if a man, who has wife and children who will be left utterly unsupported unless he supports them, marry a rich wife who remains childless and supports him, he may spend those earnings in riotous living, but the public must support those whom he has brought into the world. I am firmly persuaded that no such thing was intended by using the word

"debtor," without more, and am abidingly convinced that here there should be a reversal, because (1) the allowance for alimony is not a debt at all, and therefore there is no exemption that can be asserted against it; and (2) if it be conceded that the allowance is in some senses a debt, it was not the legislative intent to apply the Exemption Statute to it.

Stevens and Ladd, JJ., concur in this dissent.

ANNOTATION.

Enforcement of claim for alimony against exemptions.

There seems to be no doubt that a claim for alimony may be enforced by the court against any exemptions which the statute grants the husband, if the court provides for such enforcement in its decree.

Iowa.—*Abey v. Abey* (1871) 32 Iowa, 575; *Hemenway v. Wood* (1879) 53 Iowa, 21, 3 N. W. 794; *Daniels v. Morris* (1880) 54 Iowa, 369, 6 N. W. 532; *Szymanski v. Szymanski* (1920) — Iowa, —, 176 N. W. 806.

Kansas.—*Blankenship v. Blankenship* (1877) 19 Kan. 159; *Johnson v. Johnson* (1903) 66 Kan. 546, 72 Pac. 267.

Kentucky.—*Nunn v. Page* (1909) 134 Ky. 698, 135 Am. St. Rep. 429, 121 S. W. 442; *Pearson v. Pearson* (1915) 166 Ky. 91, 178 S. W. 1164.

Minnesota.—*Mahoney v. Mahoney* (1894) 59 Minn. 347, 61 N. W. 334.

Mississippi.—*Moseley v. Larson* (1905) 86 Miss. 288, 38 So. 234.

Nebraska.—*Best v. Zutavern* (1898) 53 Neb. 604, 74 N. W. 64; *Rhoades v. Rhoades* (1907) 78 Neb. 495, 126 Am. St. Rep. 611, 111 N. W. 122; *Pedersen v. Pedersen* (1910) 88 Neb. 55, 128 N. W. 649.

South Dakota.—*Harding v. Harding* (1902) 16 S. D. 406, 102 Am. St. Rep. 694, 92 N. W. 1080.

Wisconsin.—*Stanley v. Sullivan* (1888) 71 Wis. 585, 5 Am. St. Rep. 245, 37 N. W. 801; *Schultz v. Schultz* (1907) 133 Wis. 125, 126 Am. St. Rep. 934, 113 N. W. 445.

The court has authority to set aside specific property of the husband to the wife as alimony, whether exempt or not. And therefore it may set aside a homestead purchased by a retired soldier with the allowance made him by the government. *Szymanski v. Szymanski* (Iowa) *supra*.

The court says it was not the intention of the legislature, in exempting personal money or property purchased therewith from execution, to change the statute with reference to the inchoate rights of the wife to alimony.

In *Nunn v. Page* (Ky.) *supra*, the court, in speaking of the right to enforce a claim for alimony against the homestead, said the exception in favor of a claim of this nature may be put upon the ground that the wife is entitled to an interest in the homestead, since it is, partially, at least, set apart as exempt for her use and benefit as a member of the family, and so when the husband has compelled her to abandon his home, and by his wrong has deprived her of the enjoyment of it, he should not be allowed to hold the whole of it as against her claim for maintenance and alimony. . . . The statute is broad enough to save the homestead, even as against maintenance or alimony adjudged the wife. But to enable the wife to participate in the homestead, the statute should be so construed as to permit her, when abandoned, to share in the enjoyment of it, and this can only be

done by setting apart for her use a portion of it for maintenance, or divesting him of title to so much of it as may be necessary to satisfy the alimony awarded.

If the court, in granting a divorce, may transfer the title of the homestead from the husband to the wife, it may make the judgment for alimony a lien on all the property of the husband, which may be satisfied by sale of the homestead. *Blankenship v. Blankenship* (Kan.) *supra*.

In a suit for divorce and alimony the law of homestead has no application. *Daniels v. Morris* (1880) 54 Iowa, 371, 6 N. W. 532.

A plea of homestead and statutory exemptions is of no avail against a decree making an allowance of alimony a lien on the husband's property. *Pearson v. Pearson* (Ky.) *supra*.

An allowance of alimony to the wife out of the property of the husband, in case of a divorce, is not a debt or liability within the meaning of either the Constitution or statute relating to exemptions. In providing for the division and adjustment of property in case of divorce, the law proceeds upon the theory that the wife has an interest in the property of her husband. This is peculiarly true of a homestead, which is exempted from seizure and sale for debt, for the benefit of the wife and children, if any, as well as of the husband. This consideration, whether expressed in terms or not, lies at the foundation of all homestead exemption laws. Therefore, in making an adjustment or division of the property of the husband in case of a divorce, the "homestead exemption" has no more application than it would have in an ordinary suit for partition. The court can set off to the wife in fee the whole or a part of the homestead, or, if this is impracticable, it may allow her a sum of money equivalent to her proper share of the homestead, and make the amount a specific lien on the land." *Mahoney v. Mahoney* (Minn.) *supra*. In *Moseley v. Larson* (Miss.) *supra*, where the husband while non compos mentis, and in fraud of the wife's

rights, had conveyed the homestead, it was held that the sum allowed for alimony might be made a lien upon the homestead, superior to any claim of purchasers for reimbursements, and that the deed should be canceled in order to make the lien effective. And in *Daniels v. Morris* (1880) 54 Iowa, 369, 6 N. W. 532,—an action to annul a marriage,—it being alleged that defendant was about to dispose of his property with intent to defraud creditors, a writ of attachment was issued and levied upon property claimed as a homestead, and it was held that, conceding the property to be a homestead, the attachment was proper, as, since in a suit for divorce and alimony the court, in adjusting the rights of the parties, is not precluded from making such division or disposition of the homestead between the parties as may appear to be just and equitable, the attachment could be levied upon any property which the court might dispose of by the decree. But to make a judgment for alimony a specific lien upon real estate which would take precedence of homestead exemption, it is necessary that the property be brought before the court by describing it in the pleadings; otherwise, it has no jurisdiction over it, and cannot dispose of it therein, nor create a specific lien thereon. *Philbrick v. Andrews* (1894) 8 Wash. 7, 35 Pac. 358. In *Barnes v. Barnes* (1882) 59 Iowa, 456, 18 N. W. 441, the part of the decree which made alimony a lien on the homestead was reversed as unjust, inasmuch as the alimony, the propriety of granting which was questioned, was granted to the party in fault, the husband, and the homestead and improvements were paid for with the wife's money; the court stating that the wife had no sons owing her services, but did have a daughter dependent upon her, and the lien would embarrass her and might result in the loss of her homestead, while the husband was able-bodied, and, if he remained sober, could easily provide his own support.

In *Jackson v. Coleman* (1917) 115 Miss. 535, 76 So. 545, the court says it seems to be the general rule that a

homestead is not subject to the demand for alimony, unless there are no children, and the court held that, where the homestead law named the claims to which the exemptions should not apply, the court will not extend them so as to include a claim for alimony which was not named in the statute.

If the decree is not made a lien on the property, but a money judgment is taken for the alimony, the weight of authority is that the execution will not reach a homestead.

Alabama.—*Ford v. Ford* (1918) 201 Ala. 519, 78 So. 873.

California. — *Ex parte Silvia*, 123 Cal. 293, 69 Am. St. Rep. 58, 55 Pac. 988.

Georgia. — *Coulter v. Lumpkin* (1894) 94 Ga. 225, 21 S. E. 461; *Knox v. Knox* (1918) 148 Ga. 253, 96 S. E. 337.

Iowa.—*Byers v. Byers* (1866) 21 Iowa, 268; *Whitcomb v. Whitcomb* (1879) 52 Iowa, 715, 2 N. W. 1000.

Kentucky. — *Nunn v. Page* (1909) 134 Ky. 698, 135 Am. St. Rep. 429, 121 S. W. 442.

Missouri.—*Biffle v. Pullam* (1893) 114 Mo. 50, 21 S. W. 450.

Mississippi.—*Jackson v. Coleman* (1917) 115 Miss. 535, 76 So. 545.

Wisconsin.—*Stanley v. Sullivan* (1888) 71 Wis. 585, 5 Am. St. Rep. 245, 87 N. W. 801.

Contra:

Michigan.—*Rogers v. Day* (1898) 115 Mich. 664, 69 Am. St. Rep. 593, 74 N. W. 190.

Nebraska.—*Best v. Zutavern* (1898) 53 Neb. 604, 74 N. W. 64; *Fraaman v. Fraaman* (1902) 64 Neb. 472, 97 Am. St. Rep. 650, 90 N. W. 245; *Kimmerly v. McMichael* (1909) 83 Neb. 789, 120 N. W. 487.

In *Coulter v. Lumpkin* (Ga.) *supra*, which was a contest between an execution upon a judgment for alimony and a mortgagee pendente lite, the court said the judgment and decree granting the application for alimony had only the lien of an ordinary judgment for money.

A general judgment for a fixed sum for unpaid alimony cannot be enforced by execution against the homestead of

an aged and infirm person, under a statute providing that such property shall be exempt from levy and sale by virtue of any process whatever, with certain exceptions not including claims for alimony, and providing that no court or officer shall ever have jurisdiction or authority to enforce any judgment or decree against the property set apart for such purpose. *Knox v. Knox* (Ga.) *supra*.

A homestead is exempt from execution issued on a judgment for alimony in the same manner and to the same extent as in case of execution upon other judgments, no exception having been made in favor of such judgment. *Biffle v. Pullam* (Mo.) *supra*. And in *Stanley v. Sullivan* (Wis.) *supra*, it was held that a judgment which does not declare upon its face that it shall be a lien upon a homestead must be treated as having the same force as an ordinary judgment, and execution thereunder cannot be levied upon the homestead. So, also, it has been held that a man cannot be compelled by duress or imprisonment, to sell or encumber the homestead to pay alimony, and so the continued imprisonment for contempt for nonpayment of alimony is unlawful, where one has no means aside from his homestead. *Ex parte Silvia* (Cal.) *supra*. A husband does not cease to be head of the family by reason of divorce, and so the homestead acquired and occupied as such prior to the rendering of the decree of divorce is not liable to sale upon execution, to satisfy a general money judgment for alimony. *Byers v. Byers* (Iowa) *supra*. The court stated that the Homestead Law is intended for the benefit of the family, children as well as wife; and while it is true the wife should be paid her support, it does not follow that her right to support is greater than the right of the children to shelter.

A homestead is not subject to execution for costs and attorney's fees awarded the wife in a proceeding for divorce. *Nunn v. Page* (1909) 134 Ky. 698, 135 Am. St. Rep. 429, 121 S. W. 442. The court says they are not different from any other claim that might be presented against the hus-

band, or a judgment rendered for them of higher dignity than a judgment rendered for any other debt, and there does not appear to be any good reason why the husband should not be allowed a homestead against this demand.

Where the statutory homestead exemption is against debts contracted, it is not good against a judgment for alimony pendente lite, since they are not a debt contracted. *Ford v. Ford* (1918) 201 Ala. 519, 78 So. 873. The court says: "The amounts so ordered were provided by the court, wholly without regard to the concurrence or acquiescence of the appellant, to the end that the wife might be supported pending the suit and be put in a position to litigate with the husband on something like equal terms. It would be anomalous to hold that an exemption from levy and sale at the suit of creditors—an exemption, one leading idea of which is to secure wife and children in the shelter of the family roof-tree—should operate to the prejudice of the wife and children in a contest with the husband and father."

On the other hand, in *Best v. Zuta-vern* (Neb.) supra, it was said that the logic of decisions of other states that the courts may decree an alimony lien on the homestead, and may award the wife the homestead, title to which is in the husband, is that exemption statutes are not designed to protect the husband against the wife's claim for alimony, and so held that judgment for alimony is a lien on the homestead. And this decision was followed as authority in *Fraaman v. Fraaman* and *Kimmerly v. McMichael* (Neb.) supra.

In *Rogers v. Day* (1898) 115 Mich. 664, 69 Am. St. Rep. 593, 74 N. W. 190, affirming a judgment setting aside a mortgage, in favor of one deriving title under sale of a homestead upon an execution on a judgment for alimony, no question seems to have been raised as to the validity of the sale.

Whether or not the ordinary exemption statutes are available against an execution on a judgment for alimony depends largely on the language of the statute. The tendency seems to be to deny the applicability of the exemp-

tion statutes to such claims, unless the language of the statute is so explicit as to make it certain that the legislature intended to give the husband the benefit of his exemptions against the wife's claim for alimony. *Bates v. Bates* (1884) 74 Ga. 105; *Menzie v. Anderson* (1879) 65 Ind. 239; *Tully v. Tully* (1893) 159 Mass. 91, 34 N. E. 79; *Spengler v. Kaufman* (1891) 46 Mo. App. 644; *Anderson v. Norvell-Shapleigh Hardware Co.* (1908) 134 Mo. App. 188, 113 S. W. 733; *Winter v. Winter* (1914) 95 Neb. 335, 50 L.R.A.(N.S.) 697, 145 N. W. 709; *Zwingmann v. Zwingmann* (1912) 150 App. Div. 358, 134 N. Y. Supp. 1077.

Where a decree of divorce and for the payment of alimony is granted the wife, the derelict husband cannot defeat the collection of alimony by remarrying and claiming the benefit of the Exemption Law. *Winter v. Winter* (1914) 95 Neb. 335, 50 L.R.A.(N.S.) 697, 145 N. W. 709, the court says: "In this case there is no justice in permitting the defendant to deny support to his first wife and to his little daughter. If the defendant can create a condition with which to successfully defend himself against the decree of the court, then it may well be doubted whether the decree is of any use. The defendant knew that he was under obligations to satisfy the decree that the court had rendered against him for alimony, and he knew that he was bound to support his little child, and to aid in the support of his wife, as provided by the decree. The law ought not to permit him to construct a shield that will protect him in his marital and domestic recklessness. By getting married again, he ought not to be permitted to relieve himself from the burden of supporting the child that he caused to come into the world. When the legislature passed the act providing for the exemption of the 'head of a family,' it certainly did not contemplate that, after a man had failed to provide for his wife and the children born to them, he could, in defiance of the decree of the court, avoid the natural duty of providing for his children. . . . The right

of exemption is based purely upon a law remedy. In the instant case the defendant is separated from his wife because of his neglect to perform the obligations that are incumbent upon him as a husband. He neglected to provide for his wife and child. He neglected to comply with the decree of the court. He undertook to stand above the court, and to disregard its decree. In doing this he interposed, or attempted to interpose, the Exemption Law as a shield to protect him from doing that which the court had clearly decreed that he should do."

It was held in *Spengler v. Kaufman* (1891) 46 Mo. App. 644, that a man cannot invoke the protection of the Exemption Statute against an execution issued upon a judgment obtained by his wife for maintenance, although he has a widowed mother and sister dependent upon him, and would, under these circumstances, ordinarily be deemed the head of the family within the Exemption Statute. This decision, however, was subsequently limited, if not overruled. In it the court said: "The plaintiff seeks by legal process to compel her husband to support her, as he is legally bound to do. If the appellant's construction of the statute is to prevail, then its enforcement against the plaintiff becomes the means of oppression, rather than of protection. This would entirely subvert the law, and defeat the intention of the legislature. The defendant's obligation to support his mother and sisters is a moral one only, and he is to be commended for so doing; but his obligation to support his wife rests on legal as well as moral grounds, which we think makes the obligation a paramount one. As to ordinary creditors the statute would protect the fund for the benefit of the mother and sisters, but not as to the claims of the wife for maintenance. It would be very strange, indeed, if the defendant could shield himself under the Exemption Statute, when his wife was seeking to compel him to support her, to secure which was one of the chief objects of the law."

The amount due as wages as a school-teacher is subject to garnish-

ment for unpaid alimony. *Bates v. Bates* (1884) 74 Ga. 105. The court stated that a claim for alimony occupies a different position from an ordinary debt, and added that a decree for alimony might have been enforced by imprisonment of the husband, when he would have been totally deprived of all means of supporting himself, when the whole object of the exemption of debts from garnishment would have ceased. In *Zwingmann v. Zwingmann* (1912) 150 App. Div. 358, 134 N. Y. Supp. 1077, property in pension fund, of a retired policeman, who had removed from the state to avoid liability on a judgment for alimony, was sequestered for payment of alimony, although it is provided by statute that the "moneys, securities, and effects of the police pension fund, and all pensions granted and payable from said fund, shall be and are exempt from execution, and from all process and proceedings to enjoin and recover the same by or on behalf of any creditor or person having or asserting any claims against, or debt or liability of, any pensioner of said fund." The court said: "It is contended in behalf of the defendant, who has removed from the state for the purpose of defeating a judgment rendered against him, that his property in this pension fund is exempt from the duty he owes to the state to support and maintain his wife; that notwithstanding the legal oneness of the man and wife, which in this respect has not been changed by statute from the common-law rule, the defendant is entitled to be supported and sustained out of a trust fund created under the laws of this state, while his wife goes hungry. We do not believe the legislature, in creating the police pension fund and exempting it from execution and other processes, ever intended that this exemption should be construed to deprive the wife of her legal and moral right to the support of her husband. The whole purpose of the statute is served when the fund is preserved for the use of the pensioner and those legally dependent upon him for support and maintenance; when it is held intact for the care of the woman who is,

in law, but a part of himself, and entitled, with him, to share in the pension. . . . This court should not be astute in discovering a way to relieve the defendant of his obligations, voluntarily assumed, because of any strict construction of the language of an act which was designed to give protection to the faithful servants of the public, and those dependent upon them." In *Tully v. Tully* (1893) 159 Mass. 91, 34 N. E. 79, the court refused to reverse a decree granting alimony, although the only means of the husband were derived from pension money, stating that pension money is designed in part to enable the pensioner to support his wife and family, and that the Federal statute which provides that pension money shall be exempt from legal process should not be strained to enable him to avoid that duty. In *Anderson v. Norvell-Shapleigh Hardware Co.* (1908) 184 Mo. App. 188, 113 S. W. 733, where the divorced husband had remarried and claimed exemption as head of the family, it was held that, under a statute which provides that "each head of a family, at his election, . . . may select and hold, exempt from execution, any other property, real, personal, or mixed, or debts and wages, not exceeding in value the amount of \$300," exemptions cannot be claimed against execution on judgment for alimony. The court said: "The argument of the hardship that § 4327a imposes upon defendant and others similarly situated might be of some force, if addressed to the legislative department. It is of no persuasive force when addressed to a court called upon to construe the statute of which he complains. The hardship, if any, was not created by the law, but was brought upon defendant by his own voluntary acts and conduct, and the conduct which brought about the decree of divorce and judgment for alimony against him was wrongful; for this reason, he is in no position to complain that the law denies him the exemptions accorded to ordinary debtors. Nor ought he be heard to complain of the burden he has brought upon himself by his misconduct,—a

violation of his marriage vow. His marital pledge to his wife was that he would support and maintain her so long as they both should live. Why should he be relieved of that burden, when his wife has been guilty of no misconduct? His answer is, because he has married another woman, and ought not to be required to support two families. Why assume the burden of supporting two families, if he was not able, or was unwilling, to discharge it? To use a homely phrase, 'He has made his bed and on it he must lie.'" In *Menzie v. Anderson* (1879) 65 Ind. 239, the husband, the guilty party, who had no property, remarried, became a householder and head of a family, and inherited an interest in real estate, which he claimed to be exempt from execution on judgment for alimony obtained by his former wife; but it was held that no property could be claimed as exempt against such a judgment, as alimony is not a debt growing out of, or founded upon, a contract, express or implied, within the meaning of the statute; since, although the marriage is a civil contract, the cause of divorce arose out of a tort.

A distinction has been made in a few cases where the husband had children to support, and claimed the exemption for their benefit, while the wife was free from such encumbrances. *Maag v. Williams* (1902) 92 Mo. App. 680. In that case the husband had two children, a boy about six years old, the son of a former wife, and a girl about two years old, the child of his marriage with plaintiff. The latter was placed in the custody of the mother and the award was for its support. The father married again and claimed the exemption as head of a family, and the claim was sustained, although he was thereby enabled to defeat his liability for support of his two-year-old daughter. The court relied on the homestead exemption case of *Biffle v. Pullam* (1893) 114 Mo. 50, 21 S. W. 450, *supra*, saying of the *Spengler Case* (1891) 46 Mo. App. 644, that, in that case, "his wife was the only other member of *Spengler's* family, and there is some apparent justice

in the ruling; but suppose Spengler had had minor children dependent upon his wages for their daily bread; the case would present altogether a different aspect and the apparent justice of the decision would be transformed into a palpable injustice. The Spengler decision ingrafts upon the statutes of exemption an exception to the protection they were designed to secure to every head of a family, and is judicial legislation."

Following the Maag Case, the court in Jarboe v. Jarboe (1904) 106 Mo. App. 459, 79 S. W. 1162, comes into direct conflict with the Spengler Case, which was decided by a co-ordinate court in another district. In the Jarboe Case, defendant supported his mother and brothers and sister, and was held to be the head of a family. The court said that the statute provided for no such exception to the Exemption Law, and that such construction would be, in effect, in the nature of judicial legislation. In that case the

defendant was permitted to repudiate his legal obligation to support his wife, and nullify the decree of the court, by furnishing his money to his mother's family.

The legislature had, however, a year before the decision in the Jarboe Case, enacted a statute, which was not referred to in that case, providing expressly that no property shall be exempt in a proceeding by a married woman for maintenance, nor from execution upon a judgment to enforce a decree for alimony. That statute is construed in *Anderson v. Norvell-Shapleigh Hardware Co.* (1908) 134 Mo. App. 188, 113 S. W. 733, *supra*.

The reported case (*SCHOOLEY v. SCHOOLEY*, ante, 110), however, permits the husband effectually to cast off his first wife, by holding that when he marries again, and thus becomes the head of a family, he is entitled to rely upon his statutory exemption against an execution for alimony in favor of his first wife. H. P. F.

GYPSY OIL COMPANY, Plff. in Err.,

v.

CHARLES E. COVER et al.

Oklahoma Supreme Court — March 2, 1920.

(78 Okla. 158, 189 Pac. 540.)

Mines — oil and gas — separated parcels — effect of development of one.

1. Where an oil and gas mining lease covers 160 acres of land, 120 acres thereof are contiguous, and the other 40-acre tract is located $\frac{1}{2}$ mile therefrom, and the lessee assigns the 40-acre tract, and the assigns bring in a producing well producing oil and gas in paying quantities within the one-year period stipulated for in the lease, and pays the royalties reserved to the owner of the land, which are accepted by such owner according to the terms of the lease, and the lease contains the stipulation "that this lease shall remain in full force for the term of five years from this date, and as long thereafter as oil and gas or either of them is produced therefrom by the party of the second part, successors or assigns," these facts do not make the lease a separate lease upon each tract of land, but the same remains a lease upon the entire 160 acres, and the drilling of such well on any portion thereof and the payment of the royalties extend the life of the lease upon the entire 160 acres.

[See note on this question beginning on page 138.]

Headnotes by JOHNSON, J.

11 A.L.R.—9.

— effect of development.

2. After gas was found upon the leased premises within five years from the date thereof in paying quantities, the lessee thereby became vested with a limited estate in the leased premises for further operations in accordance with the terms of the lease.

[See 18 R. C. L. 1211.]

Judgment — effect on grantee.

3. A grantee of land is not bound by a judgment in an action, to which he is not a party, commenced against his grantor subsequent to the grant.

[See 15 R. C. L. 1028.]

Mines — cancelation of oil and gas lease — trust relation.

4. From the fact that a trust relation existed between the lessee in an oil and gas mining lease and a third person, as to one of the two tracts of land covered by the lease, at the time the lease was executed by the lessors, and some time thereafter the lessee, upon the payment to it by the person for whose benefit the trust existed, of the bonus agreed upon, and at his request the lessor assigned the lease to such other, covering said tract, which assignment has been treated as valid by the lessee, and the purchasers of the fee in the land covered by the lease, held, that such trust relation is not available to the purchasers of the fee as a ground for a suit for the cancelation of the lease covering the other tract.

— cancelation of lease — failure of proof.

5. An oil and gas mining lease gave the lessee, his successors or assigns, one year from date thereof to complete a well or pay at the rate of \$160 in advance for each additional twelve months such completion is delayed,

providing that the completion of such well shall operate as a full liquidation of all rent during the remainder of the term of the lease, which was for five years; and where the assignee of the lessee to a portion of the leased premises completed a well upon such portion within one year, and such well continued to produce oil and gas in paying quantities, and assignees continued to operate said well and pay to the landowners the royalties reserved to them for the full term, and where the lessee neither drilled on the unassigned portion of the lease nor paid delay money during the term, and some time after the term expired the landowners brought suit to quiet the title to the unassigned portion of the premises, and asked that the lease as to such portion be forfeited for failure to drill and operate and develop the same, and where, upon the trial of the cause, the court announced as his findings "that the plaintiffs are the owners of the land and went in possession of the premises at the time of taking their deed, and have retained possession since that date," and entered a judgment in favor of the plaintiffs, quieting their title to the premises and canceling the lease of the defendant, held, that from an examination of the record it clearly appeared that the plaintiffs alleged no facts, nor offered proof of such facts, as would be sufficient to authorize the court to cancel the lease for a breach of the implied covenants to diligently operate and develop the premises, that the demurrer of the defendant to the evidence of the plaintiffs should have been sustained, and that the judgment of the trial court should be reversed, and the cause remanded.

ERROR to the District Court for Okmulgee County (Bozarth, J.) to review a judgment in favor of plaintiffs in an action brought to quiet title to certain real estate. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. James B. Diggs, Rush Greenslade, and William C. Liedtke, for plaintiff in error:

The legal relationship between defendant and John J. McCrory appearing from the recitals in the deed of assignments does not change or affect in any way the rights and obligations created by the oil and gas lease.

39 Cyc. 47; *Connell v. Cole*, 89 Ala. 381, 8 So. 72; *Perry, Trusts*, 6th ed. § 520; *Herlihy v. Coney*, 99 Me. 469, 59 Atl. 952; *Indian Land & Trust Co. v. Owen*, — Okla. —, 162 Pac. 818; *Trask v. Green*, 9 Mich. 358; *Pierce Oil Corp. v. Schacht*, 75 Okla. 101, 181 Pac. 731.

The production of oil on part of the

leased premises by Davis and his assigns, in compliance with the terms of the lease, extended the primary term of the lease as long as oil or gas is produced, and vested in the lessee and its assigns the right to produce oil or gas from all of the leased premises.

Thornton, Oil & Gas, 3d ed. § 219; Chandler v. Hart, 161 Cal. 405, 119 Pac. 516, Ann. Cas. 1913B, 1094; Brennan v. Hunter, — Okla. —, 172 Pac. 49; Roach v. Junction Oil & Gas Co. — Okla. —, 179 Pac. 935; Harris v. Michael, 70 W. Va. 356, 73 S. E. 934; South Penn Oil Co. v. Snodgrass, 71 W. Va. 438, 43 L.R.A. (N.S.) 848, 76 S. E. 961; Fisher v. Crescent Oil Co. — Tex. Civ. App. —, 178 S. W. 905; Nabors v. Producers' Oil Co. 140 La. 985, L.R.A.1917D, 1115, 74 So. 527; Northwestern Ohio Natural Gas Co. v. Ullery, 68 Ohio St. 259, 67 N. E. 494, 22 Mor. Min. Rep. 647; Harness v. Eastern Oil Co. 49 W. Va. 232, 38 S. E. 662; Campbell v. Lynch, 81 W. Va. 374, L.R.A.1918B, 1070, 94 S. E. 739.

Messrs. W. W. Calhoun and George James for defendants in error.

Johnson, J., delivered the opinion of the court:

This is an appeal from the district court of Okmulgee county. On the 19th day of September, 1918, the defendants in error, Charles Cover and George James, as plaintiffs, commenced an action in the district court of Okmulgee county against the plaintiff in error, the Gypsy Oil Company, a corporation, as defendant, to quiet title to certain real estate situated in said county. For convenience the parties will hereinafter be referred to as plaintiffs and defendant, respectively, as they appeared in the trial court.

The essential allegations of the plaintiffs' petition are as follows:

"That the plaintiffs are the legal owners in fee simple and in the actual and peaceable possession by their tenant, G. S. P. Washington, of the following described premises, situated in Okmulgee county, state of Oklahoma, to wit: The southeast quarter of the southeast quarter of section 31 and the southwest quarter of the southwest quarter of section 32, township 15 north, range 12 east, and the northwest

quarter of the northwest quarter of section 5, township 14 north, range 12 east.

"That the said defendant claims some right, title, or interest in and to said property adverse to these plaintiffs, the exact nature of which to them is unknown, which constitutes a cloud on the title of plaintiffs."

The defendant answered, claiming a valid oil and gas lease upon the premises, and deraigned title thereto from the heirs of Mary Harjo, deceased, the original allottee; the allegations of the defendant being, in effect, that said allottee died intestate, leaving as her sole heirs her five children, three of whom, Benn Harjo, Cinda Harjo, and Salina Harjo, were adults, that Buzzy Harjo and Sarah Harjo were minors, that each inherited an undivided one-fifth interest in said allotment, that, prior to the execution of the defendant's lease to the entire allotment of 160 acres, said adult heirs had conveyed their interest in said allotment to Lewis Adams, Thomas Adams, Jr., and Wash Adams, and that thereafter, on January 28, 1910, the Adamses, together with Thomas Adams, as guardian of Sarah Harjo and Buzzy Harjo, minors, and as administrator of the estate of Mary Harjo, deceased, executed to the defendant an oil and gas lease to the entire 160-acre allotment, which was duly approved by the county court of Okmulgee county on said date, and that thereafter defendant executed and delivered to George S. Davis a deed of assignment to the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 5, township 14 north, range 12 east, and that thereafter the said George S. Davis assigned a three-fourths interest in said tract to the Producers' Oil Company, who in turn afterward assigned the same to the Texas Company, and that prior to the expiration of one year from the date of said oil and gas lease a producing well was completed upon the said tract by the Producers' Oil Company and G. S. Davis, which had ever since been producing oil and gas in paying quantities, and had

been operated for the production of oil and gas, and that the royalty reserved by said lease to the lessors upon the oil and gas produced upon said land had been paid to the plaintiffs and their predecessors according to the terms of the said oil and gas lease, and accepted by them, and that said assignees had paid, kept, and performed all of the conditions, covenants, and agreements provided in said lease, and that the defendant had a valid and subsisting leasehold estate, covering the remaining 120 acres of said allotment, and that the same was in full force and effect. The defendant made copies of said conveyances exhibits to its answer.

The plaintiffs replied to said answer, admitting the allegations of the defendant except as to the validity of the lease upon the 120 acres sued for herein, alleging that the same was invalid, because: (1) The defendant took title under its lease to the 40-acre tract as trustee only and in trust for one John J. McCrory, and that, when the defendant assigned the same to George S. Davis, the trust and the purpose for which it was created ceased and terminated all the rights and interest held by the defendant, and on account thereof the defendant is estopped to claim any right, title, or interest to said 40-acre tract; and (2) the deeds from the adult heirs to the Adamses had been canceled by the district court of Okmulgee county in a certain action brought by said adult heirs against the Adamses for that purpose, and alleging that no well had been completed on the 120 acres or rentals paid thereon by the defendant.

Plaintiffs prayed that their title be quieted, to which reply the defendant interposed a demurrer, which being overruled, the defendant moved for a judgment upon the pleadings, which was overruled by the court, to each of which rulings the defendant saved objections.

Upon the issues thus joined, the cause was tried to the court. At the conclusion of the plaintiffs' testimony the defendant interposed a de-

murrer to the evidence, which demurrer was overruled by the court and excepted to by the defendant, whereupon the court made the following finding: "The court finds that the plaintiffs are the owners of the land in controversy and went into possession of the premises at the time of the taking of said deed, exhibit No. 1, and have retained possession of the land since that date. I will just find for the plaintiffs and against the defendant, and you can prepare your journal entry. Defendant excepts to the findings and the judgment of the court."

The defendant filed its motion for a new trial, which was overruled by the court. Thereafter in due time this proceeding in error to reverse the judgment of the trial court was regularly commenced.

The trial court was not requested to, nor did it, make and file separate findings of fact. The plaintiff in error assigns numerous errors in its petition in error, but its counsel say in their brief:

"The case of the plaintiff in error is grounded upon the settled and established law that the production of oil and gas upon any portion of the leased premises, in compliance with the provisions of the oil and gas lease, vests in the lessee or his assigns the right to continue the production from all of the leased premises. For the sake of clarity in this brief, the case is discussed under two subheads:

"(1) The legal relationship between the Gypsy Oil Company and John L. McCrory appearing from the recitals in the deed of assignment does not change or affect in any way the rights and obligations created by the oil and gas lease, and (2) the production of oil on part of the leased premises by Davis and his assigns in compliance with the terms of the lease extended the primary term of the lease as long as oil or gas is produced, and vested in the lessee and its assigns the right to produce oil or gas from all of the leased premises."

In answer to the foregoing propositions of the plaintiff in error, coun-

sel for defendants in error say in their brief:

"The case presents three questions for the court's decision:

"(1) The title of the Gypsy Oil Company as to the interest of Salina, Ben, and Cinda Harjo.

"(2) Failure to drill and develop the 120 acres of land, the lease upon which was for the use of the Gypsy Oil Company.

"(3) The implied covenant to reasonably develop the entire demised premises in the event it should be held that the drilling of a producing well on the 40-acre tract by Davis and the Producers' Oil Company within one year was a sufficient compliance with the covenant of the lease to develop the premises and to operate the same during the primary term thereof."

The essential parts of the defendant's lease to the 160 acres and its assignment to Davis of the 40 acres are as follows:

"Witneseth: That the said parties of the first part, for and in consideration of the sum of \$1 to them in hand well and truly paid by the said party of the second part, the receipt of which is hereby acknowledged, and of the covenants and agreements hereinafter contained on the part of the party of the second part to be kept, paid, and performed, have granted, demised, leased, and let, and by these presents do grant, demise, lease, and let, unto the said second party, its successors or assigns, for the sole and only purpose of mining and operating for oil and gas, and of laying pipe lines, constructing tanks, buildings, and other structures thereon to take care of said products, all that certain tract of land situate in the county of Okmulgee, state of Oklahoma, described as follows, to wit: The S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 31, and the S. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 32, township 15 north, range 12 east, and the N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ and the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 5, township 14 north, range 12 east, and containing 160 acres more or less.

"It is agreed that this lease shall

remain in full force for the term of five years from this date, and as long thereafter as oil and gas, or either of them, are produced therefrom by the party of the second part, successors or assigns.

"The party of the second part agrees to complete a well on said premises within one year from the date hereof, or pay at the rate of \$160 in advance for each additional twelve months such completion is delayed from the time above mentioned for the completion of such well until a well is completed; and it is agreed that the completion of such well to 2,200-foot sand shall be and operate as a full liquidation of all rent under this provision during the remainder of the term of this lease.

"All covenants and agreements herein set forth between the parties hereto shall extend to their successors, heirs, executors, administrators, and assigns, and these covenants for the benefit of first parties shall extend to them as their interests may appear."

Deed of Assignment.

This contract and agreement made and entered into this the 23d day of February, 1910, by and between Gypsy Oil Company, a corporation, party of the first part, and George S. Davis, party of the second part, does witness that:

Whereas, the Gypsy Oil Company secured an oil and gas mining lease covering the southeast quarter of the southeast quarter of section 5, township 14, range 12 east in Okmulgee county, Oklahoma, and

Whereas, said land was included in said lease before the same was accepted by the Gypsy Oil Company, and the Gypsy Oil Company did not desire to take an oil and gas mining lease on said above-described land; and

Whereas, John L. McCrory was the owner of an option of the oil and gas mining lease on said above-described land, and it was, at the time said lease was drawn and executed, presumed by him that the Gypsy Oil Company desired to take

a lease on said land, when in fact the Gypsy Oil Company did not so desire; and

Whereas, at the time of the acceptance of the above lease on said lands, it was understood and agreed that the Gypsy Oil Company should furnish the entire consideration for an oil and gas mining lease on all the lands described therein, and said John J. McCrory should refund to the Gypsy Oil Company the part of the consideration for said lease which would be the proportionate part of said purchase price for said above-described lands, and said price was then and there agreed upon to be \$1,600; and

Whereas, the said John J. McCrory has paid to the Gypsy Oil Company the sum of \$1,600 and has requested the Gypsy Oil Company to assign said lease, in so far as the same covers the above-described land, to George S. Davis:

Now, therefore, in consideration of the premises, the party of the first part hath this day granted, bargained, sold, transferred, and assigned, and by these presents doth hereby grant, bargain, sell, transfer, and assign, to George S. Davis, his heirs and assigns, all of its right, title, interest, and estate in and to its certain oil and gas mining leases and leasehold estates in and to the above-described land.

We will notice, the first contention of the plaintiffs, which is that the interest acquired,—three fifths of the whole,—by the defendant from the Adamses, was lost by reason of the judgment of the district court canceling the deeds from the adult heirs of Mary Harjo to the Adamses, and that thereafter the plaintiff acquired the fee of all the heirs, concerning which counsel for plaintiffs say in their brief: "It is true that the Gypsy Oil Company was not a party to the suits brought by Salina, Ben, and Cinda to cancel the conveyances made by them to the Adamses. But the Gypsy Oil Company is a party to this suit; indeed, it is the only party, and the very purpose of the suit is to cancel and

set aside the lease of January 28, 1910. The decree canceling these deeds was set up in the plaintiffs' reply, to which no objection on the grounds of departure or otherwise was made. The record was introduced at the trial showing that the deeds to the Adamses from the Harjo heirs named were canceled and set aside. It is through these deeds, it should be kept in mind, that the Gypsy Oil Company obtained whatever title it may have had as to a three-fifths interest in the land."

We cannot agree with counsel in this contention. It being admitted that the defendant was not a party to the suit, then its rights were not affected by the judgment rendered. Such was the holding of this court in the case of *Blackwell v. McCall*, 54 Okla. 96, 153 Pac. 815, where it was said (¶ 1, Syl.): "A grantee of land is not bound by a judgment in an action, to which he is not a party, commenced against his grantor subsequent to the grant."

See *De Watteville v. Sims*, 44 Okla. 708, 146 Pac. 224; *Dull v. Blackman*, 169 U. S. 243, 42 L. ed. 735, 18 Sup. Ct. Rep. 333; *Freeman*, Judgm. 1st ed. 162.

Concerning the plaintiffs' second proposition, "failure to drill and develop the 120 acres of land leased to the Gypsy Oil Company," counsel say in their brief:

"In brief, it is the contention of plaintiff in error that, as Davis and the Producers' Oil Company drilled and brought in a producing oil well on the southeast quarter of the southeast quarter of section 5, township 14 north, range 12 east, within one year from the date of the lease, thereby the covenants of the lease in respect to the drilling and operation of the premises for oil and gas have been complied with, and hence plaintiffs are not entitled to a decree of cancelation. This contention, we say, cannot be sustained, for at least two reasons: First, the Gypsy Oil Company never had any title, legal or equitable, in and to the foregoing 40-acre tract; second, if in this we

Judgment—
effect on
grantee.

are mistaken, then the lease as to the 120 acres, admittedly made to and for the use and benefit of the Gypsy Oil Company, terminated before the bringing of the present suit, for failure to drill and operate the premises according to the terms of the lease, or at least was subject to forfeiture for failure to develop. Under this subdivision we shall consider only the first of the two propositions.

"The agreement of January 28, 1910, purports on its face to be a lease of 160 acres of land to the Gypsy Oil Company. The southeast quarter of the southeast quarter of section 31, the southwest quarter of the southwest quarter of section 32, township 15 north, range 12 east, and the northwest quarter of the northwest quarter of section 5, township 14 north, range 12 east, are adjoining tracts, while the southeast quarter of the southeast quarter of section 5, township 14 north, range 12 east, is a separate tract, at the nearest point a distance of more than $\frac{1}{4}$ mile from the 120-acre tract.

"On February 23, 1910, the Gypsy Oil Company, at the request of John J. McCrory, executed in writing an assignment, or release, of the separate 40-acre tract. This release, as we read it, recites, in effect, that it was not the purpose or the intention of the Gypsy Oil Company 'to take an oil and gas mining lease on said above-described lands,' that at the time thereof John J. McCrory was owner of an option on an oil and gas mining lease on such tract, and that at the time the lease was entered into it was understood and agreed by the Gypsy Oil Company and McCrory that upon the payment of a fixed amount the Gypsy Oil Company would release of record any title standing in its name. This combined declaration of trust and assignment was duly executed by the officers of the Gypsy Oil Company. Considered in connection with the oil and gas mining lease, this instrument constituted a dry, passive express trust, or power in trust, and was executed by the Statute of Uses

and Trust (article 4, chap. 65, Revised Laws)."

We cannot agree with counsel in their contention. As we view the transactions of the parties as disclosed by the recitations contained in the lease and the assignment, the lessors granted to the lessee all the rights and estate conveyed by the usual and customary form of an oil and gas mining lease to the entire 160 acres, and the lease granted to the lessee the power to assign all or any portion of the leased premises. It is apparent from the recitations of the assignment to Davis of the 40-acre tract that, prior to the execution of the lease, one McCrory owned some sort of option for an oil and gas mining lease on said 40-acre tract, the exact nature of which is not disclosed, but the fact that he owned it is not disputed, and has ever since been recognized by all the parties—by the lessee in making the assignment in consideration of the payment to it of the proportionate part, \$1,600 of the bonus paid for the entire tract of 160 acres; by McCrory in directing that the assignment be made to Davis; and by the plaintiffs as purchasers of the fee in the land, by accepting the royalties reserved in the lease. So, whatever the rights of McCrory may have been by reason of his option to purchase a lease upon the 40-acre tract, the same have been protected by all the parties and acquiesced in by them. In these circumstances we know of no reason why the usual rule as to the vesting of the lessee's right to produce should not apply to this case.

Mines—can-
celation of oil
and gas lease—
trust relation.

—oil and gas—
separated
parcels—effect of
development of
one.

The plaintiffs are the successors in interest of the original lessors who made the oil and gas lease to the defendant. The lease is still in force, and the plaintiffs are claiming under it and have been receiving the benefits therefrom.

The assignment was from the lessee to Davis, and the instrument

was evidence of a transaction which was authorized by the terms of the lease, and did not affect the rights of the lessors or their assigns, but only the lessee. It did not change the rights, duties, or obligations of the lessors or their successors in interest. *Thornton, Oil & Gas*, 3d ed. 219; *Chandler v. Hart*, 161 Cal. 405, 119 Pac. 516, Ann. Cas. 1913B, 1094.

The plaintiffs' next contention is that the lease as to the 120 acres terminated before the bringing of this action, for failure to drill and operate the premises according to the terms of the lease, or was subject to forfeiture for failure to develop.

It is admitted that one producing well was put down by Davis and the Producers' Oil Company within one year from the date of the lease; also that no well was drilled on the 120-acre tract or rentals paid. This court held in the case of *Roach v. Junction Oil & Gas Co.* — Okla. —, 179 Pac. 985, that after gas was found upon the leased premises

—effect of
development.

within five years from date thereof, in paying quantities, the lessee thereby became vested with a limited estate in the leased premises for further operations in accordance with the terms of the lease—citing *Brennan v. Hunter*, — Okla. —, 172 Pac. 49, citing numerous cases. In *Pierce Oil Corp. v. Schacht*, 75 Okla. 101, 181 Pac. 731, it was held that, where a lease covered a tract of 160 acres, and an assignment was thereafter made to 40 acres, upon which a gas well was brought in and the royalties paid, from that time on there would be no indebtedness for future rentals due from that time on, and this would not only apply to the portion of the land where the gas well is situated, but to the land in its entirety, and the payment of said stipulated royalties continued the lease in force and effect as to the entire 160 acres of land. We are aware that this court has held that oil and gas leases will be so construed as to promote development and prevent delayed

unproductiveness. *Paraffine Oil Co. v. Cruce*, — Okla. —, — A.L.R. —, 162 Pac. 716; *New State Oil & Gas Co. v. Dunn*, 75 Okla. 141, 182 Pac. 514; and *Curtis v. Harris*, 76 Okla. 226, 184 Pac. 574. This court has also held that a court of equity will, where necessary, decree forfeiture of oil and gas leases on account of a breach of an implied covenant to diligently operate and develop the property, when such forfeiture will perpetuate justice (*Indiana Oil, Gas & Development Co. v. McCrory*, 42 Okla. 136, 140 Pac. 610; *Blackwell Oil & Gas Co. v. Whitesides*, — Okla. —, 174 Pac. 573), and such has been the holdings of the Federal courts in numerous cases, the leading case being that of *Brewster v. Lanyon Zinc Co.* 72 C. C. A. 213, 140 Fed. 801. This lease was for a period of five years from date and as long thereafter as oil and gas, or either of them, are produced from the premises by the lessees, its successors, or assigns.

This lessee agreed to complete a well on the premises within one year, or pay at the rate of \$160 in advance for each additional twelve months completion is delayed, until a well is completed. The lease contains no covenant as to the number of wells to be drilled on the premises. The lease contains no express stipulation that anything should be done in the way of drilling for and producing oil and gas after the first five years. We think the rule announced by this court in the cases cited supra is the rule to be applied here, which is thus stated in the *Brewster Case*: "There could not well have been an express stipulation as to the number of wells to be drilled, as to when the wells, other than the first, should be drilled, or as to the rate at which the production therefrom should proceed, because these matters would depend in large measure upon future conditions, which could not be anticipated with certainty, such as to the extent to which oil and gas, one or both, could be produced from the premises, as indicated by the first well

and any others in the vicinity, the existence of a local market or demand therefor, or the means of transporting them to a market, and the presence of wells on adjacent lands capable of diminishing or exhausting the supply in the natural reservoir. The subject was therefore rationally left to the implication, necessarily arising in the absence of express stipulation, that the further prosecution of the work should be along such lines as would be reasonably calculated to effectuate the controlling intention of the parties, as manifested in the lease, which was to make the extraction of oil and gas from the premises of mutual advantage and profit. Even in respect of the first well, if oil or gas was found in paying quantity, there was no express engagement to operate it; but that it was intended to be operated was plainly implied in the engagement to pay royalties, to be gauged according to the production of oil and the use of gas. Whatever is necessary to the accomplishment of that which is expressly contracted to be done is part and parcel of the contract, though not specified."

With these rules in mind, let us examine the circumstances surrounding the parties as disclosed by the record, for the purpose of supplying the rules to the facts. The finding of the trial court was as follows: "The court finds that the plaintiffs are the owners of the land in controversy, and went in possession of the premises at the time of taking said deed, exhibit No. 1, and have retained possession of the land since that date."

The facts thus found would not be sufficient to authorize the court to cancel the lease for a breach of an implied covenant to diligently operate and develop the premises. Concerning that matter, the learned judge in the opinion in the Brewster Case, *supra*, said: "There can, therefore, be a breach of the covenant for the exercise of reasonable diligence, though the lessee be not guilty of fraud or bad faith. But,

while this is so, no breach can occur save where the absence of such diligence is both certain and substantial in view of the actual circumstances at the time, as distinguished from mere expectations on the part of the lessor and conjecture on the part of mining enthusiasts. The large expense incident to the work of exploration and development, and the fact that the lessee must bear the loss if the operations are not successful, require that he proceed with due regard to his own interests, as well as those of the lessor. No obligation rests on him to carry the operations beyond the point where they will be profitable to him, even if some benefit to the lessor will result from them. It is only to the end that the oil and gas shall be extracted with benefit or profit to both that reasonable diligence is required. Whether or not in any particular instance such diligence is exercised depends upon a variety of circumstances, such as the quantity of oil and gas capable of being produced from the premises, as indicated by prior exploration and development, the local market or demand therefor, or the means of transporting them to market, the extent and results of the operations, if any, on adjacent lands, the character of the natural reservoir—whether such as to permit the drainage of a large area by each well—and the usages of the business. Whatever, in the circumstances, would be reasonably expected of operators of ordinary prudence, having regard to the interests of both lessor and lessee, is what is required."

The trial court made no findings upon any of the conditions pointed out in the excerpt from the opinion *supra* that would authorize a decree of forfeiture of the lease on account of a breach of an implied covenant to diligently operate and develop the property, undoubtedly for the all-sufficient reason that neither the petition nor reply of the plaintiffs contained any allegation that any such condition existed, nor was

there a single word in the testimony of the plaintiffs to that effect.

The record contains the following stipulation: "By Mr. James: It is stipulated and agreed by and between the plaintiffs and the defendant herein that the deed of assignment set up in plaintiffs' reply, showing an assignment of 40 acres of land on the 23d day of February, 1910, by the Gypsy Oil Company to George S. Davis, was executed by the Gypsy Oil Company, and that the same was of record in the office of the county clerk or register of deeds of Okmulgee county, Oklahoma, at the time plaintiffs purchased the land in controversy, or the land in said deed of assignment."

We have carefully examined the entire record, and are clearly of the opinion that the defendant's demurrer to the evidence ^{—cancellation of lease—failure of proof.} should have been sustained.

The judgment is reversed, and the cause remanded, and the trial court directed to proceed in accordance with the views herein expressed.

Rainey, V. Ch. J., and Kane, Pitchford, McNeill, Higgins, and Bailey, JJ., concur.

Owen, Ch. J., and Harrison, J., not participating.

Petition for rehearing denied April, 27, 1920.

ANNOTATION.

Construction of oil or gas lease covering more than one tract of land by the same owner.

It is to be noted that this annotation is limited to cases involving the construction of oil and gas leases covering different tracts of land by the same owner, and hence excludes cases involving the construction of such leases covering different tracts of land owned by different persons in severalty.

The fact that two or more tracts of land owned by the same person are included in a single lease of land for the development and production of oil and gas has the effect of making the two or more tracts a unit, in so far as concerns the effect of developing the wells required by the lease; hence where, by the terms of the lease, the lessor is required within a certain time to drill a designated number of wells, this condition will be held to be complied with, if the stated number of wells are drilled upon either or any of the tracts of land. It is not necessary that such wells be drilled on each of the tracts. *Brewster v. Lanyon Zinc Co.* (1905) 72 C. C. A. 213, 140 Fed. 801; *GYPSY OIL CO. v. COVER* (reported herewith) ante, 129; *Wettengel v. Gormley* (1898) 184 Pa. 354, 39 Atl. 57, 19 Mor. Min. Rep. 213.

So, where the lease requires the lessee to drill a designated number of wells upon the leased premises, or pay a designated sum of money in lieu of development, the drilling of the stated number of wells upon any of the tracts will relieve the lessee of the obligation longer to pay money in lieu of development as to all of the tracts, and the lease is thereby extended for the designated period of time as to all of the land included within its provisions. *Brewster v. Lanyon Zinc Co.* (Fed.) supra; *GYPSY OIL CO. v. COVER* (reported herewith); *Wettengel v. Gormley* (Pa.) supra.

In the reported case (*GYPSY OIL CO. v. COVER*), it is held that a lease of two tracts of land, not contiguous, is single, at least to the extent that a development of one of the tracts by an assignee of that portion of the lease constitutes, as to both tracts, performance of the condition requiring the lessee, within a designated time, to develop oil or gas in paying quantities. The effect of the development of the one tract is also to extend the lease in accordance with the provision that it shall remain "in full force for the term of five years

from this date, and as long thereafter as oil and gas, or either of them, are produced therefrom by the party of the second part, his successors, or assigns.

Under a lease of this character, the royalties are payable as for the rental of the tract as a whole, and not for any particular tract or tracts, even though the paying wells are all located upon one of the tracts.

For example, in *Wettengel v. Gormley* (1898) 184 Pa. 354, 39 Atl. 57, 19 Mor. Min. Rep. 213, where the owner of three distinct contiguous tracts of land, which had been acquired at different times, leased the same as a single tract for oil and gas purposes, and subsequently, before anything had been done under this lease by the lessee, willed the different tracts to his different children, and after his death one of the tracts was successfully developed for oil, it was held that the royalties which were payable to the lessor, in lieu of development, were properly divided among the different devisees according to their respective acreage, but no part of this royalty was due or payable after a well had been developed under the lease, since, by the terms of the lease, no further rental money was payable; however, the royalties due upon the oil produced were to be paid to the testator's children, rather than to the owner of the particular tract of land from which the oil was produced. The court said that, as between themselves, the devisees took the title precisely as the testator held it, subject to all the provisions of the lease. The division of the surface was absolute; but as to the holder of the leasehold, each took the part devised to him, subject to the common burden which had been put upon the entire body of the land as a single undivided tract. As the lease covered all the land, so the rent may be said to issue from each and every part of it. The royalties belonged to the owners of the entire tract, and not to the owner of any subdivision of it. But these royalties were personal; they were not disposed of by the testator's will; hence, the Intestate Laws must control as to the

disposition thereof. Since the testator's children together held the entire acreage covered by the lease, "each should receive such share of the royalty as his or her share of the land bears to the whole tract covered by the lease. It does not matter in what acre or 100 acres the wells may be situated. The royalties are not payable by the acre, nor by the farm into which the surface may be divided, but upon the total production, wherever within the 600 acres the production may take place."

There is an implied condition in leases of land for the development and production of oil and gas that, after one or more wells have been drilled and are producing oil or gas in profitable quantities, the lessee will use reasonable diligence to develop the entire tract of land, if necessary to protect the oil therein from being withdrawn by wells located on adjoining lands. This condition is not performed by the lessee by merely developing and protecting one of the tracts of land, but it imposes upon him the duty of developing and protecting each tract. And if he fails or refuses to do so, and persists in such refusal, the lessor is entitled to the cancellation of the lease. *Brewster v. Lanyon Zinc Co.* (Fed.) *supra*; *Alford v. Dennis* (1918) 102 Kan. 403, 170 Pac. 1005.

In *Brewster v. Lanyon Zinc Co.* (Fed.) *supra*, upon this point the court said: "Considering the migratory nature of oil and gas, and the danger of their being drawn off through wells on other lands if the field should become fully developed, all of which must have been in the minds of the parties, it is manifest that the terms of the lease contemplated action and diligence on the part of the lessee. There could not well have been an express stipulation as to the number of wells to be drilled, as to when the wells, other than the first, should be drilled, or as to the rate at which the production therefrom should proceed, because these matters would depend in large measure upon future conditions, which could not be anticipated with certainty, such as the extent to which oil and gas, one or both,

could be produced from the premises, as indicated by the first well and any others in the vicinity, the existence of a local market, or demand therefor, or the means of transporting them to a market, and the presence of wells on adjacent lands capable of diminishing or exhausting the supply in the natural reservoir. The subject was, therefore, rationally left to the implication, necessarily arising in the absence of express stipulation, that the further prosecution of the work should be along such lines as would be reasonably calculated to effectuate the controlling intention of the parties, as manifested in the lease, which was to make the extraction of oil and gas from the premises of mutual advantage and profit. Even in respect of the first well, if oil or gas was found in paying quantity, there was no express engagement to operate it; but that it was intended to be operated was plainly implied in the engagement to pay royalties, to be gauged according to the production of oil and the use of gas. Whatever is necessary to the accomplishment of that which is expressly contracted to be done is part and parcel of the contract, though not specified. . . . Upon both principle and authority, it must be held that the present lease contains a covenant by the lessee to continue, with reasonable diligence, the work of exploration, development, and production at the end of the five years [the period to which the lease was extended upon the development of one well], if during that time oil and gas, one or both, are found in paying quantities. It does not militate against this conclusion that the lessee can, at his option, surrender the lease at any time, because until that is done the lessee is equally bound by all of its covenants, whether express or implied. The option does not entitle it to do less than to entirely surrender the lease, and to thereby enable the lessor to herself exercise the right to extract the oil and gas from her lands, or to negotiate a new lease to that end. . . . The conclusion is that compliance with the covenant to continue with reasonable diligence the work of exploration, de-

velopment, and production after the expiration of the five-year period, if during that time oil and gas, one or both, be found in paying quantities, is, by the terms employed, made a condition the breach of which entitles the lessor to avoid the lease. . . . By reason of the conditions on which the lease is granted, the lessor retains at least a contingent interest in the oil and gas, to the profitable extraction of which the operations are directed. This interest in the subject of the lease, and the fact that the substantial consideration for the grant lies in the provisions for the payment of royalties in kind and in money on the oil and gas extracted, make the extent to which, and the diligence with which, the operations are prosecuted of immediate concern to the lessor. If they do not proceed with reasonable diligence, and by reason thereof the oil and gas are diminished or exhausted through the operation of wells on adjoining lands, the lessor loses not only royalties to which he would otherwise be entitled, but also his contingent interest in the oil and gas, which thus passes into the control of others. The object of the operations being to obtain a benefit or profit for both lessor and lessee, it seems obvious, in the absence of some stipulation to that effect, that neither is made the arbiter of the extent to which, or the diligence with which, the operations shall proceed, and that both are bound by the standard of what is reasonable. This is the rule in respect of all other contracts, where the time, mode, or quality of performance is not specified, and no reason is perceived why it should not be equally applicable to oil and gas leases. There can, therefore, be a breach of the covenant for the exercise of reasonable diligence, though the lessee be not guilty of fraud or bad faith. . . . As the amended bill discloses that there was no breach of any condition during the five-year period, and as the lessor will not be permitted to complain that the work of exploration and development is not proceeded with during the pendency of a suit in which she is seeking to

have it adjudged that the right to proceed therewith was terminated before the suit was begun, the question of the lessee's diligence has reference only to the fourteen months intervening between the expiration of the five-year period and the declaration of forfeiture made by the lessor a few days prior to the beginning of the suit. The circumstances out of which the right to avoid the lease are alleged to have arisen are these: The land covered by the lease and owned by the lessor, omitting the tract sold, consisted of two tracts, separated by a distance of 8 miles and embracing 232.50 acres. Both tracts were within a recognized oil and gas field. The lessee had drilled one well on one of the tracts, in which gas was found in paying quantities. No additional wells were drilled or attempted to be drilled during the fourteen months. Many wells had been drilled in the territory adjacent to and surrounding these tracts, which produced oil and gas in paying quantities, and new wells were being drilled and operated in that territory. The wells on adjacent lands were so near to these tracts that they drained the same of a good portion of the oil and gas therein, and rendered the lease of much less value to the lessor than it would have been had the lessee proceeded with reasonable diligence to drill other wells on the two tracts, and to operate them for the mutual benefit of the parties. The lessee took and maintained the position that, by drilling the single well, it acquired the right to hold the lease indefinitely, without further development, or doing more than paying annually the stipulated \$50 for the gas from that well used off the premises. The extent of the drainage through wells on adjacent lands was not susceptible of definite ascertainment, and therefore the injury to the lessor from the lessee's failure to proceed with reasonable diligence could not be adequately compensated in damages. We think there can be no difference of opinion as to the effect of these allegations, all of which stand admitted by the demurrer. They show not only an absence of

reasonable diligence on the part of the lessee, but a practical repudiation of the controlling purpose of the lease and a persistent disregard of the rights of the lessor. The existence of gas in paying quantities in one of the tracts was an ascertained fact. Both oil and gas were being produced in paying quantities from the lands surrounding that tract, and also from those surrounding the other. The consequent reduction of the underlying supply of these migratory minerals was operating to the serious disadvantage of the lessor. The necessary inference from what is stated is that further exploration and development would have been profitable to the lessee, as well as beneficial to the lessor. In these circumstances the prolonged failure of the lessee to proceed with the contemplated operations, though due to a mistaken view of the obligations imposed by the lease, was a plain and substantial breach of the covenant and condition in respect of the exercise of reasonable diligence, and entitled the lessor to terminate the lease."

In *Alford v. Dennis* (1918) 102 Kan. 403, 170 Pac. 1005, the court had before it a lease for gas and oil development of two separate tracts of land, one of over 200 acres and the other of over 700 acres; the two tracts were about 2 miles apart. They were leased in writing as a unit, for ten years, and "as much longer as gas or oil may be found in paying quantities;" the lease acknowledged receipt of \$1 as a consideration; bound the lessees to pay certain royalties and provided that "it is mutually agreed that the parties of the second part shall begin operations under this lease within six months from the delivery hereof, and complete on or before the 1st day of January, 1904, three wells on the above-described land; no other or additional expense shall be incurred under this lease by the second party, and this lease shall be binding so long as the second party shall comply with their obligations hereunder, otherwise this lease shall be null and void, and no longer binding on either party;" subsequently to this lease these differ-

ent tracts of land passed into the hands of different parties, and thereafter the lessee developed wells of producing oil on the larger tract, but made no effort to develop wells on the smaller tract. The owner of the smaller tract of land sought to have the lease canceled in equity for the failure of the lessee to make any effort to develop the land for oil or gas. The court said that the owner of the smaller tract was entitled to damages for failure to develop the land for oil or gas, if they could be definitely ascertained, and, as alternative relief, that the lessee be required to proceed in good faith to prospect and develop the land within a reasonable time, and on failure so to do that the lease be canceled. In giving this relief, the court said: "Both tracts of land were covered by the one contract of lease. It was improvident for the owner to grant a lease of two large tracts of land for a long term, on such meager specified requirements of exploration and development as those particularized in this contract, and without providing that a certain minimum of work should be done on each tract. But it is not the province of the courts to end a contract merely because it is a bad bargain. . . . Plaintiff [the subsequent owner of the land] may have some redress in damages for breach of the alleged implied covenant 'that it was the intention of the parties to the lease' that plaintiff's tract of land (as well as the other) should be drilled and explored for gas

and oil, and not held indefinitely without exploration. . . . The plaintiff asks the court to cancel this contract, to decree a forfeiture of it, and not for default of any express provision of the contract, but merely for default of one of its implied covenants. The instances are rare where equity will enforce a forfeiture. It will never do so where less drastic redress will satisfy the demands of justice. . . . Forfeiture of oil and gas leases for breaches of mere implied covenants are seldom decreed. . . . The clause in the lease providing that 'no other or additional expense should be incurred' seems fairly susceptible of restriction to the acknowledged obligation to build three wells, etc., prior to January 1st, 1904; and such interpretation is more rational and just than to say that it exempted the lessees from developing plaintiff's separate tract of 220 acres to any extent; or at any time—even in fourteen years. Unless the plaintiff's tract was to be developed sometime, there was no reason to include it in the lease, and as it stands it is of no value to defendants. Unless the defendants had a bona fide intention to prospect and develop this tract, they had no proper purpose in leasing it, and to cancel the lease will do them no injury. While equity abhors forfeiture it likewise abhors injustice. Since plaintiff's lands are burdened with an oil and gas lease, he is entitled to have those lands prospected for oil and gas within a reasonable time." A. G. S.

RE GEORGE L. HOSFORD.

Kansas Supreme Court—June 5, 1920.

(107 Kan. 115, 190 Pac. 765.)

Courts — jurisdiction — custody of child — divorce and juvenile courts.

Where the juvenile court has, in accordance with the statute, committed a dependent and neglected child to the care of a children's aid society, a court which has previously granted a divorce to the parents of the child thereby loses jurisdiction to control its custody, and in a hearing of the

Headnote by MASON, J.

application of one of the parents in relation thereto cannot require an officer of the aid society to disclose its whereabouts.

[See note on this question beginning on page 147.]

APPLICATION for a writ of habeas corpus to secure petitioner's release from the county jail, to which he had been committed for contempt of the district court of Sedgwick County. *Petitioner discharged.*

The facts are stated in the opinion of the court.

Mr. E. L. Foulke, for petitioner:

Admitting that the court did retain jurisdiction to modify its order as to the custody of the child, this judgment was only a judgment between the parties, and, while binding upon the parties, it was not in any manner controlling upon other parties not parties to this divorce proceeding, nor upon other courts.

Re Bort, 25 Kan. 308, 37 Am. Rep. 255; Avery v. Avery, 33 Kan. 1, 52 Am. Rep. 523, 5 Pac. 418.

It is the general custom throughout the state, and the custom of the state institutions, to refuse to disclose the whereabouts of children that have been placed for adoption.

Dumain v. Gwynne, 10 Allen, 270; Brana v. Brana, 139 La. 306, 71 So. 519; Younger v. Younger, 106 Cal. 377, 39 Pac. 779; Whalen v. Olmstead, 61 Conn. 263, 15 L.R.A. 593, 23 Atl. 964.

Messrs. John Madden, C. E. Cooper, and John Madden, Jr., for respondent:

The court always retains jurisdiction of minor children of the divorced parents, and has power on its own motion to change or modify any order.

Miles v. Miles, 65 Kan. 676, 70 Pac. 631; Re Pettitt, 84 Kan. 637, 114 Pac. 1071; 12 R. C. L. 1186; Greenwood v. Greenwood, 85 Kan. 303, 116 Pac. 828.

Mason, J., delivered the opinion of the court:

George L. Hosford refused to answer a question asked of him as a witness in the district court of Sedgwick county, and was adjudged guilty of contempt, and ordered committed to the county jail. He asks relief of this court by habeas corpus, on the ground that the order was made without jurisdiction. The matter is submitted upon the papers.

The district court ordered the petitioner to be committed until he should signify his willingness to answer the question, or until the expiration of six months, but stayed the execution of the order until the

next day to allow time for the matter to be presented here. Within that period this court took jurisdiction, and by reason of these facts the sheriff was enabled to make a return, which he did, to the effect that he was not restraining the petitioner. While that is technically true, the merits of the legal questions upon which the validity of the order of commitment depends have been fully argued, and it would be futile to withhold action until a physical restraint should be imposed.

The petitioner is the general superintendent of the Christian Service League—a "children's aid society" as defined in the statute (Gen. Stat. 1915, § 6373)—to which has been intrusted by the juvenile court of Sedgwick county the custody of Ethel Hook, minor daughter of George Hook and Myrtle Hook, who had been divorced by a decree of the district court of that county in April, 1918, the custody of the child having been awarded to the father. In February, 1919, the juvenile court made a finding that the child was dependent and neglected, and gave her to the care of the League. In November, 1919, the child's mother applied to the district court, asking that the order made in the divorce case be modified, and that she be granted the custody of the child. Neither the league nor anyone representing it was a party to the proceeding, but its superintendent, the petitioner, was present, and testified that the child had been placed by the juvenile court with the League for adoption. The judge asked him where the child was, and he declined to answer, on the ground of privilege and want of jurisdiction in the court, such refusal being the basis of the order adjudging him to

be in contempt. The court awarded the custody of the child to the mother, but made no order in that respect upon the petitioner or the League.

The petitioner represents that the usefulness of such societies as that which he represents will be seriously impaired if parents of children committed to their care are permitted, as a matter of right, to be advised of their whereabouts. He contends that the continuing jurisdiction of the district court to control the custody of a minor child of the parties to a divorce suit ceases when the action of the juvenile court is properly invoked with respect to it; that the power exercised in such a case by the juvenile court is one specially delegated to it by the state, in its capacity as supreme guardian of all minors, and supersedes even that of another court, which had already acquired jurisdiction to determine the most suitable custodian of a child, whether depending upon the conflicting claims of its parents or upon its own welfare. So far as the matter is affected merely by the claims of father or mother, little difficulty is presented. "The most striking demonstration of the supremacy of the guardianship of the state over that of the parent is furnished by the statutes under which children cruelly treated, abandoned, or being brought up in ways of vice, are taken from the parents by administrative proceedings instituted by the state, and committed to public or charitable institutions." 20 R. C. L. 600.

In 1901, prior to the enactment of the Juvenile Court Law, the legislature authorized dependent or neglected children to be placed under the care of children's aid societies, and made provision against subsequent interference by the parents in these words: "No parent or guardian or other person who by instrument of writing surrenders or has heretofore surrendered the custody of a child to any children's aid society or institution shall thereafter, contrary to the terms of such instruments, be entitled to the custody

of or any control or authority over or any right to interfere with any such child, and these same conditions shall prevail where a child is or has been delivered to such children's aid society or institution by action of any proper court." Gen. Stat. 1915, § 6378.

Although the provision of the statute giving the district court power to modify an order made in a divorce case regarding the custody of the children (Gen. Stat. 1915, § 7580) is a part of the Revised Code of Civil Procedure adopted in 1909, it is a re-enactment of a section of the original Code (Gen. Stat. 1868, chap. 80, § 645), and is to be regarded as a continuation thereof (Gen. Stat. 1915, § 10,973, subd. 1), yielding, so far as there may be any conflict, to the later expression of the legislative will.

The continuing jurisdiction of a court which has granted a divorce, to supervise the custody of minor children of the parties, cannot be interfered with by another court which, except for such retained jurisdiction, would have authority under a writ of habeas corpus to make the same inquiry and grant the same relief. *Re Pettitt*, 84 Kan. 637, 114 Pac. 1071. The juvenile court, however, stands upon a very different footing. It is specifically given jurisdiction "of all cases concerning dependent, neglected, and delinquent children." Gen. Stat. 1915, § 3065. The conditions under which it may take control of a child and the manner in which it may exercise it are quite different from those existing in the case of any other tribunal. It is, of course, inferior to the district court, to which an appeal in some instances may be taken from its rulings (Gen. Stat. 1915, § 3076), and which may exercise supervision and control over it to prevent and correct errors and abuses (Gen. Stat. 1915, § 2957). But this appellate and supervising power must be exercised directly and according to some prescribed method. The district court has no authority, merely by reason of its

broader powers, to disregard the action of the juvenile court. If, for instance, a boy whose custody had been awarded by the district court to his father, should, by reason of some serious delinquency, be regularly committed by the juvenile court to the state reformatory, assuming that to be authorized by the statute (Gen. Stat. 1915, § 3073), or, as often happens, to the state industrial school, it would seem quite out of keeping with the general plan of administering such matters if the duration of his stay there could be controlled by the district court in virtue of its reserved jurisdiction, and that situation would not be essentially different from the one here presented, so far as relates to the jurisdiction of the district court; for even such a commitment would not be for the purpose of punishment, but for the welfare of the child. *Re Turner*, 94 Kan. 115, 145 Pac. 871, Ann. Cas. 1916E, 1022.

It is not necessary to the protection of a minor that its control, when regularly assumed by a court having only specially conferred powers, or by an administrative body, shall be subordinate to that of a court of general or superior jurisdiction. Much unfavorable criticism of the legal system of the state of Georgia was occasioned a few years ago, by the refusal of its supreme court, on the ground of want of power, to order the release from custody of a ten-year-old boy, Ollie Taylor. *Taylor v. Means*, 139 Ga. 578, 77 S. E. 373. The decision was widely interpreted as a holding that the boy had been sentenced to penal servitude until he should attain his majority, for the offense of having stolen a bottle of soda water, and that the law afforded no means of relieving him from that penalty. The facts appear to be that, although the language of the criminal law was to some extent employed, for practical purposes he was merely committed for his own good to a county industrial farm, and the want of jurisdiction in the superior or supreme court to interfere arose from the fact that

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the legislature had empowered another tribunal—the authorities having charge of the farm—to decide when his own interests and the public welfare would be best subserved by his discharge. Moreover, the application for his release, which was denied by the supreme court, was made by his father, apparently for the selfish purpose of obtaining a material benefit from his services. 50 Congressional Record, 960; 4 Journal of Criminal Law and Criminology, 171. We are of the opinion that in the present case, when the juvenile court intrusted the care of the child to the children's aid society, the cutting off of the right of the parents to its control involved also the extinguishment of the authority of the district court, derived from the retention of the jurisdiction acquired through the divorce action, to regulate the matter—an authority which originated in a consideration of the conflicting claims of the parents, although in its exercise the welfare of the child was of primary importance.

Courts—
jurisdiction—
custody of child
—divorce and
juvenile courts.

As the court, for this reason, had no power to make an order affecting the custody of the child, there was no basis for an inquiry as to its whereabouts.

This view seems in accordance with that taken by the courts so far as the question has been discussed by them. In *Miller v. Higgins*, 14 Cal. App. 156, 111 Pac. 403, it was held that a court which had granted a divorce could not be divested of jurisdiction over a minor child of the parties, by its secret removal to another county, where, by fraudulent concealment of the facts, an order of adoption had been procured. But in the opinion in that case the court of appeals expressly recognized the force of an earlier decision of the supreme court (*Younger v. Younger*, 106 Cal. 377, 39 Pac. 779), to the effect that "where the adoption was regularly had, the status of the child was changed, and it no longer remained the child of

the parties to the marriage, but became the child of another, and its relation to its natural parents ceased, and the jurisdiction of the divorce court was terminated." 14 Cal. App. 163.

The mere passage of a Juvenile Court Act has been held not to affect the jurisdiction of the court trying a divorce suit, over the minor children. *McDaniel v. Youngblood*, 201 Ala. 260, 77 So. 674. But it has been held that the pendency of a divorce case, in which the court, as between the parties, could determine the custody of their minor child, does not prevent the juvenile court from taking charge of it on the ground of its being neglected. *Brana v. Brana*, 139 La. 306, 71 So. 519. The scope of that decision is fairly indicated by these paragraphs of the syllabus:

"The decision of the juvenile court, vested with jurisdiction to determine when a child answers the description of a neglected child given by the Constitution, is not to be challenged except in a direct action brought for that purpose, or in some appellate tribunal; and hence is not subject to inquiry in the civil district court, but must there be assumed to be well founded. . . .

"The jurisdiction of the juvenile court as to the custody of neglected children is quasi criminal, operating as between the state and the parents, or as between the child and the state, and if the civil district court, having civil jurisdiction of a suit for separation from bed and board, has awarded the child to the mother, there was nothing to prevent the juvenile court from finding that the child was neglected and from taking it away from the parent who was neglecting it, or from both parents, as in that matter its jurisdiction was not concurrent with the civil district court."

The opinion refers to an earlier case where the father of a child sought, without success, to defeat the jurisdiction of the juvenile court over it, on the ground that it was not neglected, and that it was subject to the control of the district court in an action for separation from bed

and board, the supreme court saying:

"The juvenile court and the court in which a suit in separation from bed and board is pending between the parents of a child may have simultaneous, though not concurrent or conflicting, jurisdiction of the custody of the child; that of the juvenile court to be exercised as between the state, or, so to speak, the child, and the parents of the child; and that of the other court to be exercised as between the two parents. In the instant case, on the assumption of the child, *Iska McCloskey*, not being a neglected child within the meaning of that term as defined by the Constitution (art. 118, § 3), the juvenile court is utterly without jurisdiction of her custody, and the civil district court has exclusive jurisdiction. On the contrary assumption, the juvenile court has jurisdiction.

"With the facts of the case this court has nothing to do, but must assume that the learned judge of the juvenile court exercised jurisdiction because he found upon the facts that the said child of relator was a neglected child within the meaning of that term as expressly, carefully, and explicitly defined by said article of the Constitution." *State v. McCloskey*, 136 La. 739, 741, 742, 67 So. 814.

During the proceedings in the district court in the present case, a suggestion was made challenging the constitutionality of the Juvenile Court Act. No specific basis for a doubt in that regard was indicated, and the validity of the statute is not attacked in the brief of the respondent. It has been sustained against all the attacks heretofore made upon it in this court (*Re Turner*, 94 Kan. 115, 145 Pac. 871, Ann. Cas. 1916E, 1022), and the constitutionality of similar statutes has been elsewhere upheld in other respects (notes in 18 L.R.A. (N.S.) 886, and 45 L.R.A. (N.S.) 908, 913).

The question already determined is that upon which the case has been principally argued, and as the con-

clusion reached requires the discharge of the petitioner, there is no occasion for undertaking to determine in what circumstances an adoptive parent, or one standing in substantially that relation, should be excused from giving information, at the demand of a natural parent, as to the whereabouts of an adopted child. It is obvious that under some conditions the welfare of the child may be promoted by the absolute severance of all connections with its parents, harsh as such a measure may seem. Persons in every way adapted to the responsibility, when considering whether or not they should adopt it, might not unreasonably be influenced in their decision by the question whether they could rely with entire confidence upon protection from any attempt of the natural parents to re-establish relations with it, and this might be insured only by keeping them in ignorance of where it was to be found. In a case in which the court denied the right of parents to be informed of the whereabouts of their two

children, who by agreement had been turned over to an institution known as the Temporary Home for the Destitute, the court said: "In some of our public institutions it has been deemed expedient to keep parents in ignorance of the place where homes have been found for their children, on account of the disposition often manifested to visit them and excite uneasiness and discontent in their minds. Such influences may be feared in this case, and there may be just ground for the suggestion made by the respondent's counsel that, if the former character of the father were made known among the present schoolmates and associates of the children, it might cause annoyance and injury to them at their present tender age. The children ought not to be thus exposed, unless the judge who hears the cause shall have some ground to believe that their welfare requires it." *Dumain v. Gwynne*, 10 Allen, 270, 275.

The petitioner is discharged.

Petition for rehearing denied July 10, 1920.

ANNOTATION.

Jurisdiction of another court over child as affected by assumption of jurisdiction by juvenile court.

- I. **Introductory**, 147.
- II. **Generally**, 147.
- III. **Power to determine jurisdiction of juvenile court**, 150.

I. Introductory.

The assumption of jurisdiction over a child by a juvenile court frequently raises intricate jurisdictional questions, since the statute which establishes such a court does not always clearly define the limitation which is thus imposed on the jurisdiction of another court. Judicial determination of this limitation on the jurisdiction of another court appears, at the present time, to be in a formative stage; but there are several well-considered decisions on the question, almost all of which reflect a disposition to construe the powers of a juvenile court

liberally, in view of the purpose for which it was created, even though considerable readjustment is required with respect to the jurisdiction formerly reposed in other courts.

II. Generally.

The assumption of jurisdiction by a juvenile court over a child, in conformity to a statute expressly conferring on that court the power to determine the custody of a neglected or delinquent child, has been frequently held to end, or to prevent the assumption of, jurisdiction over such child by another court. *State v. McCloskey* (1915) 136 La. 739, 67 So. 813; *Brana v. Brana* (1916) 139 La. 306, 71 So. 519; *Children's Home v. Fetter* (1914) 90 Ohio St. 110, 106 N. E. 761. See also *Spade v. State* (1909) 44 Ind.

App. 529, 89 N. E. 604; *Ex parte Bowers* (1915) 78 Or. 390, 153 Pac. 412; *State ex rel. Birch v. Baker* (1919) — La. —, 84 So. 796. And see the reported case (*RE HOSFORD*, ante, 142). Compare *Cleveland Protestant Orphan Asylum v. Soule* (1915) 5 Ohio App. 67.

In *Children's Home v. Fetter* (1914) 90 Ohio St. 110, 106 N. E. 761, it appeared that a juvenile court had acquired jurisdiction of a delinquent child, had entered an order dividing its custody between its father and its mother, who were separated, and eventually committed it to a state institution. In the meantime, a divorce action was instituted by the mother, and a decree entered in that action, prior to the commitment of the child to the state institution, which awarded its custody to the mother. Thereafter, in a habeas corpus proceeding brought by the mother, the court of appeals found that the child was illegally detained by the state institution, and ordered that the agents of the institution deliver it to its mother. The supreme court, however, held that the divorce decree, though it might determine the rights of the parents, could not affect the order of the juvenile court, under which the child became a ward of the court, to continue as such until it reached the age of twenty-one. The court said: "Exclusive jurisdiction of the child and of the subject-matter was acquired by the juvenile court several months prior to the proceedings in divorce, and was a continuing jurisdiction, and that the order of commitment to the Children's Home was made subsequently to the decree in divorce in Erie county is wholly immaterial." The supreme court also decided that the court of appeals should have dismissed the writ of habeas corpus when it appeared that the juvenile court had acquired jurisdiction of the child. The decision was based on the ground that exclusive jurisdiction of the custody of a delinquent child was conferred by statute on the juvenile court, and no other court was authorized to interfere, in an independent proceeding, with any disposition which

the juvenile court might make relating thereto.

In *State ex rel. Birch v. Baker* (1919) — La. —, 84 So. 796, it appeared that a court in a divorce decree had awarded the custody of a child to its mother. Thereafter, the mother consented to its adoption by its maternal grandparents. The child's father, who had not consented to or signed the notarial act of adoption, applied for a writ of habeas corpus to obtain custody of the child. On motion of the grandparents the case was transferred to the juvenile side of the court, and a judgment was rendered granting the father the permanent custody of the child, subject to such action as the juvenile court might take in respect thereto. On appeal, the judgment was affirmed on the ground that the father did not consent to the adoption, and the mother, to whom the custody was awarded by the divorce court, was not a litigant in the case. Though the court did not base its decision on the extent of the jurisdiction of a juvenile court as affected by that of a divorce court, it made the following statement: "In the juvenile court, the matter partakes of the nature of a criminal charge against the child, originated by affidavit, and that court may, on proper showing, remove the child from its parent, or parents, or any other custodian, and make such disposition as it sees fit; while in divorce or separation proceedings in the district courts, the judge may consider those matters in exercising his discretion to award the custody to one or the other of the parents."

Likewise, in *Brana v. Brana* (1916) 139 La. 306, 71 So. 519, a writ of prohibition was granted to prevent the execution of an order of a district court in a divorce proceeding, giving the custody of a child to its father, after a juvenile court had ordered the father to pay to the mother a certain sum weekly for its support. It appeared that on the day a charge of nonsupport of the child was made by the mother, the father brought a suit for separation in the district court. The jurisdiction of the juvenile court

was upheld on the ground that its jurisdiction was quasi criminal, that it acted as between the state and the child, and that its finding that the child was neglected gave it jurisdiction of the child's custody, notwithstanding the action pending in a court with civil jurisdiction over the rights of the two parents inter se.

Since the jurisdiction over a child of a certain class, specifically conferred on a juvenile court by statute, is paramount to, and not concurrent with, the incidental jurisdiction which a divorce court may have in the premises, the fact that the divorce court first asserted jurisdiction is generally held not to warrant a continuance of its jurisdiction, if it is in conflict with the jurisdiction later assumed by a juvenile court in conformity to a power thus specifically granted to it by statute. *Spade v. State* (1909) 44 Ind. App. 529, 89 N. E. 604; *State v. McCloskey* (1915) 136 La. 739, 67 So. 313. And see the reported case (*RE HOSFORD*, ante, 142). Compare *Cleveland Protestant Orphan Asylum v. Soule* (1915) 5 Ohio App. 67.

In the reported case (*RE HOSFORD*), it is held that the continuing jurisdiction of a divorce court over a minor child of the parties is extinguished, when a juvenile court, by virtue of the powers specifically conferred on it by statute, intrusts the care of the child to a third person. The decision is based on the grounds that the continuing jurisdiction of the court which grants the divorce is derived from its power to determine the rights of the parties to the divorce action, and that the rights of those parties, with respect to the custody of a minor child, are cut off when a juvenile court intrusts the custody of the child to a third party, in the exercise of a power specifically conferred on it by a statute enacted after that giving to the court granting the divorce its jurisdiction. It is admitted that the court of general jurisdiction which granted the divorce in the case at bar has, under the Kansas statutes, supervision and control over the juvenile court to prevent and correct errors and abuses, but it is maintained that this power

is appellate in character and must be exercised directly and according to some prescribed method. It is therefore decided that a general superintendent of a children's aid society, to whom the custody of a minor child was assigned by a juvenile court, was not guilty of a contempt of court in refusing to testify as to the whereabouts of the child, in a proceeding brought by one of its parents to obtain custody of the child, in a court which had previously granted a divorce to the parents.

In a frequently cited case, *State v. McCloskey* (1915) 136 La. 739, 67 So. 813, it appeared that, while a separation suit was pending in a district court, one of the parties to the suit applied to a juvenile court to have a child of the parties adjudged to be abandoned and neglected, and its custody awarded to her. The juvenile court granted the application, and ordered the child to be taken from the custody of its father and committed to that of its mother. An application was made by the father for a writ of prohibition and certiorari, on the ground that a juvenile court had no jurisdiction of the children of a marriage pending a suit for its dissolution. The application was denied on the ground that a finding by the juvenile court that the child was neglected gave that court jurisdiction to determine its custody. The court said: "The juvenile court and the court in which a suit in separation from bed and board is pending between the parents of a child may have simultaneous though not concurrent or conflicting jurisdiction of the custody of the child, that of the juvenile court to be exercised as between the state, or, so to speak, the child, and the parents of the child, and that of the other court to be exercised as between the two parents."

Similarly, in *Spade v. State* (1909) 44 Ind. App. 529, 89 N. E. 604, it appeared that, in a divorce proceeding, the custody of a child had been given to its mother, and the father was ordered to pay \$1.50 per week to her for its support. Later the child was adjudged by a juvenile court to be de-

pendent and neglected, and its custody was awarded to a county board of commissioners. The father was found guilty of contributing to its delinquency, and was assessed a fine of \$100, judgment to be suspended on condition that he should report to the court once in every three months, and pay \$1.25 per week to a court clerk for the use of the board in supporting the child. The validity of the judgment of the juvenile court was attacked, in an appellate proceeding, on the ground, among others, that the father had been ordered to pay for the support of the child by the court which granted the divorce. The appellate court, without discussing the conflict of jurisdiction, affirmed the judgment of the juvenile court, stating that it would defer a determination of the question of conflicting jurisdiction until a contest should arise between the two courts as to the disbursement of the funds for the support of the child.

However, in *Cleveland Protestant Orphan Asylum v. Soule* (1915) 5 Ohio App. 67, it was held that, where a district court in a divorce decree has assumed jurisdiction of the custody of a child, its disposition of that matter could not be disturbed by any order of a juvenile court. In this decision the Ohio statutes conferring power on juvenile courts were construed to limit the application of such power to children not already provided for by some other court previously obtaining jurisdiction. This decision appears to be in conflict with the current of authority.

In *Ex parte Bowers* (1915) 78 Or. 390, 153 Pac. 412, it was held that, as between courts of concurrent jurisdiction which had been authorized by statute to sit as juvenile courts, the one which first exercised jurisdiction of the custody of a minor child, and did not dismiss the proceeding or release its ward, retained its jurisdiction of the child's custody, and that the orders of another court with power to act as a juvenile court were invalid so far as they were in conflict with the disposition of the child's cus-

tody made by the court which first asserted jurisdiction in the premises.

III. Power to determine jurisdiction of juvenile court.

According to the rule applied in two decisions, a juvenile court has exclusive jurisdiction to determine whether a child is within the class over which it is given jurisdiction by statute, and that, since this is only a quasi jurisdictional fact, a decision of the juvenile court based thereon is not subject to collateral attack.

Thus, in *Brana v. Brana* (1916) 139 La. 306, 71 So. 519, a juvenile court assumed jurisdiction of the custody of a child on a finding that it was "neglected," within the meaning of a statute conferring such jurisdiction as to "neglected" children. A district court before which a suit was pending for the separation of the parents of the child made a finding that it was not "neglected" within the meaning of the statute, and entered an order with respect to the custody of the child in conflict with the disposition of the same matter by the juvenile court. The supreme court decided that since the condition of the child was not strictly a jurisdictional fact, but only quasi jurisdictional, its determination was within the province of the juvenile court, and its decision thereon could not be attacked collaterally. See to the same effect, *Children's Home v. Fetter* (1914) 90 Ohio St. 110, 106 N. E. 764, wherein the jurisdiction of a juvenile court depended on the fact of a child's delinquency.

Under the Kentucky statutes relating to habeas corpus proceedings, however, it has been held that a circuit court had power, in a habeas corpus proceeding, to determine whether a juvenile court had jurisdiction over the custody of a child which it committed to a detention home. *Rallihan v. Gordon* (1917) 176 Ky. 471, 195 S. W. 783. In that case the court of appeals denied a petition for a writ of prohibition against a judge of the circuit court. It also stated that, under the Kentucky statutes, there could be no appeal from a decision which the circuit court might make in the ha-

beas corpus proceeding, but added that the decision of that court would not be final if an equitable action were brought before the chancellor to have the question of the child's custody determined. W. S. R.

RAY HOLLINGSWORTH

v.

GEORGE D. BERRY et al., Appts.

Kansas Supreme Court—October 9, 1920.

(— Kan. —, 192 Pac. 768.)

Workmen's compensation — drilling oil well.

An employer of less than five workmen, who has not affirmatively elected to accept the provisions of the Workmen's Compensation Act, is not brought within its operation by reason of the fact that he is engaged in drilling an oil or gas well. An oil or gas well is not a mine within the meaning of the provision extending the effect of the act to mines, irrespective of the number of workmen employed.

[See note on this question beginning on page 154.]

Headnote by MASON, J.

APPEAL by defendants from an order of the District Court for Montgomery County (Holdren, J.) overruling a demurrer to a petition filed to recover damages for personal injuries alleged to have been caused by defendants' negligence. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Thomas E. Wagstaff and D. W. Stewart for appellants.

Mr. Charles D. Welch for appellee.

Mason, J., delivered the opinion of the court:

On October 25, 1919, George D. Berry and Herman H. Fisher were engaged in the business of drilling oil and gas wells, and Ray Hollingsworth was in their employ as tool dresser. While they were drilling a well Hollingsworth received an injury arising out of and in the course of such employment. He brought an action against the firm upon their common-law liability, alleging that his injury was due to their negligence. The defendants demurred to the petition upon the ground that it showed that they were subject to the provisions of the Workmen's Compensation Act (Gen. Stat. 1915, §§ 5896-5942), and that therefore the plaintiff's remedy was confined

thereto. This appeal is taken from an order overruling the demurrer.

The petition sets out that the defendants did not employ as many as five workmen, and it is not suggested that they had affirmatively elected to come within the terms of the Compensation Act. They consequently were subject to liability under the common law for any injury to the plaintiff resulting from the negligence alleged, unless they were brought within the operation of the statute by virtue of its provision that it applies to mines, irrespective of the number of employees. Gen. Stat. 1915, § 5902. In other words the ruling of the district court is correct, unless an oil and gas well in the process of being drilled is to be regarded as a mine within the meaning of that provision.

Oil and gas, and for that matter water, are, of course, minerals in the

broader sense of the word, but their extraction from the earth is not ordinarily spoken of as mining. In a number of cases it has been held that the word "mine," as used in a statute, does not include an oil or gas well, there being no express provision to that effect, a matter, however, which obviously might be affected by the subject or context. *J. M. Guffey Petroleum Co. v. Murrel*, 127 La. 466, 53 So. 705; *Kreps v. Brady*, 37 Okla. 754, 47 L.R.A. (N.S.) 106, 133 Pac. 216; *Barton v. Wichita River Oil Co.* — Tex. Civ. App. —, 187 S. W. 1043. If such a meaning is to be given to it here, it must be by virtue of the following portion of the section of the act, giving definitions of terms therein used, which are to control "unless the context otherwise requires:" "'Mine' means any opening in the earth for the purpose of extracting any minerals and all underground workings, slopes, shafts, galleries and tunnels, and other ways, cuts, and openings connected therewith, including those in the course of being opened, sunk or driven; and includes all the appurtenant structures at or about the openings of the mine, and any adjoining adjacent work place where the material from a mine is prepared for use or shipment." Gen. Stat. 1915, § 5903, subd. (c); Laws 1917, chap. 226, § 2, subd. (c).

An oil or gas well, being an opening in the earth for the purpose of extracting minerals, is literally and technically within this definition. The language, however, does not suggest a purpose to depart from the ordinary meaning of the word, except by making it include all connections and appurtenances. If it should be assumed that the sentence quoted, standing alone, would warrant regarding an oil and gas well as a mine for the purpose of this act, we think that effect must be denied it by reason of further provisions, one of which reads as follows: "This act shall apply only to employment in the course of the employer's trade or business on, in or about a railway, factory, mine or

quarry, electric, building or engineering work, laundry, natural gas plant, county and municipal work, and all employments wherein a process requiring the use of any dangerous explosive or inflammable materials is carried on, which is conducted for the purpose of business, trade or gain." Gen. Stat. 1915, § 5900; Laws 1917, chap. 226, § 1.

It will be noted that twelve classes of plants or occupations are enumerated, employment on, in, or about which is necessarily in order to render the statute applicable. The third of these is described by the word "mine," and it is only to this class that the statute is made applicable without an affirmative election by the employer, where less than five workmen are employed. The seventh class is designated by the phrase "engineering work," which is thus defined: "'Engineering work' means any work in the construction, alteration, extension, repair or demolition of a railway (as hereinbefore defined), bridge, jetty, dike, dam, reservoir, underground conduit, pole lines constructed or used or carrying conductors, sewer, oil or gas well, oil tank, gas tank, water tower, or waterworks (including standpipes or mains), any caisson work or work in artificially compressed air, any work in dredging, pile driving, moving buildings, moving safes, construction and repairing of streets, roads and highways, or in laying, repairing or removing underground pipes and connections; the erection, installing, repairing, or removing of boilers, furnaces, engines and power machinery (including belting and other connections), and any work in grading or excavating where shoring is necessary or power machinery or blasting powder, dynamite or other high explosives are in use (excluding mining and quarrying)." Gen. Stat. 1915, § 5903; subd. (g); Laws 1917, chap. 226, § 2, subd. (g).

From this it plainly appears that the effect the statute should have upon workmen employed in the construction of an oil or gas well

engaged the attention of the legislature, and from the fact that they were placed under the classification designated as "engineering work,"

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drilling
oil well.

and not elsewhere mentioned, we think the inference is clearly to be drawn

that they were not intended to be covered by the provision in relation to mines, even if the language employed would otherwise be open to that construction. This interpretation seems to us to be in harmony with the letter of the statute, and we think it also in accordance with its spirit. The mining industry was doubtless singled out from all others for special treatment, for the reason that the workmen engaged therein are exposed to special and unusual dangers. Obviously the risks the legislature had in mind in this connection were those peculiar to working in or about the kind of a mine that is suggested by the use of that word in common speech. One who is helping to drill an oil or gas well might be injured in substantially the same way as a miner, but the similarity would be incidental and not characteristic. The perils of well drilling would seem to resemble those of the other engineering work with which it is associated in the statutory enumeration, more closely than those that readily suggest themselves in connection with what is ordinarily spoken of as mining.

An objection is made to the conclusion we have reached on the ground that "construction" is not an appropriate word to apply to the drilling of a well, and therefore that process is not included within the statutory definition of "engineering work." It is true that "construct" is not the term commonly used, or that naturally suggests itself in that connection. And this is true of its synonyms "form" and "make." But any one of these words is sufficiently descriptive of the process to make its use in that sense entirely permissible and free from the least ambiguity. The word "construct" was obviously used as a convenient term

to be applied to the various structures, work upon which was included within the definition.

In subdivision (e) of the section already referred to, "electric work" is defined as that connected with the "construction, installation, operation, alteration, removal or repair" of electric apparatus. The plaintiff, from the premise that the omission of the italicized word from the definition of engineering work implies its intentional exclusion, argues that the drilling of an oil or gas well is not included because it constitutes the operation of the well rather than its construction. The drilling of such a well is, of course, an operation; it is an operation in the course of prospecting for oil or gas such as, for instance, meets a requirement to begin or prosecute operations of that character within a given time; but we think the drilling of an oil or gas well is more appropriately spoken of as its construction than as its operation. A distinction between drilling such a well and operating it is recognized in the statute, which forbids doing either within 100 feet of a railroad. Gen. Stat. 1915, § 4978.

The plaintiff also invokes the statute enacted in 1903 (eight years before the first Kansas workmen's compensation legislation), under the title "An Act to Define the Term 'Mining,' and to Further Provide for the Formation of Mining Companies and Corporations," the first section of which reads as follows: "The term 'mining,' as used in this and all other statutes, shall be held to mean the prospecting for and obtaining of all metallic and mineral substances, and in addition thereto, coal, clay, stone, petroleum, and natural gas, and any and all other valuable products formed or existing beneath the earth's surface." Gen. Stat. 1915, § 2326.

The specific purpose of this act was obviously to extend the provisions of the law authorizing the creation of corporations for the transaction of mining business, so that it would unquestionably cover

companies formed to prospect for and produce oil and gas. It does not expressly undertake to lay down a rule for the interpretation of statutes to be enacted in the future, but if such construction were to be given

it, and its validity as so construed were conceded, we think the considerations already stated should still control.

The judgment is affirmed.

All the Justices concur.

ANNOTATION.

Workmen's compensation: what is a "mine" within the meaning of the acts.

It will be observed that in the reported case (*HOLLINGSWORTH v. BERRY*, ante, 151) it was decided that an oil and gas well in the process of being drilled was not a mine within the meaning of the provision of the Kansas Workmen's Compensation Act, extending the effect of the act to "mines," irrespective of the number of workmen employed, the court holding that, notwithstanding a provision of the statute that a mine meant any opening in the earth for the purpose of extracting minerals, no purpose to depart from the ordinary meaning of the word was shown, it appearing by other sections of the act that the legislature, in framing the statute, had in mind a distinction between mines and gas and oil wells.

Generally, with respect to the term "mine," it is stated in 18 R. C. L. 1092: "A 'mine,' in its specific sense, is a work for the excavation of minerals, by means of pits, shafts, levels, tunnels, et cetera, as opposed to a quarry where the whole excavation is open. It has been said that whether any excavation be a mine or not depends on the mode in which it is worked, and not on the substance obtained from it. As originally used, the word 'mine' was exclusively connected with underground workings, but both in this country and in England, in later times, the word has received an enlarged meaning, and under the modern construction it is not limited to mere subterranean excavations or workings, but includes, for example, beds of clay, ironstone, or limestone reached by open workings, and workable only by open cuts."

There is little direct authority concerning the meaning of the term

"mine," as used in the Compensation Acts.

Attention may be called to *Scullion v. Cadzow Coal Co.* (1913) 51 Scot. L. R. 39, 7 B. W. C. C. 833, where it was held that an employee engaged as a surface laborer at the pit head was not employed in any process of "mining," within the meaning of the English Workmen's Compensation Act regulating allowance for industrial diseases. The court said: "Now, at the date of the disablement, this man was, as I have said, engaged at work on the surface of the mine, and was not engaged, in my opinion, in the process of mining. It is acknowledged that there is no statutory definition of the 'process of mining'—that the expression is not used in any technical or secondary sense, but is to be construed according to the plain, ordinary signification of the words. What, then, is, in plain, ordinary language, the meaning of the expression, 'the process of mining'? I think there can be no doubt the meaning of that expression is the obtaining of mineral from an excavation in the earth, which necessarily implies two things: First, the actual cutting or hewing of the mineral; and, second, its removal to the surface. In no part of that operation was the appellant engaged."

And the word "mine," as used in the English Workmen's Compensation Act, was held, in *Turnbull v. Lambton Collieries* (1900) 16 Times L. R. (Eng.) 369, not to include a spot $\frac{1}{2}$ of a mile from a coal mine, at which point the driver of an engine was injured, the court deciding that the term "mine" was not so enlarged, by a provision of the statute that "mine" meant a mine to which the Coal Mines Regulation Act applied, and it appearing that

a section of that act provided: "In this act, unless the context otherwise requires, 'mine' includes every shaft in the course of being sunk, and every level and inclined plane in the course of being driven, and all the shafts, levels, planes, works, tramways, and sidings, both below ground and above-ground in and adjacent to and belonging to the mine."

In connection with the question under consideration, attention may be called to several decisions which have passed upon the meaning of the word "mine" as used in statutes other than workmen's compensation acts.

Thus, in *Barton v. Wichita River Oil Co.* (1916) — Tex. Civ. App. —, 187 S. W. 1043, the word "mine," as used in a statute giving laborers performing services in any mine a lien, was held to have been used in its ordinary sense and not to include oil wells. The court said: "What, then, is the ordinary signification of the word 'mine'? We have examined numerous definitions of the terms 'mine' and 'mining,' and those given by Webster have perhaps received as general judicial approval as any. His primary definition of 'mine,' when used as a noun, is: 'An excavation, properly underground, for digging out some useful product, as ore, metal, or coal. (2) Any deposit of such material suitable for excavation and working; as a placer mine.' When used as a verb, the same lexicographer says 'to mine' is: 'To obtain by digging out of the earth; also to make diggings into for ore or the like, as coal is mined. "They mined rich veins of silver."' Webster defines a miner as 'one who mines in any sense; especially one whose occupation is to excavate ore, coal, etc., in a mine.' In 27 Cyc. 531, it is said: "The primary meaning of the word, "mine," standing alone, is an underground excavation made for the purpose of getting minerals; a pit or excavation in the earth from which metallic ores, or other mineral substances, are taken by digging.' While it is true that in classifying the earth's substances, oil is classed as a mineral (see 27 Cyc. 532), and that the method of its extraction, whether

by digging, trenching, or otherwise, is immaterial in a consideration of the question, yet, as it seems to us, the definitions given are ordinarily referable to minerals in place, such as iron, gold, silver, salt, sulphur, etc., and not to substances, though classed as mineral, that are in solution and migratory, such as gas and oil. It had not occurred to us on original hearing that the well upon and about which Claude Minor and his assignors worked was a 'mine,' or that they were 'miners,' and we feel safe in saying that ordinarily they would not be so designated, and by the statutory rule of construction quoted it is the ordinary, and not a strained or exceptional, significance that must be given the term 'mine' as used in the statute, by virtue of which appellee claims. It is, we think, common knowledge that an oil well is simply so designated, and that the one engaged in its boring or drilling is designated as a driller."

And in *J. M. Guffey Petroleum Co. v. Murrell* (1910) 127 La. 466, 53 So. 705, where the court was considering exempting property used in mining operations, such an operation was held to have to do with the working of a mine, and it was held that neither in the ordinary nor the scientific sense did the term "mine" include an oil well. The court said: "Let us, then, see what is really a 'mine' and a 'mining operation,' as 'understood in their most usual signification,' as shown by respectable authorities. The Century Dictionary defines a 'mine' to be: 'An excavation in the earth made for the purpose of getting metal ores, or coal. Mine work in metal mines consists in sinking shafts and winzes, running levels, and stoping out the contents of the mines thus made ready for removal. In coal mining the operations differ in detail from those carried on in connection with metal mines, but are the same in principle. The details vary in coal mining with the position and thickness of the beds. A mine differs from a quarry, in that the latter is usually open to the day, but in any mine a part of the excavation may be openwork (see that word) as in running an adit level which may be

carried a considerable distance before becoming covered by earth or rock. When the term "mine" is used, it is generally understood that the excavation so named is in actual course of exploitation; otherwise, some qualifying term like "abandoned" is required. No occurrence of ore is designated as a mine unless something has been done to develop it by actual mining operations. There are certain excavations which are termed neither mines nor quarries, as, for instance, places where clay is being dug out for bricks; such places are frequently (especially in England) called pits, and also open-works. With a few and not easily specified exceptions a quarry is a place where building stone or building materials of any kind (as lime, cement, etc.) are being got; a mine where some metal or metalliferous ore is in the process of exploitation. . . . The same authority defines 'ore' as 'a metalliferous mineral or rock, especially one which is of sufficient value to be mined.' It will be noted that, in defining the word 'excavation,' usually made use of in describing some large kind of opening, is employed. It will also be noted that only three objects are designated as being those for which a mine is opened; that is, metal, ores, or coal. It will further be noted that throughout the definition

the words 'quarry' and 'pits,' both also signifying large openings in the earth, are employed as almost synonymous with the word 'mine,' and it is shown from the language used that the three terms are extremely similar, so much so that considerable trouble is taken to explain the slight difference between the three terms. A reading of the entire definition fixes indelibly upon the mind the idea that a 'mine' is: First, a large opening into the ground, like a pit or quarry; second, that only such openings are mines as are made for the purpose of getting metal, ores, or coal. We submit that the definition above quoted is an absolutely faithful and accurate statement of what constitutes a 'mine,' in the most usual signification of the word. There is nothing whatever in this definition which would even remotely suggest that a small opening less than 12 inches in diameter, drilled into the ground for getting out oil, could possibly be termed a 'mine.'"

And in *Kreps v. Brady* (1912) 37 Okla. 754, 47 L.R.A.(N.S.) 106, 133 Pac. 216, it was held that drilling a well in search of oil or gas was not "mining," within the meaning of a section of the Constitution abrogating the fellow-servant doctrine.

J. T. W.

RE WILL OF MRS. ANNA KIELSMARK, Deceased.

ELIAS P. BIEBER

v.

HANS IVERSEN et al.

A. MITCHELL PALMER, as Alien Property Custodian, Appt.

Iowa Supreme Court — May 15, 1920.

(— Iowa, —, 177 N. W. 690.)

Will — in favor of alien enemy — validity.

1. A will by a citizen in favor of an alien enemy is not prohibited by the general law or statutory regulation against trading with the enemy.

[See note on this question beginning on page 162.]

War — effect on transactions between citizens.

2. Without license, all commercial transactions, all trading between citizens of states or nations at war, are

unlawful, and all contracts growing out of such trading, or out of voluntary intercourse with a public enemy, are void.

[See 6 R. C. L. 714; 27 R. C. L. 925.]

APPEAL by the Custodian of the property of alien heirs from a decree of the District Court for Grundy County (Mullan, J.) in favor of objectors in an action brought to probate the will of Anna Kielsmark, deceased. *Reversed.*

Statement by Gaynor, J.:

Action to probate a will. The sole question presented is whether or not a devise of property to an alien enemy is in contravention of the public law and the act of Congress referred to in the opinion. The invalidity of the devise was raised by heirs residing in this country. The court held the devise invalid. Appeal to this court. The opinion states the facts.

Messrs. Williamson & Willoughby and Emmet Tinley for appellant.

Messrs. F. P. Carr, A. G. Briggs, and Briggs, Thygeson, & Everall, for appellees:

The courts will not give effect to the intent, however it may be sought to exercise it.

Hill v. Baker, 32 Iowa, 308, 7 Am. Rep. 193.

Gaynor, J., delivered the opinion of the court:

Anna Kielsmark died on the 7th day of August, 1917, testate, leaving surviving her, as her only heirs at law, the following named persons: Marie, Elizabeth, Peter, and Christian Vodder, children of a deceased sister; and Hans and Oluf Iversen, children of another deceased sister. On the 15th day of August, 1917, an instrument purporting to be her last will and testament was filed in the district court of Grundy county, Iowa, for probate. The Vodders were all born in Germany, and, during all the times hereinafter mentioned, were actual residents and citizens of Germany, and are still residents and citizens of Germany. Hans Iversen and Oluf Iversen are residents of the United States, residing at St. Paul, Minnesota. Hans Iversen, at the time of the filing of the will, had

declared his intention to become a citizen of the United States, but had not been naturalized. It does not appear whether Oluf had declared his intention to become a citizen or not.

War was declared by the United States against the Imperial German Government on the 10th day of April, 1917.

On the 24th day of July, 1917, the will was made, and on August 15, 1917, was filed for probate. On the 2d day of January, 1918, Hans Iversen and Oluf Iversen appeared and filed objections to the probate of the will on the ground that a state of war existed between the United States of America and the Imperial Government of Germany at the time the will was made, and still exists, and the parties named in the will as beneficiaries, to wit, Marie and Elizabeth Vodder, were and are alien enemies. On these facts, objectors predicated a claim that the bequest to these Vodders is absolutely void, and that, as to the property attempted to be devised to them, Anna Kielsmark died intestate.

The will, so far as material to this controversy, recites:

"That I, Anna Kielsmark, of the town of Reinbeck in the county of Grundy, in the state of Iowa, being of sound mind, etc., do here make, execute, publish, and declare this my last will and testament.

"First. I provide that all my just debts and expenses be paid out of my estate.

"Second. A bequest of \$100 to the Ladies' Aid Society of the Congregational Church.

"Third. Instructions to the executor to hold \$100, invest the same,

and pay the income each year therefrom to the Reinbeck Cemetery Association for the purpose of keeping up her burial lot in the cemetery.

"Fourth. (The clause in controversy.) I have two nieces at this time in Germany, to wit, Miss Elizabeth Vodder and Miss Marie Vodder, and I hereby instruct my executor to communicate with them as soon as possible in case they shall not have arrived in Reinbeck prior to my death; he shall invite them to move to Reinbeck; in case they, or either of them, come, they shall have the home in Reinbeck, being the only real estate in the said town of Reinbeck, in Grundy county, Iowa, and I hereby give the same to them, together with all the furniture and personal effects therein; *my executor shall hold the said property and care for the same until they come, or until five years from the close of the present European War, and if he hears from them, and they, or either of them, come to Reinbeck to live, she, or both of them, shall have the said home in absolute title; in case he hears from them and they neither of them desire to come to America, then he shall sell the said house and the proceeds thereof shall be divided between them, and he shall also pack up my smaller effects and send to them. In case either of said nieces shall not be living at that time, then the survivor shall take half the said property, and the remaining half shall be divided between the persons named in the next paragraph.*"

The next paragraph provides for the disposition of the property in the event the two Vodders named in the will are dead.

Elizabeth and Marie Vodder were both living at the time the will was offered for probate and at the time of the trial. So far as this controversy is concerned, all the facts material were stipulated between the parties. The stipulation shows the facts above recited, and that, during all of the time mentioned, Elizabeth and Marie Vodder were and still are alien enemies of the United

States of America, residents and citizens of Germany; that testatrix, Anna Kielsmark, resided in the town of Reinbeck, in Grundy county, at the time of her death; that she had lived there for something more than thirty years, and was a citizen of the United States. Upon the hearing, A. Mitchell Palmer, Alien Property Custodian, appeared by Attorneys Williamson & Willoughby, and joined with the proponent in an effort to have the will probated and made effectual. The court, upon the final hearing, found the facts as herein recited, and concluded therefrom that any attempt on the part of Anna Kielsmark to devise to these nieces any part of her estate was an attempt to furnish aid and comfort to the enemy, and that therefore the provision of the will by which the property of the testatrix was attempted to be given to Elizabeth and Marie Vodder was and is void. The will in all other respects was upheld. The decree recites that the entire estate, except the bequests in the second and third paragraphs, descended to the legal heirs of Anna Kielsmark on her death, according to their respective shares as fixed by the statute of the state of Iowa; that Hans Iversen and Oluf Iversen, being residents of the United States, are entitled to have paid over to them by the executor the shares of the estate of the testatrix to which they are respectively entitled as heirs at law; that the shares of Marie, Elizabeth, Peter, and Christian Vodder as heirs at law should at once be taken possession of by the Alien Property Custodian, and dealt with according to the laws of the United States relating to alien enemy property, and directed that the shares of these Vodders be delivered by the executors to the Alien Property Custodian.

The only question presented is whether or not the provision of the will by which Anna Kielsmark devised her property to these two nieces is void, on the sole ground that they were alien enemies of the

United States at the time the bequest was made and at the time the will was presented for probate.

Much learning has been expended on this question. It is a mere fiction of the law that all citizens of one country at war with another are each the enemy of the other. It is a fiction, however, indulged in to justify in a measure the rule that prohibits intercourse between citizens of countries at war with each other. The innocent suffer for the good of the whole people. It is a general principle, recognized and enforced by the courts of all civilized countries, that war operates as an interdiction on all commercial or other specific intercourse and communication with a public enemy. The courts of England and the courts of this country have spoken upon the question, and have recognized that, during war, all trade and intercourse between the citizens or subjects of one of the belligerent states or powers, with those of the others, is inimical to the best interests of each, except it be by license or permission of the government. So it follows that, without license, all commercial transactions, all trading between citizens of states or nations at war, is unlawful, and all contracts growing out of such trading, or out of voluntary intercourse with a public enemy, are void, and that no valid contract can exist, nor any

promise arise, by implication of law, from any transaction with an enemy, without permission from the government. See *Hill v. Baker*, 32 Iowa, 302, 7 Am. Rep. 193; *Rice v. Shook*, 27 Ark. 137, 11 Am. Rep. 783; *Billgerry v. Branch*, 19 Gratt. 393, 100 Am. Dec. 679; *Statham v. New York L. Ins. Co.* 45 Miss. 581, 7 Am. Rep. 737; *Potts v. Bell*, 8 T. R. 549, 101 Eng. Reprint, 1540, 2 Esp. 612, 5 Revised Rep. 452, 2 Eng. Rul. Cas. 654; also authorities collected on page 686, L.R.A.1917C; *United States v. Lapene*, 17 Wall. 601, 21 L. ed. 693.

After the breaking out of war be-

tween Germany and the United States, Congress passed an act (40 Stat. at L. 411, chap. 106, Comp. Stat. 1918, §§ 3115½a-3115½ff, 3115½g-3115½j, Fed. Stat. Anno. Supp. 1918, pp. 846-867), providing, among other things, that it shall be unlawful for any person in the United States, except with license of the President granted to such person, to trade, or attempt to trade, either directly or indirectly, with any person with knowledge or reasonable cause to believe that such other person is an enemy or ally of an enemy. Further: "That . . . no conveyance, transfer, delivery, payment, or loan of money or other property, in violation of [the foregoing provisions] made after the passage of this act, and not under license as herein provided shall confer or create any right or remedy in respect thereof." Section 3115½d (b), Fed. Stat. Anno. Supp. 1918, p. 855.

The act defined the words "to trade" as follows:

"(a) Pay, satisfy, compromise, or give security for the payment or satisfaction of any debt or obligation.

"(b) Draw, accept, pay, present for acceptance or payment, or indorse any negotiable instrument or chose in action.

"(c) Enter into, carry on, complete, or perform any contract, agreement, or obligation.

"(d) Buy or sell, loan or extend credit, trade in, deal with, exchange, transmit, transfer, assign, or otherwise dispose of, or receive any form of property.

"(e) To have any form of business or commercial communication or intercourse with" an enemy. Section 3115½aa, Fed. Stat. Anno. Supp. 1918, p. 849.

We do not find that it has ever been expressly held that the law of nations, as judicially declared, renders void a devise made to an alien enemy. We do not find it so held in direct terms, and we think there is reason for distinguishing the act of devising property to an alien from

those transactions heretofore held void, especially when the devise relates to real estate. Nothing passes to the enemy at the time of the making of the will. The making of the will involves no personal transaction between the devisee and testator. Nothing passes at that time, nor can anything pass until the death of the testator. On the probate of the will, an executor is appointed, who serves as custodian of all the property, under the direction of the court. No action can be maintained by the alien to recover the property, or the increment of the property, while a state of war exists, and he acquires no dominion over it either for use or service. A bequest by one relative to another, though the other be an alien enemy, does not even remotely suggest a purpose to give aid or comfort to the alien enemy, and does not, and in the nature of things cannot, tend to increase his resources. As said by Justice Gray in *Kershaw v. Kelsey*, 100 Mass. 561, 97 Am. Dec. 124, 1 Am. Rep. 142: "At this age of the world, when all the tendencies of the law of nations are to exempt individuals and private contracts from injury or restraint in consequence of war between their governments, we are not disposed to declare such contracts unlawful as have not been heretofore adjudged to be inconsistent with a state of war."

Justice Gray in that case further said: "The result is that the law of nations, as judicially declared, prohibits all intercourse between citizens of the two belligerents which is inconsistent with the state of war between their countries; and that this includes any act of voluntary submission to the enemy, or receiving his protection, as well as any act or contract which tends to increase his resources, and every kind of trading or commercial dealing or intercourse, whether by transmission of money or goods, or orders for the delivery of either, between the two countries, directly or indirectly, . . . or by contract in

any form looking to or involving such transmission. . . . Beyond the principle of these cases the prohibition has not been carried by judicial decision."

What was said there by Justice Gray was quoted with approval by the Supreme Court of the United States in *Williams v. Paine*, in an opinion written by Justice Peckham, reported in 169 U. S. 55, 42 L. ed. 658, 18 Sup. Ct. Rep. 279.

It will be noted that the devisees Marie and Elizabeth Vodder were not represented in the trial of this case, except by the Alien Property Custodian, and it will be noted that he is insisting on the part of the government that the devise be declared valid, and is asking that the property so devised be turned over to him for the use and benefit of the government. The Custodian has alone appealed. Justice Field, in dealing with an act of Congress not unlike the one here under consideration, in *Corbett v. Nutt*, 10 Wall. 464, 19 L. ed. 976, said: "If the devise of Mrs. Hunter can be brought within the language of this last section, it must be because a devise is embraced within the terms 'sales, transfers, and conveyances;' and because her 'aiding and abetting' the Rebellion . . . are legitimate and necessary inferences from her voluntary and continued residence within the Confederate lines. . . . Assuming, however, that a devise is within the 'sales, transfers, and conveyances' invalidated by the act, and that Mrs. Hunter is within the category of persons for whom the warning and proclamation of the President were intended, we are of the opinion that the invalidity declared is limited, and not absolute; that it is only as against the United States that the 'sales, transfers, and conveyances' of property liable to seizure are null and void; and that they are not void as between private persons, or against any other party than the United States. . . . It was to prevent these provisions from being evaded by the parties whose property was

liable to seizure that 'sales, transfers, and conveyances' of the property were declared invalid. They were null and void as against the belligerent or sovereign right of the United States to appropriate and use the property for the purposes designated, but in no other respect, and not as against any other party. Neither the object sought, nor the language of the act, requires any greater extension of the terms used. The United States were the only party who could institute the proceedings for condemnation; the offense for which such condemnation was decreed was against the United States, and the property condemned, or its proceeds, went to their sole use. They alone could, therefore, be affected by the sale."

This case is not directly in point on the question here under consideration, but in a general way it has a bearing upon the question here to be determined.

It will be borne in mind that Anna Kielsmark was a resident and a citizen of the United States; that she was the owner of the property, and acquired and held such ownership under the laws of the United States; that she had a right to convey and dispose of this property as she saw fit; that she had a right to bequeath it to aliens, and aliens had a right to take it under the bequest. The only question legitimately presented to the court was whether or not the instrument was the last will and testament of Anna Kielsmark, executed in conformity with the laws of this state, and whether or not she had testamentary capacity at the time to make the will. The effect of the will, when executed, presented an entirely different question; but the parties, waiving the form in which the question was raised, have presented to us the sole question whether or not, when properly probated, the instrument is effectual as a devise of property within this state, and whether or not the interdiction of public law based upon public policy, or the act of Congress hereinbefore referred to

makes it void. We cannot construe the making of a will as within the inhibition of either the general law or the act of Congress. It certainly is not an act of trading, nor can it be legitimately brought within any of the definitions of trading as made by the act itself.

Will—in favor
of alien enemy—
validity.

We must assume that the testator had a knowledge of the law; knew that any devise which she made would subject the property to confiscation by this government; knew that the devisees could not maintain any action to recover the property or the rent and profits accruing from the property during the continuance of the war; knew that the devisees could get no benefit from the property until after peace was declared. The time of her death was uncertain. The time when the will would become effectual was uncertain. Further, it was provided in the will itself, and this negatives the thought that she was comforting the enemy: "My executor shall hold the property and care for the same until they come, or until five years from the close of the present European War."

She expressly provided that her executor, a resident and citizen of this country and this state, should hold the property until five years from the close of the war, unless the devisees became residents of this country, and residents of the place in which the property was situated. We think the fairer and better rule is that which was suggested and followed in *Weiditschka v. Supreme Tent, K. M.*, decided by this court January 15, 1919, — Iowa, —, 170 N. W. 300. In that case the answer raised the issue that the heirs of the insured person were residents and citizens of Germany, and therefore, as such, not entitled to take, and any bequest to them was void. In that case it was said: "The object [of the law] is not to defeat the alien enemy of his right to recover whatever may be owing him, nor to shield the citizen from the enforce-

ment of his just obligations, but to obviate any advantage being derived by the enemy, directly or indirectly, pending hostilities. These reasons have persuaded many courts to postpone, rather than abate, actions begun before the countries were engaged in war."

Our conclusion is that, instead of declaring the devise invalid, the court should have declared it valid, and ordered the executor to retain the property until such time as peace was declared between this country and Germany. This construction of the law is in accord with that innate sense of fairness, decency, and justice which ought to exist between civilized countries even in time of war, and to require courts that believe in international rights to be more careful to preserve them. To this end the property of the German citizen may be preserved until such time as peace is declared, subject only to the rights of the government to take it under any act providing for the forfeiture

of alien property to the government. In *Ex parte Boussmaker*, 13 Ves. Jr. 71, 33 Eng. Reprint, 221, 9 Revised Rep. 142, the court allowed the claim of an alien enemy to be proved in time of war, and the dividends held by the British court until peace. In that case it was said: "Indeed, the fact that our country is now at war with Germany is all the more reason why this court should most scrupulously award to this German citizen those international and equitable rights which no fair-minded people ever deny, even to their enemies in times of war." [The Kaiser Wilhelm II. L.R.A. 1918C, 795, 159 C. C. A. 88, 246 Fed. 786.]

Upon the whole record we think the case should be reversed, and is reversed, with order to enter decree in harmony with the conclusions herein expressed.

Reversed and remanded.

Weaver, Ch. J., and Ladd and Stevens, JJ., concur.

ANNOTATION.

Right of alien enemy to take by inheritance or by will.

As to the effect of war on a treaty with the enemy country, providing that the subjects of each may hold land descended to them in the other for a certain time, to enable them to dispose of it, see *TECHT v. HUGHES*, post, 166, and accompanying annotation.

As to right of parties to contracts, the performance of which is interfered with or prevented by war conditions or acts of government in prosecution of war, see annotations to *Allanwilde Transport Corp. v. Vacuum Oil Co.* 3 A.L.R. 21, and *Brooke Tool Mfg. Co. v. Hydraulic Gears Co.* 9 A.L.R. 1509.

As to right of resident alien who is a subject of an enemy country to prosecute suit during war, see annotation appended to *Heiler v. Goodman's Motor Exp. Van & Storage Co.* 3 A.L.R. 336.

Independently of express treaty rights, the rule appears to be that an

alien enemy may take land by devise and hold it subject to the will of the government in which the land is situated; in other words, that the devise is not void except as against the government, whose will must be manifested by appropriate action, as by inquest of office or other proceedings, or legislative act equivalent thereto, and that until such governmental action the validity of the devise will be sustained, the property being held in trust until the return of peace. *Fairfax v. Hunter* (1813) 7 Cranch (U. S.) 603, 3 L. ed. 453; *RE KIELSMARK* (reported herewith) ante, 156; *Yeo v. Mercereau* (1842) 18 N. J. L. 387 (recognizing rule); *Re Gregg's Estate* (1920) 266 Pa. 189, 109 Atl. 777, petition for writ of certiorari denied in (1920) 252 U. S. 588, 64 L. ed. 730, 40 Sup. Ct. Rep. 396; *Marshall v. Conrad* (1805) 5 Call (Va.) 364; *Stephen v. Swann* (1838) 9 Leigh (Va.) 404. See

also *Jackson v. Clarke* (1818) 3 Wheat. (U. S.) 1, 4 L. ed. 319, and *Craig v. Radford* (1818) 3 Wheat. (U. S.) 594, 4 L. ed. 467.

The Federal Supreme Court held in *Fairfax v. Hunter* (U. S.) *supra*, that as to the right to take land by devise the same principles applied as respects alien friends and alien enemies; and that an alien enemy might take land in Virginia by devise, and hold the same until office found. The court, after referring to the common-law rule that an alien can take land by purchase, though not by descent, and that there is no distinction whether the purchase is by grant or devise, the estate in either case vesting in the alien subject to be divested by the state, said: "We do not find that in respect to these general rights and disabilities there is any admitted difference between alien friends and alien enemies. During the war, the property of alien enemies is subject to confiscation *jure belli*, and their civil capacity to sue is suspended. . . . But as to capacity to purchase, no case has been cited in which it has been denied. . . . Indeed, the common law in these particulars seems to coincide with the *jus gentium*." And after referring to the contention that even if the alien enemy had capacity to take the land as devisee, he took it to the use of the commonwealth only, and had therefore but a momentary seisin, the title being vested in the commonwealth immediately on the death of the testator, leaving but a mere naked possession in the devisee, the court said: "If we are right in the position that the capacity of an alien enemy does not differ in this respect from an alien friend, it will not be easy to maintain this argument. It is incontrovertibly settled, upon the fullest authority, that the title acquired by an alien by purchase is not divested until office found. The principle is founded upon the ground that as the freehold is in the alien, and he is a tenant to the lord of whom the lands are holden, it cannot be divested out of him but by some notorious act, by which it may appear that the freehold is in another. . . . Now an office of entitling is

necessary to give this notoriety, and fix the title in the sovereign."

The above case was approved by the same court in *Craig v. Radford* (U. S.) *supra*, which involved the validity of a grant of land to a British subject in 1788. The court referred to the *Fairfax* Case as holding that, although the devisee was an alien enemy at the time of the testator's death, yet he took an estate in fee under the will, which could not, on the ground of alienage, be divested except by inquest of office, or by some legislative act equivalent thereto; that the defeasible title thus vested in the alien devisee was completely protected and confirmed by the British Treaty of 1794.

So, in *Marshall v. Conrad* (1805) 5 Call (Va.) 364, *supra*, it was said: "The law is clear that an alien may take by grant . . . and there seems to be no distinction between friends and enemies; for Lord Coke says that it was decided in *Croft's Case* that if an alien enemy takes a lease (which is part of the land), the King shall have it. 1 Inst. 2. This proves that even an alien enemy may take by grant. And there is the same reason for his taking by devise. For the statute enables the testator to dispose of his lands by will, and transfers the possession, without any act to be done, to the devisee, who takes by purchase exactly as the grantee does."

The view was taken also in *Stephen v. Swann* (1838) 9 Leigh (Va.) 404, *supra*, that there can be no sound distinction between a devise to an alien friend, and a devise to an alien enemy.

The right of the commonwealth to the land devised does not arise out of a state of war, but results from mere municipal legislation; it accrues not because the person purchasing is an enemy, but because he is an alien, and is not a right directed against the subjects of a particular power with whom the country may chance to be at war, but against the subjects of all foreign nations whatsoever. *Ibid*.

And the doctrine that generally, as to rights and disabilities with respect to real property, there is no difference

between alien friends and alien enemies, although their right to maintain an action with respect to such property may be different, is recognized in *Hardy v. DeLeon* (1849) 5 Tex. 211.

The rule that an alien enemy may take land by devise has been recognized also in some cases involving the rights of adherents of the Confederacy in the Civil War, although these cases cannot be regarded as strictly in point in the note. *Conrad v. Waples* (1878) 96 U. S. 279, 24 L. ed. 721; *Hoskins v. Gentry* (1865) 2 Duv. (Ky.) 285; *Crutcher v. Hord* (1868) 4 Bush (Ky.) 360; *Kershaw v. Kelsey* (1868) 100 Mass. 561, 97 Am. Dec. 124, 1 Am. Rep. 142.

In *Crutcher v. Hord* (1868) 4 Bush. (Ky.) 360, *supra*, a case involving rights between residents of the North and the South during the Civil War, growing out of a foreclosure sale, the court said that the parties for many purposes sustained the relation of alien enemies, yet that even alien enemies had many rights as to each other, and that in many instances the individual could not interpose when the government could; that "an alien enemy may be the devisee of real estate or the distributee or legatee of personalty; and if the government takes no proceedings of confiscation or sequestration, it will be no defense to their claim when such relation has ceased by the termination of the war."

And it is said (*obiter*) in *Kershaw v. Kelsey* (Mass.) *supra*, a case involving the validity of a lease made during the Civil War between citizens of the North and the South, that by the common law, as declared by the American courts, an alien may take land by purchase, either by grant or by devise, and hold or convey the title, or in time of peace recover it by suit, subject in either case to be divested by inquest of office; and that in regard to real estate there is no difference between an alien friend and an alien enemy, except that the latter cannot maintain an action to recover it while the war lasts, and that it may be confiscated by an extraordinary act of the government.

To the same effect as the reported

case (*RE KIELSMARK*, *ante*, 156), holding that a devise to an alien enemy is not void because of the Federal statute prohibiting trading with the enemy, is *Gregg's Estate* (1920) 266 Pa. 189, 109 Atl. 777, petition for a writ of certiorari denied in (1920) 252 U. S. 588, 64 L. ed. 730, 40 Sup. Ct. Rep. 396, where, assuming that the devise might be unlawful under the clause defining the meaning of the term "to trade," the view is taken that the illegality is only as to the government, and the residuary legatees were not entitled to the property, but that the same should be held by the Alien Property Custodian in trust, awaiting disposition by action of Congress at the close of the war.

The above construction of the Federal "Trading with the Enemy Act" is based in part on the construction of the Statute of 1862, passed by Congress for the purpose of suppressing insurrection, authorizing a seizure and confiscation of property of Confederates, as interpreted in *Corbett v. Nutt* (1871) 10 Wall. (U. S.) 464, 19 L. ed. 976, holding that it was only as against the United States that the sales, transfers, and conveyances of property liable to seizure were null and void. See quotation from this case in the reported case (*RE KIELSMARK*).

And this construction of the Act of Congress of 1862 was applied in *Smith v. Gaines* (1884) 38 N. J. Eq. 65, reversed on other grounds in (1885) 39 N. J. Eq. 545, where, assuming that the resident of a southern state should be regarded as subject to the disabilities of alien enemies during the Civil War, the court held that a devise of land in New Jersey to such a resident was good and passed title.

Property held by a trustee under a will for the benefit of an alien enemy beneficiary, and not merely property the legal title to which was in the alien enemy, was held in *Keppelmann v. Palmer* (1919) — N. J. —, 108 Atl. 432, to be subject to seizure by the Alien Property Custodian, under the provision of the "Trading with the Enemy Act" that, if the President so required, any money or other property

"owing or belonging to, or held for, by, on account of, or on behalf of, or for the benefit of an enemy or ally of enemy," should be delivered to the Alien Property Custodian.

The contention was overruled in *Keppelmann v. Palmer* (N. J.) *supra*, that, even if the Alien Property Custodian was entitled to the property as against the alien enemy beneficiaries themselves, he was not entitled to it as against persons who, after the testator's death, but before the declaration of war, had received a power of attorney from the alien beneficiaries to accept and receipt for property distributed under the will, the rights of such attorneys not being superior to those of the principals.

And the Alien Property Custodian was held entitled to the property without the execution of a refunding bond required by the New York statute. *Ibid.*

In this connection, attention is called to the statement in an earlier proceeding in the above case, in the New Jersey court of chancery, reported in (1918) — N. J. —, 103 Atl. 27, that the Act of Congress of 1917 to punish trading with the enemy should be construed in the light of two purposes: First, absolutely to prevent any act which would result in a detriment to the United States in the progress of the war; and, second, not to permit or compel any act which would result in an injury to an individual alien enemy, which act would in no wise benefit the United States in the progress of the war.

And although on facts beyond the scope of the note, attention is called to the statement in *Posselt v. D'Espard* (1917) 87 N. J. Eq. 571, 100 Atl. 893, which apparently represents the modern judicial view, that "the right of government to confiscate property of alien enemies and close the doors of its courts to them, whether resident here or elsewhere, may be conceded. Whether that right is to be exercised is a matter of policy. The modern trend is to discourage interference with property rights, whether of friends or enemies, in time of war, except so far as may be necessary to

effectively accomplish the objects of the war."

So, generally, it is said in 27 R. C. L. p. 924, that "a declaration of war does not, in itself, enact a confiscation of the property of alien enemies within the territory of the belligerent power. An alien enemy holds his property legally against all the world but the sovereign. The power to confiscate is discretionary, and not to be exercised in the interest of private citizens, and the modern tendency is to withhold the property of the alien enemy, if necessary, and restore it to him at the termination of hostilities."

An alien, although an enemy, was held in *Bradwell v. Weeks* (1814) 1 Johns. Ch. (N. Y.) 206, to be a next of kin, within the New York statute providing that in the case of an intestate dying without issue a moiety of the personal estate shall go to the widow, and the residue "shall be distributed equally to every of the next of kin of the intestate." The decision was, however, reversed in (1815) 13 Johns. 1, where the judges present were equally divided, and the president of the court, the lieutenant governor, cast the deciding vote for reversal. In view of the facts that the decision of the lower court was rendered in an able opinion by Chancellor Kent, that on appeal all of the judges of the supreme court who were present voted for affirmance, and that the reversal, without any reported opinion supporting it, was due only to the votes of certain senators and the casting vote of the lieutenant governor, as above stated, the lower court's opinion would seem the more valuable as a precedent in other jurisdictions.

It was held in *Techt v. Hughes* (N. Y.) post, 166, that an American woman who married a citizen of Austria-Hungary resident in the United States was an alien enemy after the declaration of war with Austria in 1917, although neither she nor her husband was interned, but continued to reside peaceably in the United States, without question as to their loyalty; and therefore it was held that, as an alien enemy, she was not entitled to inherit real estate under a statute providing

that a citizen of the United States is capable of holding real property within the state, and of taking the same by descent, and that "alien friends" are empowered to take, hold, transmit, and dispose of real property within the state in the same manner as native-born citizens. It was held, however, that she might take the property under the treaty with Austria, providing that where, on the death of any person holding real property within the territories of one of the parties to the treaty, such real property would by the laws of the land descend to a citizen or a subject of the other, were he not disqualified by the laws of the country where the property is situated, such citizen or subject shall be allowed a term of two years to sell the same.

It was held in *Atty.-Gen. v. Weeden* (1699) Park. Exch. 267, 145 Eng. Reprint, 776, that legacies to an alien enemy were forfeitable to the Crown; but that to entitle the Crown thereto, an inquisition was necessary; that if peace was concluded before the inquisition was taken, the cause of forfeiture was discharged; and that an inquisition taken after the declaration of peace was ineffective, since the cause of forfeiture was removed before the King's title was found.

In the recent case of *Henderson v. Schiff* (1920) 37 Times L. R. (Eng.)

31, where the testator, in a will made during the World War, bequeathed the income from certain property to German subjects, it was held that a provision in the will that, in the event of legislation precluding them from taking the property, it should go to certain other persons, was not invalid as against public policy.

The case of *Weiditschka v. Supreme Tent, K. M.* (1919) — Iowa, —, 170 N. W. 300, cited in the reported case (*RE KIELSMARK*, ante, 156), holds that an insurance company, against which an action was begun in 1914 by the administrator of the insured for the amount of the insurance, could not object that, after the declaration of war with Germany in 1917, the action was not abated, but was continued until the termination of hostilities, on the ground that those entitled to the insurance were residents and citizens of Germany.

And that an alien enemy, resident abroad, who claims to be the sole heir of personal property of one who dies in this country during the war, may be entitled to a continuance, until peace, of a proceeding for distribution of the estate, brought by parties claiming in a more remote degree, where he cannot fully establish his claims because of the war, see *Re Henrichs* (1919) 180 Cal. 175, 179 Pac. 883. R. E. H.

SARA E. TECHT, Also Known as "Sarah" E. Techt, Respt.,

v.

ELIZABETH L. HUGHES, Impleaded, etc., Appt.

New York Court of Appeals — June 8, 1920.

(229 N. Y. 222, 128 N. E. 185.)

Treaty — effect of war upon.

1. The courts will not regard the breaking out of war as ipso facto abrogating so much of a treaty with the enemy country as provides that the subjects of each may hold land descended to them in the other, for a certain time, to enable them to dispose of it.

[See note on this question beginning on page 180.]

Descent — right of alien.

2. At common law an alien could take nothing by descent.

[See 1 R. C. L. 808.]

Alien — effect of marriage to.

3. Under the Federal statute, marriage of an American woman to an alien works expatriation.

[See 1 R. C. L. 859.]

Definition — "alien friend."

4. An "alien friend," who is by statute permitted to inherit lands, is a

subject of a foreign state at peace with the United States.

[See 1 R. C. L. 795.]

Descent — statutory right — effect on implication.

5. Where a statute expressly declares who may inherit lands, there is no room for an implied right on the part of others.

Treaty — effect on local laws.

6. A treaty supersedes all local laws inconsistent with its terms.

[See 1 R. C. L. 807; see also note in 4 A.L.R. 1391.]

APPEAL by defendant Elizabeth L. Hughes from a judgment of the Appellate Division of the Supreme Court, First Department, affirming an interlocutory judgment of a Special Term, Part III., for New York County (Giegerich, J.), in favor of plaintiff in an action for partition of real property. *Affirmed.*

The question certified by the appellate division is as follows: "Has the plaintiff herein an estate of inheritance in the real property sought to be partitioned in this action?"

The facts sufficiently appear in the opinion of the court.

Mr. Joseph Day Lee, for appellant:

Plaintiff on the date of her father's death was not an alien friend, within the meaning of the Real Property Law, and was, therefore, an alien enemy.

State ex rel. Constanti v. Darwin, 102 Wash. 402, L.R.A.1918F, 1012, 173 Pac. 29; 3 Vattel, Nations, chap. 5, p. 321; Hall, International Law, 6th ed. 383; 1 Kent. Com. 55; 2 Halleck, International Law, 1; Thurn & Taxis (Princess) v. Moffitt [1915] 1 Ch. 58 [1914] W. N. 379, 84 L. J. Ch. N. S. 220, 112 L. T. N. S. 114, 31 Times L. R. 24, 59 Sol. Jo. 26; Yeo v. Mercereau, 18 N. J. L. 387; United States v. 100 Barrels of Cement, Fed. Cas. No. 15,945; McCarthy v. Marsh, 5 N. Y. 263; McGregor v. Comstock, 3 N. Y. 408; Wadsworth v. Wadsworth, 12 N. Y. 376; 2 Bl. Com. 249; Jackson ex dem. Fitz Simmons v. Fitz Simmons, 10 Wend. 9, 24 Am. Dec. 198; Mick v. Mick, 10 Wend. 379; Beck v. McGillis, 9 Barb. 35.

Under the Treaty of 1848 with Austria-Hungary, the potential right of defendant to inherit lands in this state was abrogated by the declaration of war.

Stewart v. Russell, 91 App. Div. 310, 86 N. Y. Supp. 625; Orser v. Hoag, 3 Hill, 79; Wheaton, International Law, 5th ed. 377; Wilson & T. International Law, 238; Stockton, International Law, 264; Davis, Elements of Law, 239; 1 Kent, Com. 176.

The legislature did not discriminate against citizens in favor of aliens, in enacting § 10 of the Real Property Law.

Luhrs v. Eimer, 80 N. Y. 171.

Plaintiff had no right of inheritance prior to the outbreak of the war.

Orser v. Hoag, 3 Hill, 79.

Messrs. Samuel Franklin and Joseph Rosenzweig, with Mr. Bernard H. Levy, for respondent:

Under § 10 of the Real Property Law, plaintiff is entitled to take and acquire by inheritance a one-half share of the real estate of which her father died seised.

Bank of the Metropolis v. Faber, 150 N. Y. 200, 44 N. E. 779; Re Hudson City Sav. Inst. 5 Hun, 612; Miller v. McKeon, 15 App. Div. 133, 44 N. Y. Supp. 371; Hall v. Hall, 81 N. Y. 130; Parker v. Linden, 113 N. Y. 28, 20 N. E. 858, 861; Goodrich v. Russell, 42 N. Y. 177.

The plaintiff did not, by marrying an Austrian subject, become subject to all the disabilities of alienage, such as inability to inherit the property of her father, and under § 51 of the Domestic Relations Law she had the right to acquire and hold real estate as if she were unmarried.

Wright v. Saddler, 20 N. Y. 320; McIlvaine v. Kadel, 3 Robt. 429; Mygatt v. Coe, 152 N. Y. 457, 57 Am. St. Rep. 521, 46 N. E. 949.

On December 27, 1917, the date of

James J. Hanigan's demise, there was no Federal statute in force, or proclamation of the President issued, changing the status of plaintiff from alien friend to alien enemy, and it therefore follows that her status was that of a friend.

State ex rel. Constanti v. Darwin, 102 Wash. 402, L.R.A.1918F, 1012, 173 Pac. 29; Arndt-Ober v. Metropolitan Opera Co. 182 App. Div. 513, 169 N. Y. Supp. 944; Tortoriello v. Seghorn, — N. J. Eq. —, 103 Atl. 393; Heiler v. Goodman's Motor Exp. Van & Storage Co. 92 N. J. L. 415, 3 A.L.R. 336, 105 Atl. 233; Kannengiesser v. Israelowitz, 107 Misc. 349, 176 N. Y. Supp. 535; Porter v. Freudenberg [1915] 1 K. B. 857, 5 B. R. C. 548 [1915] W. N. 43, 84 L. J. K. B. N. S. 1001, 112 L. T. N. S. 313, 31 Times L. R. 162, 59 Sol. Jo. 216, 20 Com. Cas. 189, Ann. Cas. 1917C, 215; Janson v. Driefontein Consol. Mines [1902] A. C. 505, 5 B. R. C. 810, 71 L. J. K. B. N. S. 857, 87 L. T. N. S. 372, 18 Times L. R. 796, 7-Com. Cas. 268.

If it be determined that plaintiff was an alien enemy, and for that reason unable to take by inheritance under § 10 of the Real Property Law, then such disability was entirely removed by virtue of the treaty between the United States and Austria proclaimed February 25, 1850, under the terms of which plaintiff, as an Austrian subject, would be entitled to dispose of her share of the real estate left by her father.

Bollerman v. Blake, 24 Hun, 187, 94 N. Y. 624; Kull v. Kull, 37 Hun, 476; Re Beck, 2 Connoly, 355, 31 N. Y. S. R. 965, 11 N. Y. Supp. 199; Hauenstein v. Lynham, 100 U. S. 483, 25 L. ed. 628; Wunderle v. Wunderle, 144 Ill. 40, 19 L.R.A. 84, 33 N. E. 195; Maiden v. Ingersoll, 6 Mich. 373; People ex rel. Atty. Gen. v. Gerke, 5 Cal. 381; United States v. 43 Gallons of Whiskey (United States v. Lariviere) 93 U. S. 198, 23 L. ed. 848; Chirac v. Chirac, 2 Wheat. 259, 4 L. ed. 234; Scharpf v. Schmidt, 172 Ill. 255, 50 N. E. 182; Fischer v. Sklenar, 101 Neb. 553, 163 N. W. 861.

The right acquired by plaintiff to take by inheritance, prior to December 7, 1917, under § 10 of the Real Property Law, should not be taken away from her by the circumstance that a war intervened between that date and

December 27, the date of her father's death.

Jackson ex dem. Gansevoort v. Lunn, 3 Johns. Cas. 109.

Cardozo, J., delivered the opinion of the court:

James J. Hannigan, a citizen of the United States, died intestate on December 27, 1917, seised in fee simple of real estate in the city of New York. Two daughters, the plaintiff, Sara E. Techt, and the defendant, Elizabeth L. Hughes, survived him. In November, 1911, the plaintiff became the wife of Frederick E. Techt, a resident of the United States, but a citizen of Austria-Hungary. On December 7, 1917, twenty days before the death of plaintiff's father, war was declared between Austria-Hungary and the United States. The record contains a concession that neither the plaintiff nor her husband has been interned, nor has the loyalty of either been questioned by the government of state or nation, and that both, remaining residents of the United States, have kept the peace and obeyed the laws. The plaintiff's capacity on December 27, 1917, to acquire title by descent, is the question to be determined.

The rule at common law was that aliens might take lands by purchase, and hold until office Descent—
right of alien. found, but could take nothing by descent. Martin v. Hunter, 1 Wheat. 304, 4 L. ed. 97; Hauenstein v. Lynham, 100 U. S. 483, 25 L. ed. 628; Haley v. Sheridan, 190 N. Y. 331, 83 N. E. 296; 2 Kent, Comm. 54.

"If an alien could acquire a permanent property in lands, he must owe an allegiance equally permanent with that property to the King of England, which would probably be inconsistent with that which he owes to his own natural liege lord, besides that thereby the nation might in time be subject to foreign influence, and feel many other inconveniences." 1 Bl. Com. 372.

Blackstone was repeating the explanation which was already traditional in his day. Inheritance by

aliens, says Coke (Calvin's Case, 7 Coke 1, 19, 77 Eng. Reprint, 377), would "tend to the destruction of the realm." And if it be demanded, "Wherein doth that destruction consist?" his answer is: "First, it tends to destruction tempore belli; for then strangers might fortify themselves in the heart of the realm, and be ready to set fire on the commonwealth,"—for all which he finds example and warning in the legend of the Trojan horse. Artificial and far-fetched may seem to-day this defense of the policy of the rule. We may even doubt whether it is sound in history. 1 Pollock & M. History of English Law, 445. That is little to the point. The rule, whatever its origin, is inveterate and undoubted. It survives to-day, except as statute or treaty may have abrogated or changed it.

The plaintiff is indisputably an alien. Congress has enacted that "any American woman who marries a foreigner shall take the nationality of her husband." Act March 2, 1907, chap. 2534, § 3, 34 Stat. at L. 1228, Comp. Stat. § 3960, 2 Fed. Stat. Anno. 2d ed. p. 123.

That statute was considered in *Mackenzie v. Hare*, 239 U. S. 299, 60 L. ed. 297, 36 Sup. Ct. Rep. 106, Ann. Cas. 1916E, 645, where an American-born woman, married to a British subject and residing in California, was held, by force of her marriage, to have lost the right to vote. Compare the reciprocal rights of alien women who marry citizens of the United States. U. S. Rev. Stat. § 1994, 10 Stat. at L. 604, chap. 71, (Comp. Stat. § 3948, 2 Fed. Stat. Anno. 2d ed. p. 117); *Kelly v. Owen*, 7 Wall. 496, 19 L.

Alien—effect of marriage to.

ed. 283. Marriage to an alien is voluntary expatriation. The plaintiff is in the same position as if letters of naturalization had been issued to her in Austria. She is in the same position as her husband. She is without capacity to inherit, unless statute or treaty has removed the disability.

Both statute and treaty are invoked in her behalf. The statute

says that "a citizen of the United States is capable of holding real property within this state, and of taking the same by descent, devise or purchase," and that "alien friends are empowered to take, hold, transmit and dispose of real property within this state in the same manner as native-born citizens and their heirs and devisees take in the same manner as citizens." Real Prop. Law, § 10, as amended by Laws 1913, chap. 152; Consol. Laws, chap. 50.

Alien enemies, therefore, have such rights, and such only, as were theirs at common law. The treaty says that "where, on the death of any person holding real property, or property not personal, within the territories of one party, such real property would, by the laws of the land, descend on a citizen or subject of the other, were he not disqualified by the laws of the country where such real property is situated, such citizen or subject shall be allowed a term of two years to sell the same; which term may be reasonably prolonged, according to circumstances; and to withdraw the proceeds thereof, without molestation, and exempt from any other charges than those which may be imposed in like cases upon the inhabitants of the country from which such proceeds may be withdrawn." Article 2 of Convention between United States and Austria, concluded May 8, 1848, and proclaimed October 25, 1850; 9 Stat. at L. 944, extending the stipulations of the treaty of commerce and navigation, concluded August 27, 1829, and proclaimed February 10, 1831, 8 Stat. at L. 398.

Statute and treaty will be separately considered.

(1) If the plaintiff's capacity to inherit depended solely on the statute, I should feel constrained to hold against her. I cannot follow the appellate division in its view that she is in law an "alien friend." The wisdom or fairness of the statute I make no attempt to vindicate. Our duty is done when we enforce the law as it is written. In the primary

meaning of the words, an alien friend is the subject of a foreign state at peace with the United States; an alien enemy is the subject of a foreign state at war with the United States. 1 Kent, Com. p. 55; 2 Halleck, International Law, 1908 Rev. p. 1; Hall, International Law, 7th ed. p. 403, § 126; Baty & Morgan, "War: Its Conduct and Legal Results," p. 247; 1 Laws of England (Halsbury) p. 310; Sylvester's Case, 7 Mod. 150, 88 Eng. Reprint, 1157; The Roumania, L. R. [1915] P. 26, 84 L. J. Prob. N. S. 65, 112 L. T. N. S. 464, 31 Times L. R. 111, 59 Sol. Jo. 206, affirmed in [1916] A. C. 124, [1915] W. N. 368, 32 Times L. R. 98, 60 Sol. Jo. 58; Griswold v. Waddington, 16 Johns. 438, 448; White v. Burnley, 20 How. 235, 249, 15 L. ed. 886, 889; The Benito Estenger, 176 U. S. 568, 571, 44 L. ed. 592, 593, 20 Sup. Ct. Rep. 489; Kershaw v. Kelsey, 100 Mass. 561, 97 Am. Dec. 124, 1 Am. Rep. 142. So all the lexicographers, as, e. g., Webster, Murray, Abbott, Black, Bouvier. This primary meaning must be taken to be the true one, unless evidence is at hand that some other meaning was intended.

There are times, indeed, when alien enemies are relieved of disabilities, and treated in the same way, or nearly the same way, as friends. Porter v. Freudenberg [1915] 1 K. B. 857, 5 B. R. C. 548, [1915] W. N. 43, 84 L. J. K. B. N. S. 1001, 112 L. T. N. S. 313, 31 Times L. R. 162, 59 Sol. Jo. 216, 20 Com. Cas. 189, Ann. Cas. 1917C, 215; Clarke v. Morey, 10 Johns. 69; Hall, International Law, 7th ed. p. 410; Scrutton, The War and the Law, 34 Law Quarterly Rev. 120, 121; McNair, Alien Enemy Litigants, id. 134; Picciotto, Alien Enemies in English Law, 27 Yale L. J. 167, 168; The Right of Alien Enemies to Sue, id. 104, 105; 1 Bl. Com. 372, 373. Unless they are present in the hostile territory, or are found adhering to the enemy, they retain, by express or implied license of the sovereign, many of the

privileges that belong to them in peace. Sometimes, though loosely, we speak of them as friends, for the purpose of characterizing their status when they are brought within the range of exemption, tacit or proclaimed. The truth is that they are enemies, who, within the limits placed by the sovereign upon a revocable license, enjoy the privileges of friends. Their identification with friends is never complete. Baty & Morgan, "War: Its Conduct and Legal Results," p. 252. They are subject to one restriction or another betokening their enemy character. No doubt there is a growing tendency to narrow the field of disability. The day may come when the movement will have spread so far that the subject of a hostile power, residing within our territory and yielding obedience to our laws, will be ranked as a friend, not for some purposes, but for all. But in construing a statute we assume that the legislature has spoken in the light of the law as it is, and not as it may hereafter be. The law as declared in New York, when this statute was enacted, held fast to the old moorings. Its history, briefly followed, may make the solution of the problem clearer.

In the beginnings of English law, the bodies of alien enemies found within the realm were seized, and their goods were forfeit to the Crown. Pollock & M. History of English Law, supra; Hall, International Law, 461, 462; 2 Westlake, International Law, p. 44; East-India Co. v. Sandys (1684) How. 10 St. Tr. at page 487. The first relaxation was in favor of the merchant class. 2 Westlake, International Law, p. 44. We read in Magna Charta that "if in time of war merchants of the country at war with us shall be found in our country at the outbreak of the war, they shall be attached without damage to their bodies, or their goods, until it is known to us or to our Chief Justice how merchants of our country who are then found in the country at war with us are treated; and if ours are

safe there, the others shall be safe in our country." 2 Westlake, *supra*. Cf., the Statute of Staples, 27 Edw. III. 1354; also 2 Holdsworth, *History of English Law*, p. 393.

From foreign merchants, protection spread to others. They were still enemies, however, and were far from remaining in the realm on terms of equality with friends. Coke, writing in 1608 (Calvin's Case, 7 Coke, 1, 77 Eng. Reprint, 377), tells us that an alien friend may acquire goods personal as an Englishman, and may maintain an action for the same.

"But if this alien become an enemy (as all alien friends may), then he is utterly disabled to maintain any action, or get anything within this realm. And this is to be understood of a temporary alien that, being an enemy, may be a friend, or, becoming a friend, may be an enemy." Calvin's Case, *supra*.

In time the courts held that alien enemies, if permitted to remain within the realm, might sue in English courts. Wells v. Williams (1697) 1 Ld. Raym. 282, 91 Eng. Reprint, 1086. They were within the protection of the King's license, either tacit or express. *Ibid.*; Daubigny v. Davallon (1794) 2 Anst. 462, 145 Eng. Reprint, 936; Porter v. Freudenberg [1915] 1 K. B. 857, 868, 5 B. R. C. 548, [1915] W. N. 43, 84 L. J. K. B. N. S. 1001, 112 L. T. N. S. 313, 31 Times L. R. 162, 59 Sol. Jo. 216, 20 Com. Cas. 189, Ann. Cas. 1917C, 215.

"Treby, Chief Justice, said that wars at this day are not so implacable as heretofore, and therefore an alien enemy, who is here in protection, may sue his bond or contract; but an alien enemy abiding in his own country cannot sue here." Wells v. Williams, *supra*.

So the law has since remained for aliens within the realm. Porter v. Freudenberg, *supra*; Thurn & Taxis (Princess) v. Moffitt [1915] 1 Ch. 58 [1914] W. N. 379, 84 L. J. Ch. N. S. 220, 112 L. T. N. S. 114, 31 Times L. R. 24, 59 Sol. Jo. 26; Re Stahlwerk Becker Aktiengesell-

schaft's Patent [1917] 2 Ch. 272. Even so, they were enemies, and not to be confused with friends. A prisoner of war might sue, though assuredly an enemy. Heath, J., in Sparenburgh v. Bannatyne, 1 Bos. & P. 163, 171, 126 Eng. Reprint, 837, 2 Esp. 581, 4 Revised Rep. 772; Clarke v. Morey, 10 Johns. 69. So might an interned alien under the English statute (Schaffenius v. Goldberg [1916] 1 K. B. 284, 7 B. R. C. 842, 85 L. J. K. B. N. S. 374, 113 L. T. N. S. 949, 32 Times L. R. 133, 60 Sol. Jo. 105), though we express no opinion whether he has a like right under ours. (Cf. Birge-Forbes Co. v. Heye, 251 U. S. 317, 319, 64 L. ed. 286, 40 Sup. Ct. Rep. 160). The concession of these privileges to enemies resident within the realm neither transformed them into friends nor put the two classes on a parity. That is true of enemies in our day as of enemies in the past. Their presence is permitted, "subject to various arbitrary regulations." Baty & Morgan, "War: Its Conduct and Legal Results," p. 252. They have no "general license" to live on the same footing as Englishmen and friends. *Ibid.*

A like development has taken place in the United States. Kent, writing in 1813, held that alien enemies, if permitted to remain in the United States, could maintain actions in our courts. Clarke v. Morey, 10 Johns. 69. That they were enemies, he did not doubt. See pages 70, 71; also Commentaries, vol. 1, p. 55. A few years later, in Griswold v. Waddington, 16 Johns. 438, he makes his position plain. He will have none of the new doctrine, inspired by the teachings of Rousseau (Hall, *International Law*, 7th ed. p. 66; 2 Westlake, *International Law*, p. 40), that war is a relation solely between bodies politic, and not between individuals. He holds that "a war on the part of the government is a war on the part of all the individuals of which that government is composed." 16 Johns. 448, citing Vattel, Grotius and Burlamaqui. Other courts took

the same ground. "Every individual of the one nation must acknowledge every individual of the other nation as his own enemy—because the enemy of his country." *The Rapid*, 8 Cranch, 155, 3 L. ed. 520; *White v. Burnley*, 20 How. 235, 249, 15 L. ed. 886, 889; *Cooke v. United States*, 2 Wall. 218, 17 L. ed. 755; *Lamar v. Browne*, 92 U. S. 187, 23 L. ed. 650.

It is not a question of personal sentiments or friendship. *The Benito Estenger*, 176 U. S. 568, 571, 44 L. ed. 592, 593, 20 Sup. Ct. Rep. 489. It is a question of the allegiance due from the subject to the sovereign. I do not stop to inquire whether international law should put aside this conception of war as involving a relation between individuals, and substitute Rousseau's conception of a relation solely between states. *Hall, supra*, p. 66. The legislature of New York cannot have supposed, when it passed this statute in 1913, that the change had yet been made. The words "alien friend" and "alien enemy" had come down through the centuries, freighted with a significance which they had gained under the old order. The plaintiff has the burden of showing that, as used in this statute, they were filled with a new content.

I think the content is unchanged. At the threshold is met the evidence supplied by kindred legislation. This statute is one of a type. Throughout the type, the phraseology varies. The thought back of it is constant. In New York, the first statute regulating the rights of aliens in respect of lands was passed in 1798. *Laws 1798*, chap. 72. Its language is that "all and every conveyance or conveyances, hereafter to be made or executed to any alien or aliens, not being the subject . . . of some foreign state or power, which is or shall be at the time of such conveyance at war with the United States of America, shall be deemed valid, to vest the estate thereby granted in such alien or aliens." *Cf. Laws 1819*, chap. 25.

In other states, we find a like restriction. New Jersey says that it

shall be lawful for "any alien, not being the subject of any state or power which shall be . . . at war with the United States," to take by purchase and descent. 1 N. J. Comp. Stat. p. 39. Georgia gives a like right to "aliens, the subjects of governments at peace with the United States." *Ga. Code*, § 2173. Maryland, Kentucky, and West Virginia speak of "aliens not enemies." *Bagby's Code* (Ind.) art. 3, § 1; *Ky. Codes* (Carroll) 1915, §§ 334, 337; *Hogg's Code* (W. Va.) 1913, §§ 3737, 3738. I am persuaded that these statutes, whatever the differences of phraseology (*Davis v. Davis*, 75 N. Y. 221), reveal the same policy and mean the same thing.

Acts of Congress having relation to different, but kindred, topics, help to fix the meaning. Section 2171 of the United States Revised Statutes, *Comp. Stat.* § 4362, 6 *Fed. Stat. Anno.* 2d ed. p. 947, declares in substance that "alien enemies" shall not be naturalized. See also (1918) 40 *Stat. at L.* 545, chap. 69, *Fed. Stat. Anno. Supp.* 1918, p. 491. The courts have applied the prohibition to citizens of Austria-Hungary. *Ex parte Graber* (D. C.) 247 *Fed.* 882; *Ex parte Blazekovic* (D. C.) 248 *Fed.* 327. Another act of Congress declares that all male citizens or male persons "not alien enemies," who have declared their intention to become citizens, between the ages of twenty-one and thirty, shall be subject to the draft. (1918) 40 *Stat. at L.* 885, chap. 143, subchap. XII. § 4 (*Comp. Stat.* § 2044b, *Fed. Stat. Anno. Supp.* 1918, p. 895). Other legislative bodies use the same words with the same meaning. Texas and Connecticut have passed laws that "alien enemies" must register. *Gen. Laws* (Tex.) 1918, p. 202; *Public Acts* (Conn.) 1917, p. 2503. Great Britain, in the Alien Restriction Order (part III. § 28), issued under the authority of the British Alien Restriction Act of 1914, has said that "the expression 'alien friend' means an alien whose sovereign or state is at peace with his Majesty, and the

expression 'alien enemy' means an alien whose sovereign or state is at war with his Majesty."

I find that nothing overbears the cumulative force of all this statutory definition, either in the President's proclamation of December 11, 1917, issued under the authority of § 4067 of the United States Revised Statutes (Comp. Stat. § 7615, 1 Fed. Stat. Anno. 2d ed. p. 364), or in the Act of October 6, 1917 (40 Stat. at L. p. 411, chap. 106, Comp. Stat. §§ 3115½a-3115½j, Fed. Stat. Anno. Supp. 1918, pp. 847-867) "to define, regulate, and punish trading with the enemy."

Section 4067 of the United States Revised Statutes, as in force in December, 1917, provided that, in case of war, all "subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed, as alien enemies," and "the President is authorized, in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed, on the part of the United States, toward the aliens who become so liable; the manner and degree of the restraint to which they shall be subject and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom; and to establish any other regulations which are found necessary in the premises and for the public safety."

An amendment of the statute in April, 1918, extended its scope to women. 40 Stat. at L. chap. 55, p. 531, Comp. Stat. § 7615, Fed. Stat. Anno. Supp. p. 60. On April 6, 1917, at the outbreak of the war with Germany, and again on November 16, 1917, the President issued proclamations regulating the conduct of German subjects resident in the United States. 40 Stat. at L. pp. 1650, 1716. On December 11, 1917,

he issued a proclamation regulating the conduct of subjects of Austria-Hungary resident in the United States. 40 Stat. at L. p. 1729. After the amendment of § 4067 in April, 1918, a supplemental proclamation of May 31, 1918, brought women within the scope of the regulations then applicable to men. 40 Stat. at L. 1786. The restrictions laid upon German subjects remaining in the United States were many and minute. They were subject to summary arrest and internment by order of the President. They could not possess firearms or explosives. They could not approach forts, or arsenals, or munition factories. They could not depart from the United States without the permit of the President or the order of a court. They were excluded from the District of Columbia. They could not enter railroad depots, yards, or terminals without license. They were commanded to register, and their presence in the United States, its territories and possessions, became unlawful, without registration cards upon their persons.

Restrictions imposed upon the subjects of Austria-Hungary were fewer and less burdensome, yet the proclamations did not leave them on an equality with friends. They were not at liberty to depart from the United States without permit of the President or the order of a court. They could not land in or enter the United States except under such restrictions and at such places as the President might prescribe. They were subject to summary arrest and internment whenever there was reasonable cause for the belief that their presence at large was a menace to the peace and safety of the country. No doubt they retained many of the privileges that had been theirs in times of peace. That was true of Germans also. The courts were open to them. Keeping within the law, they might live their lives and pursue their callings unmolested. Overnight, however, a proclamation of the President might subject them to new burdens. The great immu-

nities of the Constitution were not theirs in undiminished force. *De Lacey v. United States*, L.R.A. 1918E, 1011, 161 C. C. A. 535, 249 Fed. 625; *Ex parte Fronklin* (D. C.) 253 Fed. 984; *Salamanca Ins. Co. v. New York Life Ins. & T. Co.* (D. C.) 254 Fed. 852. Cf. Bl. Com. 372. What others did confidently and of right, they did by sufferance and doubtfully, uncertain of the restrictions of the morrow. They were alien enemies, treated with liberality, but watched with a suspicious eye as enemies, and never identified with friends.

The Trading with the Enemy Act (40 Stat. at L. chap. 106, p. 411) did not invest them with a different status. Its definition of an enemy was "for the purposes of such trading and of this act," and for no other. Trade was prohibited with anyone resident within the hostile territory, even though a citizen of the United States, and with such other persons, wherever resident, if subjects of the hostile nation, as might be brought within the term "enemy" by proclamation of the President. The prohibition in its main features is in line with the restrictions which would have been imposed in default of any statute. But the disability of aliens in respect of the ownership of lands has no connection with their disabilities in respect of the privileges of trade. *Kershaw v. Kelsey*, 100 Mass. 561, at pages 574, 575, 97 Am. Dec. 124, 1 Am. Rep. 142; *Fairfax v. Hunter*, 7 Cranch, 603, 620, 3 L. ed. 453, 458; *London & N. Estates Co. v. Schlesinger* [1916] 1 K. B. 20, 7 B. R. C. 809, 85 L. J. K. B. N. S. 369, 114 L. T. N. S. 74, 32 Times L. R. 78, 60 Sol. Jo. 223.

If the state of New York had declared that all aliens should have capacity to acquire ownership by descent, neither the Trading with the Enemy Act, nor any rule of the common law, would read into the statute an implied exception in the contingency of war, and withhold the right of succession from alien enemies, whether resident in hostile

territory or here. *Kershaw v. Kelsey*, and *Fairfax v. Hunter*, *supra*. The nation by act of Congress might declare their lands forfeit (*Brown v. United States*, 8 Cranch, 110, 3 L. ed. 504; *Alexander's Cotton* (*United States v. Alexander*) 2 Wall. 404, 17 L. ed. 915; *Miller v. United States* (Page v. *United States*) 11 Wall. 268, 20 L. ed. 135), but in the absence of such a forfeiture, title would be theirs. To argue that alien enemies, resident in the United States, may inherit because they may trade, is to assume that disabilities must have identity of duration, though they have diversity of origin.

Trade in aid of the enemy's resources, since it tends to prolong the combat, is illegal for everyone within our jurisdiction, whether enemy or friend. *The Hoop*, 1 C. Rob. 196; *Griswold v. Waddington*, 16 Johns. 438; *Porter v. Freudenberg* [1915] 1 K. B. 857, 868, 5 B. R. C. 548 [1915] W. N. 43, 84 L. J. K. B. N. S. 1001, 112 L. T. N. S. 313, 31 Times L. R. 162, 59 Sol. Jo. 216, 20 Com. Cas. 189, Ann. Cas. 1917C, 215; *Kershaw v. Kelsey*, *supra*; 2 Westlake, *International Law*, 51. The prohibition does not run against the alien as an incident of the disabilities of alienage. It runs against citizen and alien, as an incident of the necessities of war. The sovereign will not permit its military operations to be hampered by those whom it controls. Much of the obscurity which surrounds the rights of aliens has its origin in this confusion of diverse subjects. Disabilities are confounded with prohibition; the incidents of alienage with incidents that are common to alienage and citizenship. Sometimes we are told in loose and sweeping terms that there may be no trade with alien enemies. The statement is inaccurate (27 Yale L. J. 105), for commercial domicil, and not alienage, determines the enemy character of commerce (*Hall, International Law*, *supra*, at page 526, and cases there cited). Then, to supply the needed correction, a new definition of alien enemies is put

forward for the purpose of the rule, and finally what is a definition for one purpose is erroneously assumed to be a definition for all others.

The truth is that the right to trade, since it does not follow lines of citizenship, should not be formulated in terms of alienage. If a citizen of the United States does business in a hostile territory, trade is prohibited with him as much as with an alien. The *Peterhoff*, 5 Wall. 28, 18 L. ed. 564. To bring him within the compass of a rule imperfectly stated at the outset, he is sometimes characterized by courts as an alien enemy himself. *Porter v. Freudenberg* [1915] 1 K. B. 857, 5 B. R. C. 548 [1915] W. N. 43, 84 L. J. K. B. N. S. 1001, 112 L. T. N. S. 313, 31 Times L. R. 162, 59 Sol. Jo. 216, 20 Com. Cas. 189, Ann. Cas. 1917C, 215. In reality, of course, he is not an alien, either enemy or friend. What is meant is that trade with him is as unlawful as if he were an alien enemy. But, plainly, the statute of New York does not speak of alien friends in this special and unnatural sense. There was no thought of taking from our own citizens the right of purchase and inheritance when resident in hostile lands. The definition of enemies for the purpose of trade is thus in some features too wide, and in others too narrow, when fitted to this statute. It is too wide, in that it includes citizens as well as aliens abroad. It is too narrow, in that it excludes the alien at home.

General statements in such cases as *Porter v. Freudenberg*, *supra*, that the test of an alien enemy is not his nationality, but the place in which he resides or carries on business, are for the same reason misleading and erroneous, if dislocated from their setting. Read in the light of the context, they become consistent and intelligible. See pages 869, 873.

"What did that case [*Porter v. Freudenberg*] decide? It decided that, for the purpose of trading, it is not a person's nationality that determines whether he is an 'alien

enemy.' " *Schaffernius v. Goldberg* [1916] 1 K. B. 284, 299, 7 B. R. C. 842.

Subjects of a belligerent power are thus classified for a particular purpose as no longer alien enemies, when all that is meant is that they are relieved to that extent and for that purpose of the disabilities of enemies. The German-born subject, resident within the British realm, who found himself interned in a war camp, though with the right to trade and sue, was probably under no delusion that he was in law an alien friend. *Ex parte Weber* [1916] 1 A. C. 421, 7 B. R. C. 880, 85 L. J. K. B. N. S. 944, 114 L. T. N. S. 214, 80 J. P. 249, 32 Times L. R. 312, 60 Sol. Jo. 306.

Other cases much relied on by the plaintiff, along with *Porter v. Freudenberg*, *supra*, are plainly beside the point. *Thurn & Taxis (Princess) v. Moffitt* [1915] L. R. 1 Ch. 58 [1914] W. N. 379, 84 L. J. Ch. N. S. 220, 112 L. T. N. S. 114, 31 Times L. R. 24, 59 Sol. Jo. 26, involved a question of the right to sue. The suitor was a British-born woman, resident in England, the wife of a German. Her right to sue was upheld, but her status as an alien enemy was assumed. *Tortoriello v. Seghorn*, — N. J. Eq. —, 103 Atl. 393 (March 12, 1918), involved a question of the right to trade. An alien enemy, who owned land in New Jersey before the war, agreed to sell it after the war. The point decided was that the Enemy Trading Act did not prohibit him from carrying out his contract. *State ex rel. Constanti v. Darwin* (May 10, 1918) 102 Wash. 402, L.R.A.1918F, 1012, 173 Pac. 29, involved the same statute.

The case under the statute of New York comes down, then, to this: The question, "What are the rights of alien enemies in the absence of statutory restrictions?" is distinct from the question, "Who are alien enemies within the scope of such restrictions?" Alien enemies, resident within our borders, retain by implied license many of the civil rights of friends. Implication

ceases, however, to be legitimate when an express and conflicting prohibition occupies the field. "Expressum facit cessare tacitum." The civil rights which belong to alien enemies by implied license of the Federal government do not include the right to purchase or inherit land. That is a subject which every state, in the absence of inconsistent treaty, may regulate for itself. *Blythe v. Hinckley*, 180 U. S. 333, 341, 45 L. ed. 557, 562, 21 Sup. Ct. Rep. 390. The civil rights which belong to alien enemies by implied license of the states do not include, in New York,

Descent—statutory right—effect on implication.

the right to purchase and inherit land, for the field is occupied by statute, and there is, therefore, nothing to be implied. The legislature might have refused to draw a distinction between enemies and friends. It might have given capacity to all aliens alike, and in that event capacity would not have ended with the outbreak of the war. It chose a policy less liberal. It gave the privilege to friends, and withheld the privilege from enemies.

I find no ground for the belief that it intended the definition of enemies to wait upon the varying terms of proclamations of future Presidents, to be enlarged to-day, and restricted to-morrow, with the changing fortunes of a war. For the same reason, I cannot think that there was willingness to impair the security of titles by substituting the uncertain and fluid test of loyalty in act and speech for the certain and historic test of allegiance to the sovereign. In the law of land, more than in any other branch of law, words are used as terms of art. Here, more than in any other field, the method of history supplies the organon of interpretation for the work of legislators and judges. Deep into the soil go the roots of the words in which the rights of the owners of the soil find expression in the law. We do not readily uproot the growths of centuries.

(2) The support of the statute

failing, there remains the question of the treaty. The treaty, if in force, is the supreme law of the land (U. S. Const. art. 6) and

Treaty—effect on local laws.

supersedes all local laws inconsistent with its terms. *Hauenstein v. Lynham*, 100 U. S. 483, 25 L. ed. 628; *Geofroy v. Riggs*, 133 U. S. 258, 33 L. ed. 642, 10 Sup. Ct. Rep. 295; *Chirac v. Chirac*, 2 Wheat. 259, 4 L. ed. 234; *Kull v. Kull*, 37 Hun, 476. Judicial construction has already fixed its meaning. *Kull v. Kull*, supra; *Bollermann v. Blake*, 24 Hun, 187; *id.* 94 N. Y. 624; *Stamm v. Bostwick*, 40 Hun, 35, 37; *Hauenstein v. Lynham*, supra; *Scharpf v. Schmidt*, 172 Ill. 255, 50 N. E. 182; *Wunderle v. Wunderle*, 144 Ill. 40, 19 L.R.A. 84, 33 N. E. 195; *Fischer v. Sklenar*, 101 Neb. 553, 163 N. W. 861. The right which it secures is in form a right of sale. In substance, it is a right of ownership. The fee descends, subject to the condition that it shall be disposed of within the "term of two years, which term may be reasonably prolonged according to circumstances." *Kull v. Kull*, supra. We do not need to determine the effect of a breach of the condition. In this instance there was none. Judgment of partition and sale was entered within the term of two years. The plaintiff has an estate of inheritance, if the treaty is in force. *Scharpf v. Schmidt*, 172 Ill. 255, 50 N. E. 182; *Kull v. Kull*, supra.

The effect of war upon the existing treaties of belligerents is one of the unsettled problems of the law. The older writers sometimes said that treaties ended ipso facto when war came. 3 Phillimore, *International Law*, 794. The writers of our own time reject these sweeping statements. 2 Oppenheim, *International Law*, § 99; Hall, *International Law*, 398, 401; Fiore, *International Law* (Borchard's Transl.) § 845. International law to-day does not preserve treaties or annul them, regardless of the effects produced. It deals with such problems pragmatically, preserving or annulling as the

necessities of war exact. It establishes standards, but it does not fetter itself with rules. When it attempts to do more, it finds that there is neither unanimity of opinion nor uniformity of practice. "The whole question remains as yet unsettled." Oppenheim, *supra*. This does not mean, of course, that there are not some classes of treaties about which there is general agreement. Treaties of alliance fall. Treaties of boundary or cession, "dispositive" or "transitory" conventions, survive. Hall, *International Law*, pp. 398, 401; 2 Westlake, *International Law*, 34; Oppenheim, *supra*. So, of course, do treaties which regulate the conduct of hostilities. Hall, *supra*; 5 Moore, *International Law* Dig. 372; Society for Propagation of the Gospel v. New Haven, 8 Wheat. 464, 494, 5 L. ed. 662, 669.

Intention in such circumstances is clear. These instances do not represent distinct and final principles. They are illustrations of the same principle. They are applications of a standard. When I ask what that principle or standard is, and endeavor to extract it from the long chapters in the books, I get this, and nothing more: That provisions compatible with a state of hostilities, unless expressly terminated, will be enforced, and those incompatible rejected.

"Treaties lose their efficacy in war only if their execution is incompatible with war. Les traités ne perdent leur efficacité en temps de guerre que si leur exécution est incompatible avec la guerre elle-même." Bluntschli, *Droit International Codifié*, § 538.

That in substance was Kent's view, here, as often, in advance of the thought of his day: "All those duties, of which the exercise is not necessarily suspended by the war, subsist in their full force. The obligation of keeping faith is so far from ceasing in time of war that its efficacy becomes increased, from the increased necessity of it." 1 Kent, Com. p. 176.

11 A.L.R.—12.

That also, more recently, is the conclusion embodied by the Institute of International Law, in the rules voted at Christiania in 1912, which defined the effects of war on international conventions. In these rules, some classes of treaties are dealt with specially and apart. Treaties of alliance, those which establish a protectorate or a sphere of influence, and generally treaties of a political nature, are, it is said, dissolved. Dissolved, too, are treaties which have relation to the cause of war. But the general principle is declared that treaties which it is reasonably practicable to execute after the outbreak of hostilities must be observed then, as in the past. The belligerents are at liberty to disregard them only to the extent and for the time required by the necessities of war.

"Les traités restés en vigueur et dont l'exécution demeure, malgré les hostilités, pratiquement possible, doivent être observés comme par le passé. Les états belligérants ne peuvent s'en dispenser que dans la mesure et pour le temps commandés par les nécessités de la guerre." Institut de droit international, *annuaire* 1912, p. 648; Scott, *Resolutions of the Institute of International Law*, p. 172.

Cf. Hall, *International Law*, 7th ed. 399; 2 Westlake, *International Law*, p. 35; 2 Oppenheim, *International Law*, §§ 99, 276.

This, I think, is the principle which must guide the judicial department of the government when called upon to determine during the progress of a war whether a treaty shall be observed, in the absence of some declaration by the political departments of the government that it has been suspended or annulled. A treaty has a twofold aspect. In its primary operation, it is a compact between independent states. In its secondary operation, it is a source of private rights for individuals within states. *Head Money Cases* (Edye v. Robertson) 112 U. S. 580, 598, 28 L. ed. 798, 803, 5 Sup. Ct. Rep. 247. Granting that the termination of the compact involves

the termination of the rights, it does not follow, because there is a privilege to rescind, that the privilege has been exercised. The question is not what states may do after war has supervened, and this without breach of their duty as members of the society of nations. The question is, what courts are to presume that they have done.

"Where the department authorized to annul a voidable treaty shall deem it most conducive to the national interest that it should longer continue to be obeyed and observed, no right can be incident to the judiciary to declare it void in a single instance." Jay, Ch. J., in *Jones v. Walker*, 2 Paine, 688, 701, Fed. Cas. No. 7,507.

Cf. *The Legal Nature of Treaties*, vol. 10, *American Journal of International Law* (1916) pp. 721, 722.

President and Senate may denounce the treaty, and thus terminate its life. Congress may enact an inconsistent rule, which will control the action of the courts. *Fong Yue Ting v. United States*, 149 U. S. 698, 37 L. ed. 905, 13 Sup. Ct. Rep. 1016. The treaty of peace itself may set up new relations, and terminate earlier compacts, either tacitly or expressly. The proposed treaties with Germany and Austria give the victorious powers the privilege of choosing the treaties which are to be kept in force or abrogated. But until some one of these things is done, until some one of these events occurs, while war is still flagrant, and the will of the political departments of the government unrevealed, the courts, as I view their function, play a humbler and more cautious part. It is not for them to denounce treaties generally en bloc. Their part it is, as one provision or another is involved in some actual controversy before them, to determine whether, alone or by force of connection with an inseparable scheme, the provision is inconsistent with the policy or safety of the nation in the emergency of war, and hence presumably intended to be limited to times of peace. The mere fact that

other portions of the treaty are suspended, or even abrogated, is not conclusive. The treaty does not fall in its entirety unless it has the character of an indivisible act.

"Le traité tombe pour le tout quand il présente le caractère d'un acte indivisible." Rules of the Institute of Int. L., *supra*.

To determine whether it has this character, it is not enough to consider its name or label. No general formula suffices. We must consult in each case the nature and purpose of the specific articles involved.

"Il faut . . . examiner dans chaque cas, si la guerre constitue par sa nature même un obstacle à l'exécution du traité." Bluntschli, *supra*.

I find nothing incompatible with the policy of the government, with the safety of the nation, or with the ^{effect of} ~~effect of~~ war upon maintenance of the

war in the enforcement of this treaty, so as to sustain the plaintiff's title. We do not confiscate the lands or goods of the stranger within our gates. If we permit him to remain, he is free, during good behavior, to buy property and sell it. Trading with Enemy Act, October 6, 1917, 40 Stat. at L. 411, chap. 106, Comp. Stat. § 3115½a, Fed. Stat. Anno. Supp. 1918, p. 847. He is to be "undisturbed in the peaceful pursuit" of his life and occupation, and "accorded the consideration due to all peaceful and law-abiding persons." President's Proclamation of December 11, 1917. If we require him to depart, we assure to him, for the recovery, disposal, and removal of his goods and effects and for his departure, the full time stipulated by any treaty then in force between the United States and the hostile nation of which he is a subject; and where no such treaty is in force, such time as may be declared by the President to be consistent with the public safety and the dictates of humanity and national hospitality. U. S. Rev. Stat. § 4068, re-enacting Act July 6, 1798 (Comp. Stat. § 7616, 1 Fed. Stat. Anno. 2d ed. p. 364). A public

policy not outraged by purchase will not be outraged by inheritance.

The plaintiff is a resident; but even if she were a nonresident, and were within the hostile territory, the policy of the nation would not divest her of the title, whether acquired before the war or later. Custody would then be assumed by the Alien Property Custodian. The proceeds of the property, in the event of sale, would be kept within the jurisdiction. Title, however, would be unchanged, in default of the later exercise by Congress of the power of confiscation (40 Stat. at L. chap. 106, pp. 416, 424), now seldom brought into play in the practice of enlightened nations (2 Westlake, International Law, 46, 47; Brown v. United States, 8 Cranch, 110, 3 L. ed. 504). Since the argument of this appeal, Congress has already directed, in advance of any treaty of peace, that property in the hands of the Custodian shall be returned in certain classes of cases to its owners, and, in particular, where the owner is a woman who, at the time of her marriage, was a native-born citizen of the United States, and prior to April 6, 1917, intermarried with a subject or citizen of Germany or Austria-Hungary. Act June 5, 1920, chap. 241, amending § 9 of Act of October 6, 1917. It follows that, even in its application to aliens in hostile territory, the maintenance of this treaty is in harmony with the nation's policy and consistent with the nation's welfare. To the extent that there is conflict between the treaty and the statute (40 Stat. at L. 411, chap. 106), we have the same situation that arises whenever there is an implied repeal of one law by another. To the extent that they are in harmony, both are still in force.

There is in truth no conflict here, except in points of detail. In fundamental principle and purpose, the treaty remains untouched by later legislation. In keeping it alive, we uphold the policy of the nation, revealed in acts of Congress and proclamations of the President, "to conduct ourselves as belligerents in

a high spirit of right and fairness" (President Wilson's Address to the Congress of April 2, 1917; Scott, Diplomatic Correspondence between United States and Germany, p. 324), without hatred of race and without taint of self-seeking.

I do not overlook the statements which may be found here and there in the works of authors of distinction (Hall, *supra*; Halleck, International Law, 4th ed. 314; Wheaton, International Law, 5th ed. 377) that treaties of commerce and navigation are to be ranked in the class of treaties which war abrogates or at least suspends. Commerce is friendly intercourse. Friendly intercourse between nations is impossible in war. Therefore treaties regulating such intercourse are not operative in war. But stipulations do not touch commerce because they happen to be embodied in a treaty which is styled one to regulate or encourage commerce. We must be on our guard against being misled by labels. Bluntschli's warning, already quoted, reminds us that the nature, and not the name of covenants, determines whether they shall be disregarded or observed. There is a line of division fundamental in importance, which separates stipulations touching commerce *between* nations from those touching the tenure of land *within* the territories of nations. Cf., the convention "as to tenure and disposition of real and personal property" between the United States and Great Britain, dated March 2, 1899.

Restrictions upon ownership of land by aliens have a history all their own, unrelated altogether to restrictions upon trade. Kershaw v. Kelsey, 100 Mass. 561, 97 Am. Dec. 124, 1 Am. Rep. 142; Fairfax v. Hunter, 7 Cranch, 603, 3 L. ed. 453. When removed, they cease to exist for enemies as well as friends, unless the statute removing them enforces a distinction. *Ibid.* More than that, the removal, when effected by treaty, gives reciprocal privileges to the subjects of each state, and is thus of value to one side as much as to the

other. For this reason, the inference is a strong one, as was pointed out by the master of the rolls in *Sutton v. Sutton*, 1 Russ. & M. 664, 675, 39 Eng. Reprint, 255, that the privileges, unless expressly revoked, are intended to endure. Cf. 2 Westlake, p. 33; also Halleck, *International Law*, supra. There, as in *Society for Propagation of the Gospel v. New Haven*, 8 Wheat. 464, 494, 5 L. ed. 662, 669, the Treaty of 1794 between the United States and England, protecting the citizens of each in the enjoyment of their landed property, was held not to have been abrogated by the War of 1812. Undoubtedly there is a distinction between those cases and this, in that there the rights had become vested before the outbreak of the war. None the less, alike in reasoning and in conclusion, they have their value and significance. If stipulations governing the tenure of land survive the stress of war, though contained in a treaty which is described as one of amity, it is not perceived why they may not also survive, though contained in a treaty which is described as one of commerce. In preserving the right of inheritance for citizens of Austria, when the land inherited is here, we preserve the same right for our citizens, when the land inherited is there. *Brown v. United States*, 8 Cranch, 110, 129, 3 L. ed. 504, 510. Congress has not yet commanded us, and the exigencies of war, as I view them, do not constrain us, to throw these benefits away.

No one can study the vague and wavering statements of treaties and decisions in this field of international law, with any feeling of assurance at the end that he has chosen the right path. One looks in vain either for uniformity of doctrine or for scientific accuracy of exposition. There are wise cautions for the statesmen. There are few precepts for the judge. All the more, in this uncertainty, I am impelled to the belief that, until the political departments have acted, the courts, in refusing to give effect to treaties, should limit their refusal to the needs of the occasion; that they are not bound by any rigid formula to nullify the whole or nothing; and that, in determining whether this treaty survived the coming of war, they are free to make choice of the conclusion which shall seem the most in keeping with the traditions of the law, the policy of the statutes, the dictates of fair dealing, and the honor of the nation.

The judgment should be affirmed, with costs, and the question certified answered in the affirmative.

Hiscock, Ch. J., and Chase, Hogan, McLaughlin, and Crane, JJ., concur.

Elkus, J., concurs in result.

Petition for writ of certiorari denied by the Supreme Court of the United States, October 25, 1920 (U. S. Adv. Ops. 1920-21, p. 47) — U. S. —, 65 L. ed. —, 41 Sup. Ct. Rep. 14.

ANNOTATION.

Effect of war on treaty rights.

As to the right of an alien enemy to take by inheritance or by will, see **RE KIELSMARK**, ante, 156, and the annotation thereto.

The pioneer character of the decision in the reported case (**TECHT v. HUGHES**, ante, 166) renders a careful scrutiny of its reasoning desirable. The argument is, in brief, that the question whether a treaty is to be ob-

served is a political and not a judicial question; that all treaties are not, ipso facto, dissolved by war between the contracting parties; and therefore that the courts will, in the absence of any declaration by the political branch of the government, consider them as still in force except so far as their observance is incompatible with war.

However the result of this reason-

ing, as applied to the situation involved in the case before the court, may commend itself to one's sympathies, it is open to the objection that, while disclaiming to decide a political question, it does in fact do so by its assumption that the political branch of the government, in declaring war, did not intend to renounce the obligations of its treaties with the opposing belligerent except in so far as their observance would be incompatible with war. To state this criticism in another form, what the court had to decide was a question of fact, the continued existence of the treaty, which it decided by invoking a presumption. Whether this presumption is a legitimate one depends on how it accords, not with the theories of writers on international law, but with international practice. What international practice has been, the opinion fails to state. As a matter of fact, it seems to have been generally, if not invariably (see 5 Moore, *International Law*, Dig. pp. 374-380), to consider all treaties to be dissolved by war, except so far as the parties have covenanted, either expressly or impliedly, that they shall not be so dissolved.

That it is competent for nations so to contract is declared in *Sutton v. Sutton* (1830) 1 Russ. & M. 664, 39 Eng. Reprint, 255, and *Fritz Schultz Jr. Co. v. Raimés & Co.* (1917) 99 Misc. 626, 164 N. Y. Supp. 454, affirmed on other points in (1917) 100 Misc. 697, 166 N. Y. Supp. 567.

Another reason why the courts should adhere to the fixed rule that war presumably dissolves all treaties, instead of attempting to determine for themselves in each instance whether the continued observance of a treaty obligation is compatible with "the policy of the government, the safety of the nation, or with the maintenance of the war," is found in the fact that the most powerful deterrent of war is the fear of its consequences,—not the abstract and general, but the concrete and personal. Modern war, with its virtual mobilization of the entire resources of the contending nations in man power, money, and materials, has effectually disposed of the conception

of war as a relation solely between bodies politic, a contest between states, in which the individual citizen is only remotely and indirectly involved. The morale of the opposing nation is a matter of as much importance as the morale of its forces in the field. Such being the case, the question whether the theory that the persons and property of enemy citizens, so far as they are within the power of the government, are wholly at its mercy, should be mitigated in practice, is, like other matters connected with the conduct of the war, for the political rather than for the judicial branch of the government. It is purely a question of expediency, into which considerations of right and justice, as such, do not enter, and which, therefore, is not one for the courts to decide. This objection is not wholly answered by saying that the courts are not likely to give effect to treaty stipulations at variance with national interest, or that it is within the power of the political department to nullify the action of the courts by expressly declaring existing treaties to be abrogated. The fact that, under the rule formulated in the reported case (*TECHT v. HUGHES*), the rights of an enemy citizen are made to depend upon the inaction, rather than the affirmative action, of the political department, is likely to induce a sense of security, which, for the reasons of policy above referred to, is not to be encouraged.

The earlier writers on international law seem to have regarded treaties as indivisible contracts, no part of which could (unless otherwise agreed) remain in force unless all remained in force. Thus Vattel (bk. 2, chap. 13, § 202) states: "We cannot consider the several articles of the same treaty as so many particular and independent treaties; for though we do not see the immediate connection between every one of these articles, they are all connected by this common relation, that the contracting powers pass them with a view to each other, by way of compensation. I should never, perhaps, have passed this article, if my ally had not granted me another, which, in its own nature, has no rela-

tion to it. Everything comprehended in the same treaty has, then, the force and nature of reciprocal promises; at least, if they are not excepted in due form. Grotius says, Very well; that all the articles of a treaty have the force of conditions, which by a default are rendered null."

This view has been incidentally recognized by the courts. Thus, in the *Head Money Cases* (*Edye v. Robertson*) (1884) 112 U. S. 580, 599, 28 L. ed. 798, 804, 5 Sup. Ct. Rep. 247, it is said that a declaration of war, "when made, usually suspends or destroys existing treaties between the nations thus at war."

And in *The Rapid* (1812) 1 Gall. 304, Fed. Cas. No. 11,576, it was said by Story, J., with reference to the effect of a declaration of war, that "all treaties, contracts, and rights of property are suspended."

In *Hutchinson v. Brock* (1814) 11 Mass. 119, it was said by Sewall, Ch. J., upon the authority of Vattel (bk. 3, chap. 10, § 175), that "treaties are broken or annulled by a war arising between the contracting parties. This is the general rule."

The tendency, however, appears to be toward a limitation of the general principle. In addition to the opinions of writers on international law quoted by the author of the opinion in the reported case (*TECHT v. HUGHES*, ante, 166), reference may be made to an article by Mr. John Bassett Moore, in the *Columbia Law Review*, vol. 1, No. 4, pages 209-223, from which the following excerpt is taken: "As to the effect of war upon treaties, we find in the publicists much contrariety of views; but it may be affirmed that the proposition that all treaties are extinguished or annulled by war is unsupported by authority at the present day. The misconception sometimes betrayed on the subject is due to the failure to note the narrow sense in which the word 'treaties' has frequently been used in this relation. By a classification originating with the earlier publicists, and often repeated by their successors, treaties have been divided into two classes—'pacta transitoria,' or 'transitory conven-

tions,' as the words have been unfortunately translated, and 'treaties, properly so-called.' In the former class were included international compacts by which a status was permanently established, or a right permanently vested; and, in the latter, compacts which looked to future action, and the execution of which presupposed the continuance of a state of peace between the contracting parties. In accordance with the distinction thus drawn, it was said that 'treaties' were terminated by war, the word 'treaties' being used in a limited technical sense. As a result of this double use of the term, controversies have occurred in which the abrogation of treaties by war has been affirmed as a universal principle on the one side, and denied on the other, when in reality the word was used by the parties in different senses,—by the one in its general and usual sense, and by the other in its special and restricted sense. For example, in the correspondence between John Quincy Adams and Lord Bathurst as to the question whether the 'liberties' of American fishermen under the Treaty of Peace of 1783 were terminated by the War of 1812, Mr. Adams maintained that the 'treaty of peace' 'was not, in its general provisions, one of those which, by the common understanding and usage of civilized nations, is or can be considered as annulled by a subsequent war between the same parties.' Lord Bathurst replied: 'To a position of this novel nature Great Britain cannot accede. She knows of no exception to the rule that all treaties are put an end to by a subsequent war between the same parties.' Nevertheless, his lordship in the same note declared: 'The Treaty of 1783, like many others, contained provisions of different characters—some in their own nature irrevocable, and others of a temporary character.' And it may be assumed that if the treaty had been composed wholly of provisions deemed by his lordship to be of the former character, there would have been no controversy between him and Mr. Adams. It is evident that in the arguments of these statesmen, as well as

in the classification of treaties above referred to, there was a recognition of the principle, which is now received as fundamental, that the question whether the stipulations of a treaty are annulled by war depends upon their intrinsic character. If they relate to a right which the outbreak of war does not annul, the treaty itself remains unannulled. Says Vattel: 'The conventions, the treaties made with a nation, are broken or annulled by a war arising between the contracting parties, either because these compacts are grounded on a tacit supposition of the continuance of peace, or because each of the parties, being authorized to deprive his enemy of what belongs to him, takes from him those rights which he had conferred on him by treaty. Yet here we must except those treaties by which certain things are stipulated in case of a rupture—as, for instance, the length of time to be allowed on each side for the subjects of the other nation to quit the country—the neutrality of a town or province, insured by mutual consent, etc. Since by treaties of this nature we mean to provide for what shall be observed in case of a rupture, we renounce the right of canceling them by a declaration of war.' The reasoning of Vattel has been repeated by many writers, and, among others, by Riquelme, who observes that war annuls 'all the treaties which form the international legislation between the belligerent states,' and that 'the reason why these treaties perish by war is because they are made with reference to peace; and, since it is lawful to take possession of whatever belongs to the enemy government, with greater reason it is proper to deprive it of the rights which grow out of the treaties.' The limitation by Riquelme in this passage of the general right of seizure to things belonging 'to the enemy government' (*cuanto pertenece al gobierno enemigo*), will be noted. Says Kent: 'Where treaties contemplate a permanent arrangement of national rights, or which by their terms are meant to provide for the event of an intervening war, it would be against every principle of just inter-

pretation to hold them extinguished by the event of war.' Wheaton expresses himself to the same effect. Phillimore ascribes the errors of some writers in discussing the effect of war on treaties, to their failure to distinguish between treaties temporary in their nature and treaties which contain 'a final adjustment of a particular question, such as the fixing of a disputed boundary or ascertaining any contested right or property.' To questions of private property he declares that the doctrine of the abrogation of treaties by war is 'certainly not applicable.' Rivier expresses the same opinion. Hall, referring to the effect of war on 'treaties with political objects, intended to set up a permanent state of things by an act done once for all,' declares that compacts of this kind 'must in all cases be regarded as continuing to impose obligations until they are either suspended by a fresh agreement or are invalidated by a sufficiently long adverse prescription;' and he further declares that where treaties, such as conventions to abolish the *droit d'aubaine* or regulate the acquisition and loss of nationality, may be considered as suspended during war, 'the effects of acts previously done under their sanction must remain unaltered.' Says Fiore: 'As to treaties between belligerents, it cannot be admitted that the state of war extinguishes them all, but only such as are incompatible with that state.' Pillet declares that the view that the declaration of war annuls all treaties between the belligerents 'is no longer held by anyone.' While forbearing to cite the many other authorities to the same effect, we may quote from Calvo the following statement: 'What effect does the declaration of war produce on treaties which bind the contracting parties at the moment of the rupture of their pacific relations? Are these international acts all and wholly annulled in strict law, or yet do some of them fall, while others remain in force? The solution of these questions depends naturally upon the particular character of the engagements contracted. Thus all are agreed in admitting the rupture of conventional

ties concluded expressly with a view to a state of peace, of those whose special object is to promote relations of harmony between nation and nation, such as treaties of amity, of alliance, and other acts of the same nature having a political character. As to customs and postal arrangements, conventions of navigation and commerce, and agreements relative to private interests, they are generally considered as suspended till the cessation of hostilities. By necessary consequence, it is a principle that every stipulation written with reference to war, as well as all clauses described as perpetual (*qualifiées de perpétuelles*), preserve, in spite of the outbreak of hostilities, their obligatory force, so long as the belligerents have not, by common accord, annulled them or replaced them with others."

In Crandall on Treaties, page 443, it is said: "Treaties that are intended to establish a permanent status between the parties by an act done once for all, designated by earlier writers as transitory conventions, and by an eminent recent authority as *depositive*, are essentially documents of title, and as such are not affected by a subsequent war. Treaties by which territory has been ceded or boundaries established, or permanent rights in territory acknowledged, are of this character. Like other rights, they are, however, subject to the law of conquest."

In *Valk v. United States* (1894) 29 Ct. Cl. (Fed.) 62, affirmed in (1897) 168 U. S. 703, 42 L. ed. 1211, 18 Sup. Ct. Rep. 949, it was said that "war supersedes treaties of peace and friendship, and makes the subjects of contending sovereignties enemies in law."

The chief judicial authority for the view that treaties are not *ipso facto* dissolved by war is the case of the *Society for Propagation of the Gospel v. New Haven* (1823) 8 Wheat. (U. S.) 464, 5 L. ed. 662, in which the question was whether the ninth article of the treaty of peace with Great Britain, which enabled the subjects of either country to hold lands in the other, and

to sell and devise them as if they were natives, was abrogated by the War of 1812. The court, although putting its decision upon the ground that the termination of a treaty cannot divest rights of property already vested under it, went on to say: "We are not inclined to admit the doctrine urged at the bar, that treaties become extinguished, *ipso facto*, by war between the two governments, unless they should be revived by an express or implied renewal on the return of peace. Whatever may be the latitude of doctrine laid down by elementary writers on the law of nations, dealing in general terms in relation to this subject, we are satisfied that the doctrine contended for is not universally true. There may be treaties of such a nature, as to their object and import, as that war will put an end to them; but where treaties contemplate a permanent arrangement of territorial and other national rights, or which, in their terms, are meant to provide for the event of an intervening war, it would be against every principle of just interpretation to hold them extinguished by the event of war. If such were the law, even the Treaty of 1783, so far as it fixed our limits and acknowledged our independence, would be gone, and we should have had again to struggle for both upon original revolutionary principles. Such a construction was never asserted, and would be so monstrous as to supersede all reasoning. We think, therefore, that treaties stipulating for permanent rights and general arrangements, and professing to aim at perpetuity, and to deal with the case of war as well as of peace, do not cease on the occurrence of war, but are, at most, only suspended while it lasts; and unless they are waived by the parties, or new and repugnant stipulations are made, they revive in their operation at the return of peace."

That the ninth article of the treaty of peace with Great Britain was intended by the parties to be permanent, and not to depend upon a continuance of a state of peace, is likewise held in *Sutton v. Sutton* (1830) 1 Russ. & M. 664, 39 Eng. Reprint, 255, and Hutch-

inson v. Brock (1814) 11 Mass. 119. And in Fox v. Southack (1815) 12 Mass. 143, it is said: "This article is one of those stipulations which are distinguished by some of the writers on the law of nations, as real in their own nature, and which are accomplished by the act of ratification so that they cannot be dissolved by any subsequent event."

In conclusion, it may be noted that the termination of a treaty, whether occasioned by war or otherwise, is uniformly held not to affect rights previously vested thereunder (see Chirac v. Chirac (1817) 2 Wheat. (U. S.) 259, 4 L. ed. 234; Society for

Propagation of the Gospel v. New Haven (1823) 8 Wheat. (U. S.) 464, 5 L. ed. 662; Carneal v. Banks (1825) 10 Wheat. (U. S.) 181, 6 L. ed. 297; North German Lloyd S. S. Co. v. Hedden (1890) 43 Fed. 17; Cohen v. Cohen (1917) 47 App. D. C. 129; McNair v. Ragland (1830) 16 N. C. (1 Dev. Eq.) 516; Fiott v. Com. (1855) 12 Gratt. (Va.) 564), and that the abrogation of the obligations of a treaty operates, like the repeal of a law, only upon the future, leaving transactions executed under it to stand unaffected (Head Money Cases (Edye v. Robertson) (1884) 112 U. S. 580, 28 L. ed. 798, 5 Sup. Ct. Rep. 247). E. S. O.

GRAND STAHL et al., Appts.,
v.

BOARD OF SUPERVISORS OF RINGGOLD COUNTY et al.

Iowa Supreme Court—January 12, 1920.

(— Iowa, —, 175 N. W. 772.)

Drainage — interest of owner of land in district.

1. One owning land within a proposed drainage district, which will be largely increased in value by establishment of the district, cannot cast a deciding vote for such establishment.

[See note on this question beginning on page 193.]

Judge — right to judge own cause.

2. One may not be judge in his own cause.

[See 15 R. C. L. 527.]

Drainage — establishment of district — administrative duty.

3. The establishment by a county board of supervisors of a drainage district is not an administrative rather than a judicial duty which will permit action by an interested official.

[See 9 R. C. L. 623, 631, 633.]

— necessity of statute expressly making officials incompetent.

4. An express statutory requirement that officials establishing a drainage district shall be disinterested is not necessary to render invalid the acts of interested officers.

— effect of right to appeal.

5. The existence of an appeal to court from the action of county supervisors in establishing a drainage

district does not avoid the necessity of having the supervisors disinterested, if the appeal does not afford a full review on the merits.

— legislative act — effect.

6. That for purposes of review the establishment of a drainage district is regarded as a legislative act does not validate an action by interested officials.

Constitutional law — necessity of impartial tribunal.

7. The necessity of laws providing impartial tribunals for the adjudication of rights is recognized by the guaranties of the Constitution.

Drainage — effect of necessity of breaking deadlock.

8. An official interested in the establishment of a drainage district is not permitted to act, merely because his vote is necessary to break a deadlock between the other officials.

APPEAL by objectors from a decree of the District Court for Ringgold County (Maxwell, J.) affirming the order of the board of supervisors establishing the Grand River Drainage District. *Reversed.*

The facts are stated in the opinion of the court:

Messrs. Carr, Carr, & Evans, and Spence, Beard, & Hayes, for appellants:

The report of the engineer must include no lands that will not be benefited.

Zinser v. Buena Vista County, 137 Iowa, 665, 114 N. W. 51.

Supervisor Vorhies was disqualified to act in determining the facts necessary to support the establishing of the district.

To permit an interested party to act as supervisor in passing upon the sufficiency of the plan, the public utility, and the relation between burden and benefits is a denial to other property owners within the proposed district, of due process of law.

Union Drainage Dist. v. Smith, 233 Ill. 417, 16 L.R.A. (N.S.) 292, 84 N. E. 376.

Messrs. Fuller & Fuller and Charles J. Lewis for appellees.

Salinger, J., delivered the opinion of the court:

I. The board of supervisors of Ringgold county consists of three members. The defendant Vorhies is one member. On the vote upon whether said drainage district should be established, one member of the board other than Vorhies voted "Aye," another member "No," and the defendant Vorhies voted "Aye." It is manifest then that the vote of Vorhies was decisive. The principal complaint of the appellant is that Vorhies was disqualified by interest, and that the court held him qualified so to act.

For the moment omitting reference to exceptions to the rule, had Mr. Vorhies acted as the judge of a court in doing any act which would substantially promote his pecuniary interest, he would have been disqualified. It would be sheer affectation to make an extensive citation of

Judge—right to judge own cause.

authorities for the proposition that one may not be "judge in his own cause." But see *Re Ryers*, 72 N. Y. 1, 28 Am. Rep. 88. In *Case v. Hoffman*, 100 Wis. 314, 44

L.R.A. 728, 72 N. W. 390, 74 N. W. 220, 75 N. W. 945, a supreme court decision was held void because one judge, who had tried the cause below before he became a member of the supreme court, cast the deciding vote. Indeed, courts have gone so far as to hold that an act of assembly which authorizes one to judge his own cause would be void, because such an enactment is a denial of due process of law. *Union Drainage Dist. v. Smith*, 233 Ill. 417, 16 L.R.A. (N.S.) 292, 84 N. E. 376; *Day v. Savadge*, Hobart, 85, 80 Eng. Reprint, 235; *Cooley*, Const. Lim. *175; *Co. Litt.* § 212.

I. (a). The rule is not challenged, but avoidances are attempted. One of these avoidances is that what Vorhies did was the performance of an administrative rather than a judicial duty. Many distinctions, resting on such differences, may be found in the books.

Drainage—establishment of district—administrative duty.

A Wisconsin statute empowers political committees to determine what candidate shall have place on the official ballot. It was held in *State ex rel. Cook v. Houser*, 122 Wis. 534, 100 N. W. 971, that the members will not be disqualified because they were active partisans and prejudiced. And there is a line of cases which allows ministerial officers to act because the legislature contemplated that those empowered to act would be prejudiced. *State ex rel. Cook v. Houser*, *supra*, is one of those, and a leading case. To like effect is *People ex rel. Shannon v. Magee*, 55 App. Div. 195, 66 N. Y. Supp. 849; *People ex rel. Samuel v. Cooper*, 139 Ill. 461, 29 N. E. 882, and *State ex rel. Starkweather v. Superior*, 90 Wis. 612, 64 N. W. 304, other Wisconsin cases, and perhaps others. In the *Starkweather Case* a prejudicial council was permitted to remove the mayor. But as to all this there is a conflict in Wis-

consin. For it was held in State ex rel. Getchel v. Bradish, 95 Wis. 205, 37 L.R.A. 289, 70 N. W. 172, that a member of a town board who had hired a minor to purchase whisky of a saloon keeper, in violation of law, was incompetent to sit as a member of the town board while trying whether the saloon keeper's license should be revoked for that illegal act. But it must be conceded that there are cases which hold that there may be ministerial acts performed which involve some aspect of judicial or quasi judicial inquiry, and where those who make the inquiry are not in what may fairly be called a judicial frame of mind. On a more careful analysis it will, however, be found that, after all, these cases turn on the fact that the action of such bodies in so judging deals with office; that the right to hold office is not property; that the officers acting have even a less substantial financial interest involved than has the candidate; that in truth no substantial benefit to them depends on how they decide; and, finally, that since there is no vested right, say, to having one's name placed on a primary ballot as a candidate, and since the legislature was not bound to provide a primary at all, it may, in granting mere privileges such as this, attach any condition to the use of the privileges, even if it be one condition that certain contests over the right to use the privilege may be decided by ministerial officers who are partisan and prejudiced.

I. (b). Another avoidance is the urging of decisions which sustain quasi judicial action by commissioners or members of boards, on the ground that no statute demands that these members or commissioners shall be disinterested, and other cases which disqualify officers who are interested, but do so on the ground that the statute demands they shall be disinterested. It is true we have no statute which in terms demands that a member of the board of supervisors, whose vote really establishes a drainage

system, shall be disinterested. That is, there is no statute whose letter makes that requirement. But the spirit of all the statutes we have on the subject does make it. There is, first, the general statute policy declared by statute enactments which condemn contracts made by members of town councils or by officers of state institutions, if these officers have an interest in such contracts. See Code 1897, §§ 189, 190, 5713, and § 668, subd. 14. Every person and every body, other than the board of supervisors, that act on the establishment of a drainage system, are by statute required to be disinterested. This is true of the body of three appraisers whom the auditor appoints. It is true of the engineer whom the board of supervisors selects and whom the auditor must appoint as one of the appraisers. Neither the engineer nor the appraisers act finally; their work is, in the end, to be either validated or nullified by the action of the board of supervisors. Can it be possible that a part is greater than the whole; that the mere intermediaries shall be disinterested and the final arbiter need not be. We have said there is no statute expressly so requiring. But the fact that it is required of the intermediaries does not exclude it being demanded of the principal and final actor. All such statute law as this is merely declaratory. 29 Cyc. 1435. The failure to require it of the members of the board looks very much like a case of legislative oversight in not going farther with purely declaratory statutes than the statutes enacted do go. But that is not controlling. It was held in Markley v. Rudy, 115 Ind. 533, 18 N. E. 50, that under general principles of jurisprudence, as well as under statute, a county surveyor is incompetent to assess for the repair of a ditch, if part of the land benefited and assessed belongs to himself and a part to his father. Be that all as it may, it is thoroughly well settled that the

—necessity of statute expressly making officials incompetent.

utmost difference there is between the cases where the statute does demand that the members shall be disinterested, and those in which there is no such express demand, is that, instead of the action of the board being void, it is but voidable. *Carr v. Duhme*, 167 Ind. 76, 78 N. E. 322, 10 Ann. Cas. 967, wherein are cited cases from Massachusetts, Michigan, Texas, and California. It is said in the case that, though the statute does not demand that a member be disinterested, "a proper sense of propriety should in all cases prevent a member from acting in any proceeding to which he is a party, but if, disregarding such disqualification in a matter over which the board has jurisdiction of the subject and the parties, he does participate in rendering a judgment from which an appeal is allowed, his act and the action of the board will not be void, but only voidable"—citing *Carroll County v. Justice*, 133 Ind. 89, 36 Am. St. Rep. 528, 30 N. E. 1085; *Rogers v. Felker*, 77 Ga. 46; *Wilson v. Smith*, 18 Ky. L. Rep. 927, 38 S. W. 870; *State ex rel. Klotz v. Ross*, 118 Mo. 23, 23 S. W. 196; *Fowler v. Brooks*, 64 N. H. 423, 10 Am. St. Rep. 425, 13 Atl. 417.

I. (c). Citations for appellees indicate reliance upon the fact that an appeal lies to the district court. But such appeal does not afford a free review of the merits.

Every reasonable presumption is indulged to support the action of the board (see *Temple v. Hamilton County*, 134 Iowa, 706, 112 N. W. 174; *Denny v. Des Moines County*, 143 Iowa, 466, 121 N. W. 1066; *Prichard v. Woodbury County*, 150 Iowa, 584, 129 N. W. 970; *Re Ryers*, 72 N. Y. 1, 28 Am. Rep. 88; *Chicago, M. & St. P. R. Co. v. Monona County*, 144 Iowa, 171, 176, 122 N. W. 820; *Mittman v. Farmer*, 162 Iowa, 364, 382, 142 N. W. 991, Ann. Cas. 1915C, 1)—and it could well happen that the appellate court would be constrained to hold that it could not interfere on the merits (*Denny v. Des Moines County*, 143 Iowa, 466, 121

N. W. 1066)—in a case in which it happened to be the fact that there would have been no system established, and hence no occasion for appellate review of the establishment, had the members of the board not been personally interested. True it is that, where the appeal may be tried to a jury, unembarrassed by the decision appealed from, it has led the courts to hold that the members of the board were not disqualified. See *Stewart v. Baltimore*, 7 Md. 500; *Scott v. People*, 120 Ill. 129, 11 N. E. 408; *People ex rel. Samuel v. Cooper*, 139 Ill. 461, 29 N. E. 872.

I. (d). But these were distinguished in *Vandalia Levee & Drainage Dist. v. Hutchins*, 234 Ill. 31, 84 N. E. 715; and the later Illinois case of *Union Drainage Dist. v. Smith*, 233 Ill. 425, 16 L.R.A. (N.S.) 292, 84 N. E. 378, disposed of the right to appeal as an avoidance, by holding that, though there be a right to trial by jury, "still it is entirely clear that, in providing for a commission to determine the amount of money that shall be collected from each property owner, the law of the land forbids the enactment of a statute that permits the selection of a commissioner who personally has a property interest in the result of the deliberations of the body of which he is a member." And it is held in *Bradley v. Frankfort*, 99 Ind. 417, that, though appeal lies, a person who is financially interested in the opening of a street, or who is a father-in-law to a person whose property will be affected by such opening, is incompetent to act as a commissioner in the assessment of the benefits and damages.

But if free review de novo were an avoidance, such review as is permitted in this jurisdiction does not cure the evil of interested action below. Appeal which is closely restricted, in which the merits are in effect not considered, in which it is almost conclusively presumed that the action below was right on the merits (see *Maben v. Olson*, — Iowa, —, 175 N. W. 512), surely affords no reason for permitting an

interested party to decide the fact merits to his own tangible pecuniary advantage.

I. (e). Upon the fact that review of the action of the board is colored by treating such action as a legislative one, is builded the argument that the interest of the members cannot be considered. Public policy demands that even what is in strictness legislation shall be free from improper influence. See *Wood v. McCann*, 6 Dana, 366; *Richardson v. Scott's Bluff County*, 59 Neb. 400, 48 L.R.A. 294, 80 Am. St. Rep. 682, 81 N. W. 319, and the cases collected in *Dodson v. McCurnin*, 178 Iowa, 1216, L.R.A. 1917E, 1084, 160 N. W. 927. Now, while it is true we may not set aside an act of the legislature because it is tainted with improper influences, the public policy which condemns such influence commands that we shall not amplify a mere rule of appellate review, which gives the act of the board the aspect of a legislative act for the purpose of review on the merits, into a rule that we cannot interfere with the establishment of a drainage district

—legislative act
—effect.

on the ground that the board member who cast the deciding vote was unduly influenced. When it comes to that, the action of the board is not beyond our power, as is an act of assembly.

II. Will any or all of these avoidances serve here? Assume that Mr. Vorhies would not be disqualified if his interest were not tangible and pecuniarily substantial; assume that the mere interest of the members of a political committee in the steps that may tend to promote the election of the candidate of their choice will not disqualify them; assume that the interests and prejudices of members of a city council will not disqualify them from acting on a tribunal which considers whether or not a city officer shall be removed from office—and yet the case before us is not decided. None or all of these things involve the deciding by a member of the board of supervisors of matters which will

take substantial benefits from the member if the decision be one way, and will give such benefits to him if it be the other way. It is conceded that Vorhies owned approximately one hundred (100) acres of land within the proposed district. He testified that when there were floods all the bottom land in his 100 acres would overflow 100 rods wide, and that probably 40 acres west and south, and about the same amount of land on the east, were at such times subject to overflow. It appears that all of his land in the district is subject to overflow, so is all his land to the west, and there is very little to the east that is not. He believed that, if saved from overflow, his said land would be the most productive of any owned by him. He was very active in the canvass for the petition. Before he voted he was informed by the engineer what lands would be included. He thought the ditch would double the value of the lands lying within the district. He remarked to Hoover that the establishment was worth \$10,000 to him. He finally cast the vote that established the district.

II. (a). We held in *Temple v. Hamilton County*, 134 Iowa, 706, 112 N. W. 174, that establishment involved the question whether the district, or a large part thereof, will be benefited in some degree; that while there will be tracts benefited more largely than others, and, while some will receive no very perceptible benefit, "all these things are subject to adjustment when the board shall come finally to pass upon the classification of the land and the assessment of the costs of the improvement upon the property within the district. All matters of alleged unequal or improper assessment will then be considered, and the board is authorized upon such hearing to increase, decrease, annul, or affirm the apportionment made by the commissioners." This makes clear that in the first instance the board is given the power to determine the following questions of fact: (1) Whether public utility and general welfare

will be benefited by the establishment; (2) the practicability and feasibility of the plan proposed; (3) whether the benefit to the lands is sufficient to warrant the taxation necessary to pay the costs; (4) how land shall be classified, and so lay the foundation for damages to be paid and for taxation to be raised according to benefits received. Included, of necessity, is the power to fix the limits of the district. Mr. Vorhies cast the deciding vote upon all these questions. He decided against others in disagreement with him that the system should be established. First, he decided who should be appointed engineer, and so who was to be one member of the body appointed by the auditor to pass upon damages and benefits. Second, he decided that the action of the body of which said engineer was a member should be approved. Without his vote, none of these questions could have been decided. Without his vote there would be no drainage system established. Without his vote its boundaries could not have included his lands. His vote, then, under the evidence, made him \$10,000 richer than he would have been had he not cast that vote.

III. So far, we have in a way assumed that judges alone were disqualified by interest. At any rate, no great stress has been laid upon how interest might affect acts that are not in strictness judicial acts.

But an interest less than Mr. Vorhies had has set aside action in substance like his. See

Bradley v. Frankfort, 99 Ind. 420; *Re Main Street*, 137 Pa. 590, 20 Atl. 711; *Betts v. Naperville*, 214 Ill. 380, 73 N. E. 753; *Chase v. Evanston*, 172 Ill. 403, 50 N. E. 241; *Shreve v. Cicero*, 129 Ill. 226, 21 N. E. 815.

As to judges, it has been held that a decision was void upon which one who had been of counsel, or tried the cause at nisi prius, or was in interest, gave the casting vote. *Case v. Hoffman*, 100 Wis. 314, 44 L.R.A. 728, 72 N. W. 390, 74 N. W. 220, 75

N. W. 945; *Oakley v. Aspinwall*, 3 N. Y. 547; *Converse v. McArthur*, 17 Barb. 410; *Reg. v. Justices*, 6 Q. B. 753, 115 Eng. Reprint, 284, 1 New Sess. Cas. 490, 14 L. J. Mag. Cas. N. S. 73, 9 Jur. 424, 18 Q. B. 416, 118 Eng. Reprint, 156; *People v. Bork*, 96 N. Y. 188. The same rule has, however, been applied to acts that are not the act of a judge. In *Hunt v. Chicago*, 60 Ill. at 184, the report and application by the commissioners for a new assessment was made by only two commissioners, one of whom was McArthur, and it was said that if McArthur was disqualified by reason of special interest, then the report should have been regarded as made by one commissioner alone, and the ordinance based upon it should be held void.

III. (a). In Illinois, where earlier cases attached importance to the fact that it was customary (and therefore permissible) for boards, say, to audit the accounts of the members, we find the case of *Union Drainage Dist. v. Smith*, 233 Ill. 417, 16 L.R.A.(N.S.) 292, 84 N. E. 376. Therein it was held that selecting one who owns lands within a district, to make an assessment of the benefits accruing from the improvement by a drainage ditch, deprives other property owners of due process of law. It seems to us this Illinois case and the one before us are identical, except for the immaterial differentiation that the Illinois case deals with the qualifications of a commissioner appointed to apportion assessments, and that Vorhies acted as a member of a board of supervisors. Indeed, it would seem that such difference militates against the order before us, because, while the officer dealt with in the Illinois case was merely a commissioner to apportion assessments, Vorhies cast the deciding vote on finding the essential facts upon which assessment on part of anyone could be predicated, and that he, in effect, established the improvement. The said Illinois decision is approved in the *Vandalia*

(— Iowa, —, 175 N. W. 772.)

Case, 234 Ill. 31, 84 N. E. 716. And it is said in the Vandalia Case that the reasoning of Chase v. Evanston, 172 Ill. 403, 50 N. E. 241, Murr v. Naperville, 210 Ill. 371, 71 N. E. 380, Betts v. Naperville, 214 Ill. 380, 73 N. E. 752, and Cooley, Const. Lim. 7th ed. pp. 592, 593, and 1 Co. Litt. Butler & Hargraves Notes, § 212, supports said case. The latest pronouncement in Illinois rules that compensation voted to an officer of a corporation is illegal if the resolution fixing such compensation is carried by his vote. Luthy v. Ream, 270 Ill. 170, 110 N. E. 375, Ann. Cas. 1917B, 368, citing McNulta v. Corn Belt Bank, 164 Ill. 427, 56 Am. St. Rep. 203, 45 N. E. 954; Vorhies v. Mason, 245 Ill. 256, 91 N. E. 1056. In Hunt v. Chicago, 60 Ill. 183, it was said as to an assessor: "Where public officers are clothed with important powers, subject to but few effectual restraints, so that the rights of private property are almost at their mercy, it must be held that the acts of such officers must be free from the motives of special pecuniary interest, and courts should open the way to a proper investigation of the sources of such improper motives; to do otherwise would be to encourage a prostitution of their powers to their own private ends, by a judicial shield, which should be applied to the protection of the oppressed."

III. (b). The constitutional guaranties recognize as a primal necessity that there be laws providing impartial tribunals for the adjudication of rights. Union Drainage Dist. v. Smith, 233 Ill. 417, 16 L.R.A.(N.S.) 292, 84 N. E. 378. The underlying reasoning is self-evident. The cases that voice it will be found collected in Dodson v. McCurnin, 178 Iowa, 1216, L.R.A.1917C, 1084, 160 N. W. 927. Roughly speaking, the reasoning is that it is not material that evil results actually follow the influence brought to bear; that even if such evil did result, it would naturally be concealed; that the courts are

concerned not with what is actually accomplished, but with the tendency of improper influences—are concerned with the natural temptation, and with the fact that, while some might resist, many would not. Nor does it matter that the act be not penalized as a crime so long as it operates against sound public policy. Farmers' Sav. Bank v. Jameson, 175 Iowa, 686, L.R.A.1916E, 362, 157 N. W. 460; Dodson v. McCurnin, 178 Iowa, 1215, L.R.A.1917C, 1084, 160 N. W. 927. In one of the well-considered of our earlier cases we set aside a verdict because of social courtesies shown a juror by a litigant, even though all united in testifying that the litigation was not mentioned, and that the courtesies had no influence. We put it all upon the ground that one so influenced might, in all honesty, but yet mistakenly, believe that he had not been influenced. In one word, no man may judge his own cause, because of the fear the law has of what would result in most cases were he permitted so to judge. We have held "there is no law preventing an officer from resigning," if for any reason he is dissatisfied with his compensation (Council Bluffs v. Waterman, 86 Iowa, 693, 53 N. W. 289), or his duties, or for any reason that appeals to him. It has been held here and elsewhere that he should do so, if his private interests and his public duties clash, and he feels himself under natural temptation to give preference to his private interests. And these holdings have been based not so much on the results to be feared, but on the temptations surrounding such a clash in interest. And on like reasoning are based the decisions which refuse all sanction to any contract whatsoever in which the officer has any interest, and which is made while he is such officer.

All this could as well have been said of the case at bar.

IV. There are some exceptions to the general rule. For instance, a judge disqualified to try the merits may still make a formal order, remanding the litigation to a compe-

Constitutional
law—necessity
of impartial
tribunal.

tent judge. Or he may carry out the provisions of an order of remand from a higher tribunal. In *Rogan v. Walker*, 1 Wis. 597, two of the three judges of the court were disqualified, but it is stipulated that the remaining justices might hear and decide the cause, and that such decision should be entered as the decree of the court. He did this without assistance from the others. But on the rendition of the judgment the other two sat pro forma to make a quorum, and the decision was upheld. There is not and cannot be a claim that the action of Mr. Vorhies was a purely formal one. What has been said of *Walker v. Rogan*, supra, introduces that other exception to the general rule, that a judge otherwise disqualified by interest may still act if on his failure to act there must be a failure of justice. See 29 Cyc. 1435.

We have disposed of every element in this summary, except whether Mr. Vorhies was so placed by statute as that unless he acted justice would fail. Where that is the situation, judges have been permitted to judge their own cause, and there is one noted case wherein the entire membership of the court were impleaded as defendants, and the court acted *ex necessitate*. It is not action *ex necessitate* merely because, if one judge do not act, there will not be a given decision, or because, without his acting, the other members of the court may be unable to agree upon a decision. The legislature may provide a method under which an appellate court shall proceed if its membership be equally divided. But in the absence of such provision, inability to agree upon a

Drainage—effect of necessity of breaking dead-lock.

decision is, as seen, not to be cured by letting an interested party cast the deciding vote. In the case before us two of the three members of the board were qualified to act. If they agreed, these two could establish the district, or settle, for the time being, that it could not then be established. There was a body com-

petent to act and to decide. It follows that Mr. Vorhies was not acting *ex necessitate*. Then, too, he could resign as soon as it became apparent that his public duty and his private interests might clash. It is unlikely that, if he resigned for that reason, his successor, chosen from the entire body of the county, would be a person who also was disqualified. And unlike the situation in *Rogan v. Walker*, supra, it cannot be said that it would require years to make changes in the personnel of the judges sufficient to make a disinterested quorum. And see *Case v. Hoffman*, 100 Wis. 314, 44 L.R.A. 728, 72 N. W. 390, 74 N. W. 220, 75 N. W. 945. True, the appointment upon resignation might have delayed the establishment of a desirable improvement. But so would the adverse vote of any two of the three members. And any such delay weighs little against establishing a rule which would permit one directly and tangibly interested to determine as between himself and others, who, too, have a substantial interest, that such action should be taken as comported best with the interest of the member who, in effect, decided the whole question by his one vote.

It may be conceded that much that is said in *State ex rel. Dorgan v. Fisk*, 15 N. D. 219, 107 N. W. 191, *Re Cranberry Creek Drainage Dist.* 128 Wis. 98, 107 N. W. 25, and some few other cases, runs contrary to the views we have expressed. But we decline to follow these cases.

V. Upon careful consideration we are unable to find anything in either *Shreve v. Cicero*, 129 Ill. 226, 21 N. E. 815, or *State, Jelliff, Prosecutor, v. Newark*, 48 N. J. L. 101, 2 Atl. 627, that is relevant to or aids in solving this controversy.

VI. In view of the conclusions reached we find it unnecessary to determine objections of the appellant, other than to the disqualification of Vorhies.

Reversed.

Ladd, Ch. J., and Preston and Stevens, JJ., concur.

ANNOTATION.

Property interest as disqualifying one to participate in proceeding to establish public improvement.

There are apparently but few cases wherein the courts have considered a property interest as affecting a person's qualification to participate in a proceeding to establish a public improvement. The effect of such an interest on one's qualification to act in making an assessment for a public improvement, however, has been considered more frequently by the courts, and is discussed in the annotation in 2 A.L.R. 1207.

By statute, of course, one may be disqualified from participating in a proceeding to establish a public improvement which affects his own land. *Cumberland Valley R. Co. v. Martin* (1905) 100 Md. 165, 59 Atl. 714; *Lickly v. Bishopp* (1907) 150 Mich. 256, 114 N. W. 69. Compare *Foot v. Stiles* (1874) 57 N. Y. 399.

Thus, in *Cumberland Valley R. Co. v. Martin* (Md.) supra, the court, in construing a statute which provided that examiners of a proposed road should be freeholders in the county, not interested, and not holding land through which the road was to run, held that where the proceedings did not show a compliance with the statutory requirements, they were void.

So, in construing a Michigan statute which provided that a commissioner could not act in establishing a drain if he, his wife, or his child owned land which would be subject to assessment for benefits, or was otherwise disqualified, it has been held that a mortgagee of land subject to assessments for a drain could not participate in the proceedings for its establishment. *Lickly v. Bishopp* (1907) 150 Mich. 256, 114 N. W. 69.

But in *Foot v. Stiles* (N. Y.) supra, it was held that under a statute dis-

qualifying a judge from sitting in any case in which he was interested, ownership of land through which a proposed highway was to pass did not disqualify a commissioner to participate in proceedings to establish the highway. The court decided that the statute applied only to judges *eo nomine*, and not to highway commissioners.

In the reported case (*STAHL v. RINGGOLD COUNTY*, ante, 185) it is held that, even in the absence of a statute applicable to the situation, a drainage district is not legally established by the vote of a board of three supervisors, where one member votes against the establishment of the district, and one of the two members who vote in its favor owns land in the proposed district, which would be very materially benefited by the action of the board.

Under an Illinois Farm Drainage Statute, which provided for an appeal from the action taken by the commissioners to the county court, and for a trial *de novo* in the latter court, it has been held that owners of land in a drainage district were qualified to act as commissioners of the district in enlarging its territory. *People ex rel. Samuel v. Cooper* (1891) 139 Ill. 461, 29 N. E. 872. See to the same effect, *Harmon Drainage Dist. v. Parker* (1916) 200 Ill. App. 577. It has been explained, however, that the rule in Illinois which permits one to participate in a proceeding to establish or enlarge a public improvement affecting his own land applies only to those proceedings from which an appeal is provided, to another tribunal where the issues may be tried by a jury. See *Vandalia Levee Drainage Dist. v. Hutchins* (1908) 234 Ill. 31, 84 N. E. 715. W. S. R.

STATE OF IOWA, Appt.,

v.

JOE T. LAW.

Iowa Supreme Court — October 2, 1920.

(— Iowa, —, 179 N. W. 145.)

Conspiracy — agreement to commit act which requires two to commit.

An agreement between two persons to commit a crime, the commission of which requires the joint act of two persons, is not conspiracy.

[See note on this question beginning on page 196.]

APPEAL by the State from a judgment of the District Court for Polk County (Meyer, J.) sustaining a demurrer to an indictment charging defendant with the crime of conspiracy to commit adultery. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. H. M. Havner, Attorney General, and F. C. Davidson, Assistant Attorney General, for the State:

An agreement to commit adultery may be the object of a conspiracy.

State v. Clemenson, 123 Iowa, 525, 99 N. W. 139; United States v. Holte, 236 U. S. 140, 59 L. ed. 504, L.R.A. 1915D, 281, 35 Sup. Ct. Rep. 271; State v. Sanders, 30 Iowa, 582; State v. Donovan, 61 Iowa, 278, 16 N. W. 130, 4 Am. Crim. Rep. 25; State v. Henderson, 84 Iowa, 161, 50 N. W. 758.

No formal agreement is necessary to constitute the crime of conspiracy.

8 Cyc. 621, and cases cited under note 8; Hyde v. United States, 225 U. S. 347, 56 L. ed. 1114, 32 Sup. Ct. Rep. 793, Ann. Cas. 1914A, 614; Diggs v. United States, 136 C. C. A. 147, 220 Fed. 545; Hays v. United States, 145 C. C. A. 294, 231 Fed. 106; United States v. Rabinowich, 238 U. S. 78, 59 L. ed. 1211, 35 Sup. Ct. Rep. 682; Badders v. United States, 240 U. S. 391, 60 L. ed. 706, 36 Sup. Ct. Rep. 367; State v. Crofford, 133 Iowa, 478, 110 N. W. 921; State v. Gilmore, 151 Iowa, 618, 35 L.R.A. (N.S.) 1084, 132 N. W. 53; Com. v. Demain, Brightly (Pa.) 441; Reg. v. Whitechurch, L. R. 24 Q. B. Div. 420, 59 L. J. Mag. Cas. N. S. 77, 62 L. T. N. S. 124, 38 Week. Rep. 336, 16 Cox, C. C. 743, 54 J. P. 472, 8 Am. Crim. Rep. 1; Solander v. People, 2 Colo. 48; Johnson v. People, 83 Colo. 224, 108 Am. St. Rep. 85, 80 Pac. 133; People v. Murphy, 101 N. Y. 126, 54 Am. Rep. 661, 4 N. E. 326, 6 Am. Crim. Rep. 194; Weightnovel v. State, 46 Fla. 1, 35 So. 856; People v. Davis, 56 N. Y. 95.

The state is a party to every mar-

riage relation, and is thereby interested in the preservation of its purity.

Drew v. Thaw, 235 U. S. 432, 59 L. ed. 302, 35 Sup. Ct. Rep. 137; State v. Clemenson, 123 Iowa, 524, 99 N. W. 139.

The offense of conspiracy to commit adultery is not merged with the crime of adultery.

State v. Fernald, 88 Iowa, 553, 55 N. W. 534; State v. Brown, 95 Iowa, 381, 64 N. W. 277.

Mr. C. C. Putnam, for appellee:

Where an indictment charges a conspiracy between a man and woman, only, to commit adultery one with the other, and no other person outside of the combination is involved, they are the only two persons who, alone, could commit the substantive offense of adultery, and cannot be subjected to a charge of conspiracy for committing the same crime, and thereby be made to suffer twice for the same offense, or be subjected to a severer punishment on a conviction of the conspiracy than may be imposed for the substantive offense itself, and the indictment is demurrable.

Miles v. State, 58 Ala. 390; Shannon v. Com. 14 Pa. 226; State ex rel. Durner v. Huegin, 110 Wis. 189, 62 L.R.A. 700, 85 N. W. 1046, 15 Am. Crim. Rep. 332; Thomas v. United States, 17 L.R.A. (N.S.) 720, 84 C. C. A. 477, 156 Fed. 897; United States v. Dietrich, 126 Fed. 664; State v. Clemenson, 123 Iowa, 524, 99 N. W. 139; 12 C. J. p. 554, § 19.

An indictment for conspiracy to commit a crime will not lie where a concert and plurality of agents are

necessary elements of the substantive offense for the commission of which a conspiracy is alleged to have been formed.

United States v. Burke, 221 Fed. 1014; United States v. New York C. & H. R. R. Co. 146 Fed. 298; Chadwick v. United States, 72 C. C. A. 343, 141 Fed. 225; Miles v. State, 58 Ala. 390; Shannon v. Com. 14 Pa. 226; 12 C. J. p. 554, § 19.

Stevens, J., delivered the opinion of the court:

The ground of the demurrer is that the indictment which charged the defendant, a married man, with conspiring, confederating, and agreeing with one Clara Watts to meet together in a room of a hotel in Des Moines, Iowa, for the purpose of committing adultery, does not allege criminal offense. The consummation of the act is also alleged. No third party is involved. The prosecution is based upon § 5059 of the Code of 1897.

The precise question presented has not been passed upon by this court, but has been before the courts of other jurisdictions. So far as we are advised, they have uniformly held that an agreement to commit an offense, which can only be com-

Conspiracy—
agreement to
commit act
which requires
two to commit.

mitted by the concerted action of the two persons to the agreement, does not amount to conspir-

acy. Shannon v. Com. 14 Pa. 226; Miles v. State, 58 Ala. 390; State ex rel. Durner v. Huegin, 110 Wis. 189, 62 L.R.A. 700, 85 N. W. 1046, 15 Am. Crim. Rep. 332; Thomas v. United States, 17 L.R.A.(N.S.) 720, 84 C. C. A. 477, 156 Fed. 897; United States v. Dietrich (C. C.) 126 Fed. 664; United States v. New York C. & H. R. R. Co. (C. C.) 146 Fed. 298; United States v. Burke, (D. C.) 221 Fed. 1014. To the same effect, see 2 Wharton, Crim. Law, 11th ed. § 1602.

The crimes most frequently referred to as coming within the class designated are adultery, bigamy, incest, and dueling. An implied recognition of this rule is contained in State v. Clemenson, 123 Iowa, 524, 99 N. W. 139. Agreements between a victim and another person to produce an abortion, and for the transportation of a female from one state to another for the purpose of prostitution, are cited by the attorney general as analogous in principle to the case at bar, but the court in United States v. Holte, 236 U. S. 140, 59 L. ed. 504, L.R.A.1915D, 281, 35 Sup. Ct. Rep. 271, in which the accused was charged with having conspired with another person for her transportation from Illinois to Wisconsin, for the purpose of prostitution, specifically recognized the principle above stated. The act of producing an abortion may be committed by a pregnant woman upon herself without the concurrence or concerted action of another person, but the crime of adultery is possible only by the concerted action of two persons. In such case, the agreement between the parties is a part of the offense itself. If, however, the agreement charged is between several persons, and is to cause the offense to be committed by others, or between a member of the combination and a person outside of it, it may amount to a conspiracy. State v. Clemenson, supra. The agreement charged in the indictment is limited to the defendant and the woman with whom the unlawful act was committed. There was no participation therein by a third person. In harmony with the uniform course of judicial decisions, we hold that the indictment does not charge crime. The demurrer was therefore properly sustained.

Affirmed.

Weaver, Ch. J., and Ladd and Arthur, JJ., concur.

ANNOTATION.

Conspiracy to commit adultery or other offense which can only be committed by the concerted action of the parties to it.

The broad proposition is stated in the reported case (*STATE v. LAW*, ante, 194), as sustained by the authorities, that an agreement to commit an offense which can only be committed by the concerted action of the two persons to the agreement does not amount to conspiracy. While this statement of the rule appears correct, it seems that the rule has only a narrow application. The present note is intended to point out the application and limitations of the rule, and for that purpose is confined to cases which consider the principle involved. In other words, the note includes only cases which discuss the rule or principle above indicated, and does not exhaustively cover the particular classes of cases cited herein. The theory appears to be that where certain crimes, such as adultery, require the concerted action of two persons, these persons cannot be charged both with a conspiracy to commit the offense and also with the offense itself; but that the conspiracy is merged into the substantive offense, or at least is such an integral part of it that the two cannot be considered separate offenses. And if the offense is not committed, the agreement to commit it on the part of the immediate persons concerned is a mere intent, not punishable as a conspiracy. Some of the decisions refer to the matter of double jeopardy in case the rule were otherwise; others show that in some instances the punishment for conspiracy, if this crime under such circumstances is sanctioned by the courts, is greater than for the offense itself, which is unreasonable; and other cases bring out the point that, where the legislature prescribes a punishment for a particular offense, it cannot be regarded as intending another and different punishment for an act which is a necessary part of that offense. The rule seems logical as applied to certain classes of crimes which necessarily require the agree-

ment of two parties to commit them. But its application appears to be limited to cases where the parties charged with conspiracy are the only ones participating in the agreement to commit the crime, and where their concerted action is essential to the commission of the crime. The cases cited will make plainer the limitations and application of the rule.

The only cases found directly in point on this question, as regards adultery, have held, in accord with *STATE v. LAW* (reported herewith), that an indictment will not lie for a conspiracy to commit adultery. *Shannon v. Com.* (1850) 14 Pa. 226; *Miles v. State* (1877) 58 Ala. 390. In the *Shannon Case* the court said: "The sum of the charge is joint consent, which is an ingredient in every fornication or adultery; and if it were separately a substantive offense, parties, acquitted of actual connection, might be put on trial for what would be, in morals, a lower degree of the same transgression. The statute which made it a temporal offense contains no provision for splitting it into degrees, like homicide, to give the prosecution of it more than a single chance of success. If consent to an adultery be a lower degree of temporal crime, why might not the parties to it be found guilty of it on an indictment for actual connection? Because, it may be said, confederacy is an offense of a different stamp. It is so in form, but not in substance, else an adultery or a fornication, consummated, would consist of distinct and different crimes. But to call the thing by different names would not enable the attorney general to put the parties twice in jeopardy for it. . . . It is impossible to lay down a rule for all cases; but it may be said that where concert is a constituent part of the act to be done, as it is in fornication and adultery, a party acquitted of the major cannot be indicted of the minor. If

it were an integral offense, and not an integrant part of one, he might otherwise be convicted of it, though he had been before convicted of the whole. We understand that this plaintiff in error had been acquitted of actual adultery; and though the fact is not found in the record, it shows how readily an indictment for the substance of the same thing in another form might be made a means of oppression. When an adulterous enterprise has been relinquished—and it ought, like every other criminal design, to have its locus penitentiae—it is impossible to believe that society has been so scathed by it as to admit of no propitiation for it but public castigation. . . . Doubtless a confederacy to dishonor a man and disgrace his family, by debauching his wife, would be indictable at the outset; but it would be more guilty in its object, and mischievous in its consequences, than an appointment for the indulgence of a passion or the gratification of a desire. Besides, the danger from the uncertainty of the evidence would be imminent. The purest intimacy is sometimes mistaken for an intrigue, which is always a mystery; and the reputation of many a virtuous wife is sacrificed to the insinuations of an enemy, working on the credulity of a suspicious husband. Would it mend the matter much, to make the grounds of such suspicions a subject of public investigation? Decency and justice require that such investigations be not encouraged."

In *Miles v. State* (Ala.) supra, the court followed the *Shannon Case*, and stated that, as long as the parties have proceeded no further than to consent and agree, the offense rests in mere intention, and the criminal intent must be accompanied by an act in furtherance of it, before it is the subject of indictment.

But it has been held that the crime of conspiracy may be committed by conspiring with a third person, not the immediate party to the intended unlawful act, to commit adultery. *State v. Clemenson* (1904) 123 Iowa, 524, 99 N. W. 139. The statute provided that "if any two or more persons conspire

or confederate together with the fraudulent or malicious intent, wrongfully to injure the person, character, business, property or rights in property of another, or to do any illegal act injurious to the public trade, health, morals or police, or to the administration of public justice, or to commit any felony, they are guilty of a conspiracy." The court distinguished the cases of *Shannon v. Com.* (Pa.) and *Miles v. State* (Ala.) supra, as follows: "In those decisions the agreement of a married woman to have intercourse with a man other than her husband was held not to amount to a conspiracy to commit adultery, for that the consent involved was a part of the offense itself. One may aid and abet in adultery without actually participating in the act. . . . And we can discover no ground for saying that a combination to commit the unlawful act, not an agreement between the immediate parties to the intended crime, may not constitute a conspiracy."

And in *State v. Reiners* (1910) 80 N. J. L. 196, 76 Atl. 330, it was held that, under the New Jersey statute, an indictment for conspiracy was sufficient which charged the defendant with procuring men, by the offer of money, to commit adultery with a married woman for the purpose of obtaining evidence against her, and which alleged an attempt on the part of such men to carry out the object of the conspiracy. It was said: "The argument advanced in support of the motion to quash is that to solicit one to commit adultery is not a common-law crime, and therefore a conspiracy to procure the commission of adultery is not a conspiracy to have a crime committed, and consequently this indictment would not be good under the common law. It is further urged that our statute does not, in terms, embrace a conspiracy of this character, and therefore, as the indictment cannot be supported under statute or common law, it charges no indictable offense. These arguments have no legal foundation. Adultery is made a crime by statute in this state, and to procure the commission of adultery is to pro-

cure the commission of a crime. The statute of this state regarding conspiracies . . . declares it to be a crime to conspire to commit any act for the 'perversion or obstruction of justice or the due administration of the laws.' . . . An agreement to procure a woman to commit the crime of adultery, followed by the hiring of a person to assist in procuring the crime to be committed, and the attempt of the employed to have the purpose of the illegal agreement carried out, although the attempt fails, is a conspiracy to pervert the due administration of the law, and those who combine for such purpose, and then attempt to carry it out in the manner charged against these defendants in this indictment, are persons guilty of a perversion or obstruction of justice or the due administration of the laws, and this count properly charges them with that offense."

The doctrine that, "where concert of action is necessary to the offense, conspiracy does not lie," is well considered in *State ex rel. Durner v. Huegin* (1901) 110 Wis. 189, 62 L.R.A. 700, 85 N. W. 1046, 15 Am. Crim. Rep. 332, in which the court said that, although the principle was familiar, its application was necessarily confined within very narrow limits; that it did not extend to a situation where mere combination to effect an object is itself criminal, and not merged in a crime of higher degree; that the rule applies where the immediate effect of the consummation of the act in view, which is the gist of the offense, reaches only the participants therein, and is in such close connection with a major wrong as to be inseparable from it, as, for instance, in the offense of adultery, bigamy, incest, or dueling; that where an act is an offense, as in the case of adultery, it cannot be made a different offense because of the circumstance that in the conception of it a precedent agreement by two persons is necessary; but that if the act is preceded by an agreement between several persons to cause the offense to be committed by others, or between a member of the combination and a person outside of it, the gist of the precedent

concurrence is the wrongful agreement; that those concerting to cause the crime to be committed may be prosecuted for the offense of conspiracy, and those guilty of the act which the combination was formed to bring about may be prosecuted for that, although the effect thereof is to prosecute one of the parties for both offenses; and that it is only where the concurrence to commit an offense and the consummated act are so connected that they really constitute one act, every element inculpatory of each party, so that separation of the whole into its constituent elements and a prosecution for each as a distinct offense would place the parties twice in jeopardy, that the rule applies.

The limitations on the doctrine that, "where concert is necessary to the offense, conspiracy does not lie," are shown by the case of *State ex rel. Durner v. Huegin* (Wis.) *supra*, where the court held that the doctrine was not applicable to a charge, brought against newspaper publishers, of conspiracy to injure another publisher in his business, it being said that there was no room whatever for saying that the prosecution for the offense in question would result in the separation of it from another and greater offense, as in the case where persons guilty of the crime of adultery were prosecuted for a conspiracy to commit that offense; and that the fact that it would not be practicable, or even possible, under the circumstances, for one person alone to commit the act, i. e., of injury to the business of the publishing company, which was the alleged object of the combination, did not militate against the prosecution of all the parties to the combination as guilty of the crime of conspiring wilfully and maliciously to injure such company in its business.

In a number of Federal cases, the contention has been made that the rule prohibiting conspiracy to commit an offense which required the concerted action of the parties to the alleged conspiracy should apply, but usually the contention has been overruled, on the ground either that the particular offense did not require concert of ac-

tion, or that other parties than the immediate parties to the offense were engaged in the conspiracy, which thus was a distinct and separate offense. These cases will make clearer the limitations and application of the rule indicated, although it should be observed that there are perhaps other cases involving similar facts which are not included in the note, for the reason that the principles discussed herein were not considered by the court.

The doctrine that, where concert of action and plurality of agents in an agreement are indispensable to the commission of an offense, an indictment will not lie for conspiracy against two persons only, charging them with an agreement to commit the offense, is applied in *United States v. Dietrich* (1904) 126 Fed. 664, where an indictment was found against two persons, charging the one with agreeing to receive, and the other with agreeing to give, a certain sum of money to procure a postmastership for the latter from the former, a United States Senator. It was held that the indictment was insufficient to charge a conspiracy, under the Federal statute relating to conspiracy by two or more persons to commit an offense against the United States, but charged an offense under another statute relating to the receiving, or agreeing to receive, by members of Congress, and the giving, or agreeing to give, to them, any valuable consideration for the purpose of procuring any contract or office from the government.

United States v. Dietrich (Fed.) *supra*, was distinguished in *United States v. Grand Trunk R. Co.* (1915) 225 Fed. 283, where an indictment was found against a railway company, and others, for conspiracy to violate the Interstate Commerce Act, by the giving and receiving of rebates, the court taking the view that since the act provided a punishment only for the giver of the rebate, and not for the receiver, all of the parties to the conspiracy were not guilty of the substantive offense prohibited by the act, and that they therefore might be indicted for conspiracy to commit an offense

against the laws of the United States, regardless of the penalty.

There are certain crimes, it was said in *United States v. New York C. & H. R. R. Co.* (1906) 146 Fed. 298, which require for their commission the concurrent action and co-operation of more than one person, such as dueling or bigamy; and when the concurrent action of two persons is necessary to perpetrate a certain crime, it seems difficult to claim that their agreement to act is in law a conspiracy, and their act a distinct crime, and that the agreement to act can be punished more severely than, or differently from, the act itself. And it was held that the offense of giving or receiving rebates was such an act, requiring the concurrence of two persons; and that, therefore, a demurrer should be sustained to an indictment which charged a conspiracy to commit an offense against the United States by inducing the giving and taking of rebates in violation of the "Elkins Act." This decision apparently proceeded upon the assumption that the taking as well as the giving of a rebate was a substantive offense, and upon that ground appears to be distinguishable from *United States v. Grand Trunk R. Co.* (Fed.) *supra*. The decision is affirmed in (1909) 212 U. S. 481, 500, 53 L. ed. 613, 624, 29 Sup. Ct. Rep. 304, 309, but the point under consideration was not before the Federal Supreme Court for decision.

It was held also that the fact that the indictment charged that a number of persons were parties to the conspiracy, instead of two, as in *United States v. Dietrich* (Fed.) *supra*, would not distinguish it from that case, where the only persons who were indicted represented either the giver or the receiver of the rebate. *United States v. New York C. & H. R. R. Co.* (Fed.) *supra*.

But where the indictment was not against persons charged with giving and receiving the rebate, but against third persons, who, it was charged, conspired to induce shippers to accept a rebate, it was held that the rule regarding plurality of agents was not applicable. *Thomas v. United States*

(1907) 17 L.R.A.(N.S.) 720, 84 C. C. A. 477, 156 Fed. 897. The court after referring to the statement in Wharton on Criminal Law that, "when to the idea of an offense plurality of agents is logically necessary, conspiracy, which assumes the voluntary accession of a person to a crime of such a character that it is aggravated by a plurality of agents, cannot be maintained," called attention to the fact that the author did not make it clearly appear whether he limited immunity from the charge of conspiracy to those who were the sole and necessary actors in the commission of the substantive offense, or whether he included in the rule of immunity against conspiracy, persons who might have conspired to induce others to commit the offense. It was said that if the applicability of the doctrine was limited to the former class, it was correct; that it could not be that, if the crime of bigamy, for instance, was punishable in a certain way, the two parties who alone could commit it could be subjected to a charge of conspiracy for committing the same crime, and thereby made to suffer twice for exactly the same offense, or be subjected to a severer punishment on a conviction for the conspiracy than was imposed upon the substantive offense itself. But, it was pointed out, if persons combine to induce others to commit bigamy, they may be punished as for a conspiracy. Distinguishing the case of *United States v. New York C. & H. R. R. Co.* (Fed.) *supra*, the court pointed out that in that case the only persons indicted for conspiracy were those representing, on the one hand, the giver, and, on the other hand, the receiver, of the rebate; while, in the case before it, the sole defendants were neither givers nor receivers of an unlawful rebate, but occupied the position of intermediaries, being charged with conspiracy to bring about the commission of the offense of receiving rebates by other parties.

(It is to be observed that the scope of the note, as outlined at the beginning, precludes the consideration of the ultimate question whether a charge of conspiracy may be predicated of an

agreement to commit such specific offenses as the giving or receiving of rebates.)

It is stated in *United States v. Shevlin* (1913) 212 Fed. 343, that, "when an offense necessarily involves an unlawful agreement between two or more persons, the parties thereto cannot be charged with conspiracy for having made such an agreement, but must be prosecuted for the principal offense." But this rule, it was held, did not apply in the case before the court, because neither smuggling nor defrauding the customs, the offenses which the indictment charged a conspiracy to commit, necessarily involves an agreement between two or more persons, but may be committed by a single individual.

And the rule prohibiting conspiracy to commit a crime requiring concerted action was held, in *United States v. Clark* (1908) 164 Fed. 75, not to apply to an indictment of a railway clerk for conspiracy to commit an offense against the United States by the issuance of free transportation to persons not entitled to it, in violation of the "Hepburn Act," where the transportation so issued was delivered to the other parties to the conspiracy, and by them sold to the parties who illegally used it, since the act made only those using the transportation issued in violation of the law, and the railway company, and not its officer or agent who issued the transportation, guilty of the penalty therein provided. It will be observed that this case comes within the principle that third parties who conspire to procure the commission of an unlawful act by others may be prosecuted for conspiracy, even if the substantive offense requires concerted action.

So, also, the rule is recognized, but held inapplicable, in *Chadwick v. United States* (1905) 72 C. C. A. 343. 141 Fed. 225, on the ground that the offense which the indictment charged the defendant with a conspiracy to commit did not require a plurality of agents, but might be committed by one person. The indictment was under the provision of the Federal statute providing a penalty for two or more persons to conspire to commit an of-

fense against the United States, and charged the defendant with conspiring to violate the Federal statute which makes it unlawful for any officer, clerk, or agent of a national bank to certify a check drawn thereon, unless at the time the check is certified the person drawing it has on deposit funds sufficient to meet it. It was contended, unsuccessfully, that as the defendant was not an agent or officer of a bank, and was therefore legally incapable of certifying the check, but was charged with conspiring with an officer of a national bank to commit the offense, by certifying her check when she had insufficient funds to meet it, the rule regarding pluralities of agents should apply. The court distinguished the case of *United States v. Dietrich* (1904) 126 Fed. 664, supra, on the ground that in that case the offense which it was charged there was a conspiracy to commit logically required a plurality of agents.

It was held, also, that the rule as to concert of action did not apply in the case of an indictment for conspiracy to commit an offense against the United States, by violating the provision of the Penal Code prohibiting any officer, agent, or employee of a common carrier from knowingly delivering to any person under a fictitious name, intoxicating liquor shipped in interstate commerce, where the party indicted for conspiracy was not shown to have taken part in the actual commission of the offense, but the alleged conspiracy was entered into by him and another party with employees of an express company, for the delivery of the liquor to persons under a fictitious name, and it appeared that the other party to the conspiracy received the liquor. *McKnight v. United States* (1918) 164 C. C. A. 527, 252 Fed. 687. Attention is called to the dissenting opinion by Sanborn, Ch. J., which discusses the rule in the class of cases under consideration in the note, and takes the view that the defendant in the indictment in this case came within the rule, because the offense required plurality of agents or concerted action, and, although the defendant did not himself receive the liquor, the

person who received it should be regarded as his agent. It was pointed out that this principle of agency was held to apply in *United States v. New York C. & H. R. R. Co.* (1906) 146 Fed. 298, supra, so as to bring the principal within the rule. The majority of the court, however, took the view that the doctrine of agency could not be relied upon to show participation, so as to apply the rule indicated.

And the contention was overruled in *Laughter v. United States* (1919) 170 C. C. A. 162, 259 Fed. 94, that the rule prohibiting indictment for conspiracy to commit an offense which a plurality of agents is logically necessary to commit prohibited an indictment for conspiracy to commit a violation of the Reed Amendment, providing for punishment of any person who should order, purchase, or cause intoxicating liquors to be transported in interstate commerce, with certain exceptions, into a prohibition state. The court said it might be that under the facts of the case there was no violation of the statute except by those transactions which carried out the conspiracy, and that the conspiracy and substantive offense ought not to be separately punished, but that no question of double prosecution or punishment was presented, the broad contention being that there could be no such thing as an indictment for conspiracy under this act; and that in this broad form the contention could not be sustained, the act plainly including mere transportation, which might be the individual act of a person, without any concert with others, and that in such cases there was abundant room for additional and precedent conspiracy with others. Petition for writ of certiorari is denied in (1919) 249 U. S. 613, 63 L. ed. 802, 39 Sup. Ct. Rep. 388.

So, it was held in *United States v. Burke* (1915) 221 Fed. 1014, reversed on other grounds in (1916) 148 C. C. A. 440, 234 Fed. 842, that the rule forbidding indictment for conspiracy to commit a crime, of those whose concerted action is necessary to the commission of the offense, did not apply to an indictment for conspiracy to

defraud the United States, under the Federal statute providing that if two or more persons conspire to defraud the United States, "in any manner or for any purpose," each of the parties to the conspiracy should be punished, since the United States could be defrauded without concert of action. The court distinguished this case from that of *United States v. Dietrich* (Fed.) *supra*, on the ground that in the latter case the crime of bribery required the participation of at least two persons, and concert of action was essential to the offense, and also on the ground that in the case before it the indictment was against three persons, one of whom was acting for the United States in an official capacity, the other two being charged with buying and selling supplies, by means of which sales it was intended to defraud the United States; and the party who raised the objection to the indictment was one of the two persons who was engaged in selling the supplies to the government's agent, and might, therefore, be regarded as agreeing with another person to bribe a government officer, which act would subject him to indictment for conspiracy, even if a single individual, who agreed with a bribed official, would not be so subject to indictment.

It is held in *United States v. Holte* (1915) 236 U. S. 140, 59 L. ed. 504, L.R.A.1915D, 281, 35 Sup. Ct. Rep. 271, that a woman may conspire "to commit an offense against the United States," within the meaning of the Federal statute, although the object

of the conspiracy is her own transportation in interstate commerce for purposes of prostitution, contrary to the White Slave Act of June 25, 1910. In the majority opinion, attention is called to the fact that the substantive offense might be committed without the woman's consent, as, if she were drugged or taken by force; and that, therefore, the decisions that it is impossible to turn the concurrence necessary to effect certain crimes, such as bigamy or dueling, into a conspiracy to commit them, do not apply.

The principle that the substantive offense must be such as requires concert of action, and that if this is not true the rule prohibiting conspiracy to commit the offense does not apply, and that one who commits an offense is not necessarily relieved by such fact from prosecution for conspiracy to commit that offense, which may be a different crime than the commission of the offense itself, is shown by the case of *Heike v. United States* (1913) 227 U. S. 131, 57 L. ed. 450, 33 Sup. Ct. Rep. 226, Ann. Cas. 1914C, 128, which holds that a person cannot escape liability for a conspiracy to commit an offense against the United States, because he may have committed the substantive offense at which the conspiracy aimed. The substantive offense,—in this instance, that of defrauding the United States of its revenue by the use of false weights,—was apparently one which could be committed by a single person.

R. E. H.

COMMONWEALTH OF KENTUCKY, Appt., v.

OSCAR NOLAN.

Kentucky Court of Appeals — September 21, 1920.

(— Ky. —, 224 S. W. 506.)

Highway — power to create one-way streets.

1. A municipal corporation having by statute exclusive control over its streets may confine traffic by motor vehicles on narrow streets to one direction.

[See note on this question beginning on page 207.]

(— Ky. —, 224 S. W. 506.)

Municipal corporation — validity of ordinance — inconveniencing persons.

2. A municipal ordinance designed to protect the safety or health of the public while necessary to its protection will not be declared invalid merely because its enforcement will subject a single individual, a considerable number, or an entire community of persons to inconvenience.

Highway — use by motor vehicles.

3. Public highways are open to the use of motor vehicles the same as to those of other kinds.

[See 13 R. C. L. 254.]

Constitutional law — one-way street — special legislation.

4. An ordinance confining the use of narrow streets by motor vehicles to travel in one direction does not violate the constitutional provision against special and discriminatory legislation.

APPEAL by the Commonwealth from a judgment of the Circuit Court for Harlan County acquitting defendant after conviction of violation of an ordinance of the city relative to motor vehicles. *Reversed.*

The facts are stated in the opinion of the court.

Mr. J. B. Carter, for the Commonwealth:

The ordinance is not unconstitutional, because of class legislation or discrimination between motor vehicles and other traffic vehicles.

Fifth Ave. Coach Co. v. New York, 194 N. Y. 19, 21 L.R.A. (N.S.) 744, 86 N. E. 824, 16 Ann. Cas. 695; State v. Mayo, 106 Me. 62, 26 L.R.A. (N.S.) 502, 75 Atl. 295, 20 Ann. Cas. 512.

Mr. Zeb. A. Stewart, for appellee:

The ordinance in question is unconstitutional and void as class legislation, and discriminates between persons operating motor vehicles on the one hand and persons operating horse-drawn and other vehicles and means of transportation for similar purposes.

Newport v. Merkel Bros. Co. 156 Ky. 580, 161 S. W. 549; Ft. Smith v. Scruggs, 70 Ark. 549, 58 L.R.A. 921, 91 Am. St. Rep. 100, 69 S. W. 679; Simrall v. Covington, 90 Ky. 444, 9 L.R.A. 556, 29 Am. St. Rep. 398, 14 S. W. 369; Cooley, Const. Lim. 200, 202; Ex parte Frank, 52 Cal. 606, 28 Am. Rep. 642; Nashville v. Althrop, 5 Coldw. 554; Henderson v. Lockett, 157 Ky. 366, 163 S. W. 199.

Settle, J., delivered the opinion of the court:

The appellee, Oscar Nolan, was arrested, tried, convicted, and, by way of punishment, subjected to a fine of \$5, in the police court of the city of Harlan, under a warrant issued therefrom charging the violation by him of an ordinance of that city, confining the operation of all motor vehicles on one of its streets, known as Central street, between Main and First streets, to travel in

one direction. Relying on the alleged unconstitutionality of the ordinance, and the amount of the fine being on that issue immaterial, appellee took an appeal from the judgment of the police court to the Harlan circuit court. In the latter court the right of trial by jury was waived, and by agreement of the parties the law and facts submitted to the court; the trial resulting in a judgment of acquittal, on the grounds, as recited therein, that the ordinance is unconstitutional because of its applicability to motor vehicles alone, which, in the opinion of the trial court, makes it discriminatory and oppressive as to that class of vehicles. Counsel for the commonwealth, being dissatisfied with the construction thus given the ordinance by the circuit court, prosecutes in its name the present appeal to this court, for the purpose of obtaining its construction of the ordinance and an authoritative declaration from it of the law of the case.

The ordinance in question, which was admittedly passed or adopted by the city council as required by law, is in words and figures as follows: "Whereas, motor vehicles have become very numerous in the city of Harlan, Kentucky; and whereas, Central street in said city, from Main street to First street, is less than 24 feet in width from curb to curb, which entails great danger to people in operating and running

motor vehicles on said street: Now, therefore, be it ordained by the city council of the city of Harlan, Kentucky, that all persons running or operating motor vehicles of any kind on Central street, between Main street and First street, shall only operate and run said vehicles in one direction, which shall be east from Main street to First street; and any person who shall run or attempt to run any kind of said motor vehicle west on said Central street, between Main and First streets, shall be deemed guilty of a misdemeanor and upon conviction shall be fined not less than \$5 nor more than \$15; and, if they fail to pay or replevy said fine, shall be confined in the county jail of Harlan county and be placed at hard labor, until said fine, and costs, has been paid."

Appellee's violation of the ordinance for which he was arrested and tried under the warrant is admitted; and it is conceded, both by him and counsel for the commonwealth, that the sole object of his prosecution therefor was and is to test the constitutionality of the ordinance. This, therefore, is the only question to be determined on this appeal.

It appears from the record that Central street, the use of which, between Main and First streets, by motor vehicles, is restricted by the ordinance to travel in one direction, viz., eastwardly from Main street, only runs from Main street to First street, is but 210 feet in length and 24 feet in width, exclusive of its pavements, while all other streets of Harlan, which is a city of the fourth class, are much longer and wider,—indeed, of the customary length and width common to cities of its size and population. Main and First streets run in parallel lines north and south; the former leading from the railroad station into and through Harlan, and being the principal business street of that city. Central street runs east and west, its west end intersecting Main street and its east end First street. Appellee is engaged in the business of transporting for hire for an ex-

press company express packages, and for others sundry other articles consisting of baggage and merchandise, not handled by the express company, to and from the railroad station and all other points in Harlan, by hauling same in a motor truck of which he is the owner and operator. Appellee's office or place of business is on First street, about 25 feet north of Central street, and in order to obey the ordinance in going from his place of business to collect packages or other freight on Central street, by traveling it with his motor truck eastwardly from Main street to First street, he must reach Main street by way of Clover, Short, or Mound streets, all of which parallel Central street, and intersect Main and First streets, the distance from his place of business on First street to Main, at its intersection with Central, by way of Clover, being about 600 feet, by way of Short 400 feet, and by way of Mound 350 feet. While doubtless it would be somewhat inconvenient for appellee, in proceeding from his office in his motor truck, to collect packages and freight on Central street, to go this increased distance to its intersection with Main street, in order to travel it from the latter street eastwardly, it is not made to appear that as much or greater use is not made of Central street by appellee's motor truck in delivering packages and other freight thereon, hauled directly from the railroad station, ordinarily rendering more convenient its entrance from Main street, the usual and direct route of travel for all vehicles from the railroad station.

Moreover, it appears from the agreed statement of facts that a great many automobiles and other motor vehicles, besides that of appellee, are owned and operated in Harlan, and it is not made to appear that any of the owners thereof are subjected by the ordinance to the alleged inconvenience complained of by appellee. At any rate, a municipal ordinance, designed to protect the safety or health of the public

(— Ky. —, 224 S. W. 506.)

and necessary to its protection, will not by the courts be declared invalid merely because its enforcement will subject to inconvenience a single person, a considerable number, or an entire community of persons. In such case the good of the public will be regarded as of paramount consideration. The ordinance itself expresses the object of its passage in declaring in the preamble that it was made necessary because of the many motor vehicles owned in Harlan, and the fact that the unusual narrowness of Central street renders its use by such vehicles dangerous to those operating them thereon. The preamble might well have added a further reason for the passage of the ordinance as self-evident as the one mentioned, viz., the danger to other kinds of vehicles, those driving them, and pedestrians generally using Central street, from the travel and frequent passing thereon of motor vehicles going both east and west at the same time; for a collision that might occur between a motor vehicle and one drawn by a horse, or between the motor vehicle and a pedestrian, would, by reason of the greater weight and speed of the former, more likely result in injury to the other vehicle, its occupants, or the pedestrian, than to the heavier vehicle or those occupying it.

While the introduction in recent years of automobiles and other motor vehicles as a means of conveyance and transportation, and the many injuries to persons and property from their use, have resulted in a multitude of judicial decisions, many of them conflicting in expression and effect, the principles they announce are in the main but rules derived from the common law, or from statutory enactments specially designed to regulate their operation. The numerous cases on the subject seem to hold that, as motor vehicles are to be regarded as furnishing a suitable and convenient mode of

travel and transportation, not necessarily inconsistent with the proper use of public highways by others, such highways are open to their use, as to other vehicles. But to this we would add that, as such vehicles have introduced new elements of danger to travelers on the highway, this fact necessarily compels a higher degree of care from those who operate them than is required of those in control of vehicles drawn by horses. While an automobile or other motor vehicle may not generally be regarded an inherently dangerous machine or agency, one court has said that "while in operation it [the automobile] should be deemed a dangerous instrument, demanding great care on the part of the possessor."

Highway—
use by motor
vehicles.

In *Weil v. Kreutzer*, 134 Ky. 563, 24 L.R.A.(N.S.) 557, 121 S. W. 471, this court said of the automobile: "The possession of the deadly and dangerous instrument always entails great care upon the possessor. . . . The degree of care one must use always bears a direct ratio to the degree of injury which would probably be caused by negligence. When one comes through the highways of a city with a machine of such deadly force as an automobile, it is incumbent upon the driver to use great care that it be not driven against or over pedestrians. An automobile is nearly as deadly as, and much more dangerous than, a street car, or even a railroad car. These are propelled along fixed rails, and all that the traveling public has to do to be safe is to keep off the tracks; but the automobile, with nearly as great weight and more rapidity, can be turned as easily as can an individual, and for this reason is far more dangerous to the traveling public than either the street car or the railway trains."

The legislature of this state, under its police power, has enacted a statute which regulates the manner of operating motor vehicles upon the highways of the state and streets of its cities, by requiring their owners

to obtain of it a license and display the number of such license and the horse power of its propelling machinery on the vehicle; also by prescribing the qualifications of those seeking to operate such vehicles, rules regulating the speed at which such vehicles shall be operated, the giving of signals and carrying of lights by them to convey warning of their presence or approach, and such other reasonable regulations as may be needful for the safety of all persons entitled to the use of the streets and highways of the state. So it may be said that the legislature of this state has exercised the power of regulation mentioned. In addition, it may be said that the legislature of this state has duly conferred upon the municipal authorities of its cities and towns such powers as are necessary to regulate the use of their streets by motor vehicles; such authority as appertains to Harlan, a city of the fourth class, being conferred by Kentucky Statutes, Supp. 1918, § 3562, which, among other things, declares that its city council shall have "exclusive control and power over the streets, roadways, sidewalks, alleys," etc., of the city. And this power the council has exercised and had the right to exercise by the passage of the ordinance in question. Certainly the power thus given by the statute, *supra*, in the

—power to
create one-way
streets.

absence of express or implied restrictions imposed by some other statute, which is not claimed, can leave no doubt of the right of the city council to pass the ordinance, and such an ordinance is a valid exercise of the police power for the protection and safety of its citizens. *Christy v. Elliott*, 216 Ill. 31, 1 L.R.A. (N.S.) 215, 108 Am. St. Rep. 196, 74 N. E. 1035, 3 Ann. Cas. 487; *People v. Schneider*, 139 Mich. 673, 69 L.R.A. 345, 103 N. W. 172, 5 Ann. Cas. 790.

Whether such an ordinance is valid or otherwise has not been passed on in this jurisdiction, but it cannot be unconstitutional, as being special legislation or discriminatory,

merely because it legislates solely upon the operation of motor vehicles, and fails to regulate the operation of all other vehicles using the same street. *Christy v. Elliott*, *supra*; *Mahoney v. Maxfield*, 102 Minn. 377, 14 L.R.A. (N.S.) 251, 113 N. W. 904, 12 Ann. Cas. 289. Indeed, the right of the state or municipality to regulate the operation of motor vehicles may be said to be universally recognized, and that this must be done, by putting them in a class in which other vehicles are not included, arises out of the new elements of danger peculiar to their structure, mechanism, and use. Objection to the constitutionality of such state or municipal regulation, on the ground that it is class legislation or discriminatory in its operation, has repeatedly been declared to be without merit. *State v. Mayo*, 106 Me. 62, 26 L.R.A. (N.S.) 502, 75 Atl. 295, 20 Ann. Cas. 512; *Fifth Ave. Coach Co. v. New York*, 194 N. Y. 19, 21 L.R.A. (N.S.) 744, 86 N. E. 824, 16 Ann. Cas. 695, and authorities cited in the notes to each. Complaints that such legislation is unreasonable and oppressive are also dealt with by the foregoing authorities and others, and likewise held to be without merit.

In *State v. Mayo*, *supra*, a municipal ordinance regarding the "use of roads in the town of Eden," and excluding the operation of automobiles on certain of them, was the subject of attack. In sustaining the validity of the ordinance and constitutionality of the act authorizing its passage, the court held: "The legislature may, without impairing the constitutional right to equal protection of the laws, or the right of pursuing happiness, authorize a municipal corporation to close to automobiles dangerous streets, the use of which by such machines may endanger the lives of their occupants, or of those driving horses upon the streets." And, further, that "forbidding the use of automobiles on highways constructed over deep ravines

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legislation.

and along the edges of cliffs, to protect the lives of their occupants and of those attempting to use horses along such roads, is reasonable."

In *Com. v. Kingsbury*, 199 Mass. 542, L.R.A.1915E, 264, 127 Am. St. Rep. 513, 85 N. E. 848, it was held that a municipal corporation might, by ordinance, exercise the power delegated by the legislature "to make special regulations . . . as to the use of automobiles and motorcycles on particular roads, including their complete exclusion therefrom; it being a valid exercise of the police power."

In *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357, the Supreme Court, Mr. Justice Field writing, said: "Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

The authorities we have cited and commented on seem to us to be conclusive of the questions under consideration, and, while we do not hold that motor vehicles may be wholly excluded from the use of any road

used by other vehicles, we are not inclined to disagree with the conclusions they otherwise express. Manifestly, there can be nothing unreasonable or oppressive in an ordinance which confines the use of a single dangerous street by such vehicles to travel one way. As in our opinion the ordinance of the city of Harlan here attacked is not open to the objections made to its constitutionality by appellee, the circuit court erred in holding it invalid.

Wherefore the judgment is reversed, and case remanded to the Circuit Court for a new trial and other necessary proceedings consistent with this opinion.

NOTE.

No other case aside from the reported case (*COM. v. NOLAN*, ante, 202) has been found that has considered the validity of an ordinance providing for a "one-way street." The decision in *COM. v. NOLAN*, upholding an ordinance making such provision, is sustained, as is pointed out in the opinion in that case, by cases which have held that it is a valid exercise of the police power, in the interest of safety, to exclude automobiles altogether from certain streets.

FREDERICK LEVY, Appt.,

v.

FIDELITY & COLUMBIA TRUST COMPANY, Exr., etc., of Louis P. Doerhoefer, Deceased.

Kentucky Court of Appeals — June 8, 1920.

(*Levy v. Doerhoefer*, 188 Ky. 413, 222 S. W. 515.)

Bills and notes — note given for gambling debt — effect of Negotiable Instruments Act.

1. The statute rendering void notes given in settlement of gambling transactions was not affected by the subsequent passage of the Negotiable Instruments Act, so as to render such notes enforceable in the hands of bona fide holders for value.

[See note on this question beginning on page 211.]

Appeal — waiver of exceptions to evidence.

2. Exceptions to depositions will be regarded as waived on appeal, if they

were not passed upon by the trial court, or if no exceptions were taken to the ruling if made.

APPEAL by cross petitioner from a judgment of the Chancery Branch, Second Division of the Circuit Court for Jefferson County, overruling an exception to, and confirming, a report of the master commissioner, and dismissing the cross petition in an action brought by the executor of the estate of Louis P. Doerhoefer, deceased, for its settlement. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Selligman & Selligman for appellant.

Mr. Walter E. Huffaker for appellee.

Settle, J., delivered the opinion of the court:

The controversy in this case is as to the right of the appellant, Frederick Levy, to recover of the appellee, Fidelity & Columbia Trust Company, executor of the will of Louis P. Doerhoefer, deceased, the amount of a note of \$1,663.05, with 6 per cent interest from its maturity, October 18, 1916, executed by Louis P. Doerhoefer July 18, 1916, to one Samuel Dinkelspiel, and payable to his order, who, acting on the advice of the appellant, Levy, July 25, 1916, indorsed the note to the Liberty Insurance Bank of Louisville, which accepted and discounted it at the request of Levy, and upon his written guaranty that he would see it paid at maturity.

As the note was not paid at maturity by the maker or indorser, it was then paid by Levy, in compliance with his guaranty, and delivered to him by the Liberty Insurance Bank, containing the indorsement of Dinkelspiel, the payee. The death of Louis P. Doerhoefer having occurred in the meantime, this action was brought in the court below by the appellee, Fidelity & Columbia Trust Company, executor of his will, for a settlement of his estate, to which the known creditors of the testator were made parties defendant. By an order of the court there was an early reference of the cause to the master commissioner for the ascertainment and a report of the assets and liabilities of the estate, with authority to take proof regarding any controverted debt.

Among the claims presented against the estate was the note in question, which appellant filed with the commissioner, verified by the

affidavits respecting such claims, required by the statute. At the time of, or shortly after, filing the note with the commissioner, the appellant filed in the court below his answer to the petition of the appellee, executor, which was made a cross petition against the latter, wherein was alleged the due execution of the note by Louis P. Doerhoefer to Samuel Dinkelspiel; appellant's ownership thereof by assignment from Dinkelspiel; its subsequent maturity and nonpayment by the maker; and the fact that it had been filed with the commissioner for its allowance by the latter as a debt against Doerhoefer's estate. By the prayer of the answer and cross petition judgment was asked against appellee as executor of Doerhoefer for the amount of the note, and interest from its maturity.

To this answer and cross petition of the appellant appellee filed a responsive pleading, styled an answer and reply, which denied appellant's ownership of the note, or its assignment to him by Dinkelspiel, the payee, for value, and, in substance, pleaded the following facts as a bar to the recovery on the note sought by appellant, viz.: That the note was executed by Doerhoefer to Dinkelspiel in settlement and payment of the aggregate amount of various sums, all lost by the former and won of him by the latter in divers unlawful gaming transactions between them, which, as further alleged, made the consideration an illegal one and rendered the note void ab initio; furthermore, that these facts and the consequent vice in the note were fully known to the appellant when and before it was assigned him or came into his possession; hence he did not become, and is not, a purchaser or holder thereof in good faith or for value. All

affirmative matter of appellee's answer and reply was controverted by appellant's rejoinder. Following such completion of the issues and the taking of all proof offered by the parties, the commissioner, in and by his report filed in the circuit court, held the note void and refused to allow it as a valid demand against Doerhoefer's estate. Appellant filed in the circuit court an exception to so much of the commissioner's report as rejected the note, but, on the hearing, that court overruled the exception, confirmed the report, and dismissed the appellant's cross petition. From the judgment manifesting these rulings, the latter has appealed.

From what has been said of the contents of the appellant's pleadings, it will be observed that his claim of ownership of the note in suit is made to rest on its assignment to him by the payee, Dinkelspiel, and not upon the fact of his (appellant's) payment of it after it was discounted by the Liberty Insurance Bank for Dinkelspiel at appellant's request; for the discounting of the note by the bank, admittedly at appellant's request and upon his guaranty of its payment at maturity, as well as the time and manner of his payment of it and its delivery to him by the bank, was first developed by the evidence produced to the commissioner in his behalf. However, in view of his alleged ownership of the note, it is not material in which of the ways mentioned he acquired it. And if in fact the note was executed by Doerhoefer to Dinkelspiel in consideration or settlement of moneys lost by the former and won of him by the latter in gambling transactions in which they engaged, it is not material to the decision of the case whether the appellant, at the time of purchasing or otherwise acquiring the note, was or not ignorant that such was its true consideration. Therefore the important question presented for decision by the appeal is: Was the note given to evidence

an indebtedness of the maker to the payee arising out of a gambling transaction or transactions? If so, the appellant, though shown by proof to be a purchaser for value and holder in good faith of the note, will not be allowed to recover the amount thereof of the estate of the deceased maker, in the absence of a further showing by proof that he was induced to purchase the note, or accept an assignment of it, by reason of the assurance of the maker that it was a legal obligation and would be paid by him, of which there is no evidence whatever to be found in this record. Kentucky Statutes, § 1955, provides: "Every contract, conveyance, transfer, or assurance, for the consideration, in whole or in part, of money, property, or other thing won, lost or bet in any game, sport, pastime, wager, or for the consideration of money, property, or other thing lent or advanced for the purpose of gaming, or lent or advanced at the time of any betting, gaming, or wagering to a person then actually engaged in betting, gaming, or wagering, shall be void."

By § 1956 it is provided that recovery by suit at any time within five years may be had by the loser, or his creditor, of the winner, or his transferee having notice of the consideration, of any money to the amount, or property of the value, therein stated, that may have been lost in gaming at one time or within twenty-four hours; and that such recovery may also be had against the winner, although the payment, transfer, or delivery was made to his indorsee, assignee, or transferee.

Another section of the statute makes it a misdemeanor, punishable by fine, for any person or persons to engage in any hazard or game of chance on which money or other property is bet, won, or lost; and yet others declare it a felony, punishable by confinement in the penitentiary, to set up and operate games for betting, bookmaking on racing, houses or contrivances for gaming, —all conducing to show the law's abhorrence of gambling, and that it is

the public policy of the state to do all in its power to suppress the evil. It will be observed that the language of § 1955, *supra*, is exceedingly broad and forceful in its condemnation of all contracts resting upon a consideration arising out of a betting, gaming, or wagering transaction; for by it all such contracts are declared absolutely void. It extends no protection to the innocent purchaser or holder in good faith of a note given for a gambling consideration. In such a case the note will be declared void. Such has been the construction given the statute by numerous decisions of this court. In *Bohon v. Brown* (Union Nat. Bank v. Brown) 101 Ky. 354, 38 L.R.A. 503, 72 Am. St. Rep. 420, 41 S. W. 275, quoting from *Cochran v. German Ins. Bank*, 9 Ky. L. Rep. 196, decided by the superior court, we said: "A bill or note based upon a gambling consideration is absolutely void, and the drawer or maker is not bound to even an innocent holder."

And in the case of *Farmers' & D. Bank v. Unser*, 13 Ky. L. Rep. 966, the court said: "The whole current of authority is that the obligor may insist upon the illegality of the contract or consideration, notwithstanding the note is in the hands of an innocent holder for value, in all those cases in which he can point to an express declaration of the legislature that such illegality makes the contract void."

In *Alexander & Co. v. Hazelrigg*, 123 Ky. 677, 97 S. W. 353, the opinion discusses at length the question under consideration, and reviews numerous authorities bearing on it; and we therein held that, when a statute in express terms declares contracts growing out of wagering or gambling transactions, which are prohibited by statute, absolutely void, no recovery can be had upon a note evidencing such a contract, even where the action is brought by an innocent holder of the note. The contention was made in the case *supra* that Kentucky Statutes, § 1955, in so far as it declares con-

tracts growing out of wagering or gambling transactions void, has been repealed by the Negotiable Instruments Act of 1904 (Laws 1904, chap. 102), providing for the protection of innocent holders of negotiable instruments. In rejecting that contention we said: "It has been the policy of this state to suppress gaming, and the statutes making gaming contracts void are founded upon what the legislature has for many years deemed to be sound public policy. It is inconceivable that the general assembly, in the passage of the Act of 1904, for the protection of innocent holders of negotiable instruments, intended to or did repeal § 1955, Ky. Stat. 1903, which declares all gaming contracts void. In our opinion the disappointment now and then of an innocent holder of a negotiable instrument would not be as hurtful and injurious to the best interests of the state as the removal of the ban from gaming contracts."

See *Dan. Neg. Inst. § 197*; *Sondheim v. Gilbert*, 117 Ind. 71, 5 L.R.A. 432, 10 Am. St. Rep. 23, 18 N. E. 687.

In the later case of *Holzbog v. Bakrow*, 156 Ky. 161, 50 L.R.A. (N.S.) 1023, 160 S. W. 792, the doctrine that, where a note is given for a gambling consideration, its infirmity may be shown against a bona fide holder, was again approved, but with this qualification, authorized by the facts of that case, viz.: That the maker of such a note, who induces another to purchase it of the payee, assuring him that it is valid and will be paid, cannot set up the illegality of the consideration against the assignee, who had no notice thereof, as in that case the doctrine of estoppel will be applied to prevent such defense. *Wooldridge v. Cates*, 2 J. J. Marsh. 221, 16 Cyc. 783.

But, however great his ignorance of the illegality of the consideration for which the note here sued on was given, the appellant, as assignee thereof, cannot rely on such estop-

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pel, as he has neither alleged nor attempted to prove that he was induced to purchase the note or accept an assignment of it by anything said or done by the maker. So, if the finding of the commissioner that the consideration for the note was a gambling debt or debts owing by the maker to the payee is supported by the evidence as set forth in his report, the action of the chancellor in overruling appellant's exception to such finding was amply authorized. And, in looking to the evidence, we find it all to the effect that the note was given in settlement of an indebtedness of Louis P. Doerhoefer to Samuel Dinkelspiel, growing out of gambling transactions between them.

It is true that the greater part of this evidence was furnished by the testimony of Huffaker, the attorney of Doerhoefer, and later of appellee, his executor, and by Brown, a servant of Doerhoefer, the competency of which is now complained of by appellant. But we do not find that exceptions were filed by appellant to this evidence with the commissioner, or to his report on that ground after it was filed in court; and, if filed, it is manifest from the record that they were not passed on by the chancellor. It is a well-recognized rule of practice and procedure that, when exceptions filed to the depositions of witnesses are not

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to evidence.

passed on in the circuit court, or, if passed on, no exception was taken to the ruling of that court thereon, upon appeal the court of appeals will regard such exceptions as having been waived, and treat the case as if no question had been made as to the competency of the witness or witnesses, or as to the admissibility of his or their testimony. Civ. Code, § 589; *Hatfield v. Hatfield*, 166 Ky. 761, 179 S. W. 832; *Lewis v. Wright*, 3 Bush, 311; *Corn v. Sims*, 3 Met. (Ky.) 398; *Bronston v. Bronston*, 141 Ky. 639, 133 S. W. 584; *Patterson v. Hansel*, 4 Bush, 654; *Louisville & N. R. Co. v. Graves*, 78 Ky. 74.

We are therefore prevented by the rule *supra* from passing on the competency of the evidence in question, which is not only uncontradicted, but strengthened by the testimony of the appellant himself, admitting his intimacy with Dinkelspiel, the fact that the latter was his tenant when the note was executed, and his knowledge that he conducted, in the building rented of him, gambling transactions, such as bookmaking on horse racing and the like. Dinkelspiel was not introduced as witness.

On the whole case we find no reason for disagreeing with the report of the Commissioner, or the action of the Circuit Court in confirming the same and dismissing the cross petition of appellant. Wherefore the judgment is affirmed.

ANNOTATION.

Effect of Negotiable Instruments Act on statute invalidating instrument given for gambling consideration.

The reported case is apparently the only recent decision which considers the effect of the Negotiable Instruments Act on a statute making invalid an instrument given for a gambling consideration. The earlier cases involving the question are collected in the annotation in 8 A.L.R., beginning at page 314. The holding in the reported case (*LEVY v. FIDELITY & C. TRUST CO.* ante, 207) to the effect

that § 1955 of the Kentucky Statutes, in so far as it declares contracts growing out of wagering or gambling transactions to be void, was not repealed by the Negotiable Instruments Act of 1904, providing for the protection of innocent holders of negotiable instruments, is in accord with the general rule on this subject, as announced in the original annotation. W. F. F.

LUCILE CROUCH
v.
FLOYD M. WARTENBERG.

West Virginia Supreme Court of Appeals — September 21, 1920.

(— W. Va. —, 104 S. E. 117.)

Marriage — effect of mock marriage.

1. A marriage ceremony, though actually and legally performed, when entered into in jest, with no intention of entering into the actual marriage status and all that it implies, and with the understanding that the parties are not to be bound thereby, or assume towards each other the relation ordinarily implied in its performance, including the duties, obligations, rights, and privileges incident thereto, and followed by no subsequent acts or conduct indicative of a purpose to enter into such relation, does not constitute a legal basis for the marriage status, and the pretended marriage may be annulled in equity at the suit of either party.

[See note on this question beginning on page 215.]

— power to annul.

2. A court of chancery, by virtue of its ordinary equity powers, possesses jurisdiction to entertain a suit for the purpose of annulling a marriage supposed to be void, or as to the validity of which some doubt may exist.

[See 9 R. C. L. 396; 10 R. C. L. 341.]

— validity.

3. The status of marriage has its inception in contract, and its validity depends largely upon the validity of the contract upon which it is based.

[See 18 R. C. L. 383.]

— necessity of consent.

4. Mutual consent, which is of the essence of all ordinary contracts, is necessary to the validity of the marriage contract as well, and such consent implies, not only willingness to go through the ceremony of marriage, but also an intention to enter into the marriage status and assume the obligations, duties, rights, and privileges which characterize it.

[See 18 R. C. L. 402, 403.]

Headnotes by LYNCH, J.

CERTIFICATION by the Circuit Court for Cabell County, in Chancery (Graham, J.), to the Supreme Court of Appeals, for determination of a question arising upon the sustaining of a demurrer to a bill filed for the annulment of a marriage ceremony and for an injunction against interference with plaintiff by defendant. *Ruling disapproved.*

The facts are stated in the opinion of the court.

Messrs. Deegan, Boman, & Taylor, for complainant:

The bill in question states a cause of action entitling plaintiff to relief.

Bishop, Marr. Div. & Sep. §§ 296 and 298; McClurg v. Terry, 21 N. J. Eq. 225; Robertson v. Cowdry, 2 West. L. J. 191, 1 S. W. L. J. 167; Robertson v. Cole, 12 Tex. 356; Lyndon v. Lyndon, 69 Ill. 43; Clark v. Field, 13 Vt. 460; Ford v. Stier, L. R. [1896] Prob. 1; Szapira v. Szapira (The Times, Dec. 22, 1898) cited in Hall v. Hall, 24 Times L. R. 756.

Lynch, J., delivered the opinion of the court:

The bill held by the circuit court insufficient on demurrer interposed by the divorce commissioner, the ruling thereon being certified for review by this court, prays for the annulment of a marriage ceremony performed between plaintiff and defendant in the manner authorized and permitted by the laws of this state, and also for an injunction

against interference with plaintiff or her molestation by defendant.

As appears from the allegations of the bill, the ceremony had its inception in jest, without serious wish, desire, or intention to enter into a matrimonial contract, valid and binding upon the parties thereto, or either of them, and they did not intend or contemplate consummation of such a contract, or the assumption of the duties, obligations, rights, privileges, and consequences usually pertaining to the marriage relation, and have not since the ceremony done or performed any act indicative of an intention to ratify or consummate the pretended marriage, and do not now desire its consummation or the exercise of such rights, obligations, duties, and privileges. The bill further alleges that plaintiff was persuaded and induced to go through the marriage ceremony by the false and fraudulent representations of defendant, believed and relied on by plaintiff, without knowledge of their falsity, accompanied also by the assurance that the performance of the ceremony was to be treated as ineffectual for any purpose, and the only purpose intended was to avoid detriment to defendant's business and loss of the respect of his friends and associates, which would result from plaintiff's refusal to go through the ceremony. The marriage license was obtained and the ceremony performed without the knowledge or consent of the parents of the plaintiff, with whom and under whose guardianship she as a minor then resided, and since has continued to reside, notwithstanding the pretended marriage to defendant. These allegations and others of like kind and character the bill amplifies with the perspicuity requisite to constitute good pleading, and with sufficient certainty to warrant annulment of the marriage vows, if otherwise plaintiff is entitled to the relief prayed by her. Wherefore the only question is whether the marriage ceremony so performed, with the apparent, though, according to the bill,

without the actual, consent of the parties thereafter to be affected and bound thereby, until dissolved in a divorce proceeding or otherwise, is legally valid under the circumstances presented.

There is no doubt of the right and power of a court of equity, at the request of either party to the con- ^{Marriage—} tract, to entertain a ^{power to annul.} suit for the purpose of affirming or annulling a marriage supposed to be void, or as to the validity of which any doubt exists, and counsel do not question such right. *McClurg v. Terry*, 21 N. J. Eq. 225; *Clark v. Field*, 13 Vt. 460. According to the allegations of the bill, the responses made to the questions propounded as part of such ceremonies, as "understood, intended, and contemplated both by your complainant and the said defendant at the time the said ceremony was performed, . . . were to impose no marital duties or obligations and confer no marital rights" upon either of them, and "the relation of husband and wife was not by virtue of such ceremony to be assumed, undertaken, or contracted for."

While no animadversion upon such frivolity probably could be too severe, such condemnation now would avail nothing and be utterly useless. Yet it is relevant to remark that vain, meaningless, false, and fraudulent replies to inquiries made to test the sincerity of the parties are especially important upon the question as to the assumption of marital rights, privileges, obligations, and duties. The object of the entire ceremony is to bind the parties by a sacred covenant, one thereafter not to be trifled with. Good faith, honest motives, frankness, and candor are essential to the validity of any contract, whatever the object may be, and the books are replete with cases avoiding contracts of all kinds where these elements are lacking. Happily, there are but few decisions annulling marriage vows on these grounds, not because courts have refused to grant relief

in appropriate cases, but because it is seldom that such frivolity occurs in a matter of such serious concern to the parties interested.

As Bishop in his work on Marriage, Divorce & Separation, vol. 1, § 296, says: "The status of marriage is entered through the door of a contract not essentially differing from other contracts. It is that circumstance without which this status is never superinduced upon the parties."

And in § 298 he says: "The forms are not a substitute for it [mutual consent to enter into the status]. They are but modes of declaring and substantiating it—matters of publicity or evidence. If they are gone through with without the added consent, the marriage is a nullity, both as to the parties and to third persons."

To constitute a valid marriage, the parties must possess the legal qualifications, and enter into a mutual agreement or consent to the marriage relation as contemplated by law, "uninfluenced by fraud or error in any particular deemed fundamental, or by duress." Spencer, Domestic Relations, § 37.

According to these and other authors and decisions dealing with the subject, mutual consent and bona fide agreement of the parties, freely given, and with the intention of entering into a valid

—necessity of consent. status of marriage, are fundamental

and essential elements, and without them the marriage is invalid (*McClurg v. Terry*, and *Clark v. Field*, supra; *Dorgeloh v. Murtha*, 92 Misc. 279, 156 N. Y. Supp. 181; *Ford v. Stier*, L. R. [1896] Prob. 1; *Hall v. Hall*, 24 Times L. R. 756; 1 Bishop, Marr. Div. & Sep. §§ 337, 338; Spencer, Dom. Rel. § 82; 26 Cyc. 832, 833), unless consummated by cohabitation as husband and wife, or otherwise ratified or confirmed (*Brooke v. Brooke*, 60 Md. 524).

In *McClurg v. Terry*, supra, the New Jersey court considered facts and circumstances very similar to

those alleged by plaintiff in this cause, and, as particularly appropriate here, we quote as follows from 21 N. J. Eq. 227: "Mere words, without any intention corresponding to them, will not make a marriage or any other civil contract. But the words are the evidence of such intention, and, if once exchanged, it must be clearly shown that both parties intended and understood that they were not to have effect. In this case the evidence is clear that no marriage was intended by either party; that it was a mere jest, got up in the exuberance of spirits to amuse the company and themselves. If this is so, there was no marriage."

And in *Dorgeloh v. Murtha*, 92 Misc. 279, 156 N. Y. Supp. 181, cited, likewise involving similar facts, the New York court states the rule thus: "The law considers marriage in the light of a civil contract, as to its inception. In the marriage contract, the same as in that of any other, consent is a necessary element. Consent, which is the essence of all ordinary contracts, is necessary to the validity of the marriage contract. The minds of the parties must meet in one common intention. Mere words, without the intention corresponding therewith, will not make a marriage or any other civil contract." "It is quite true that there was a formal ceremony, but it is also patent from the evidence that there was no intention whatever on the part of either plaintiff or the defendant that it should be considered as a valid and legal marriage. . . .

It was a mere subterfuge, gotten up for the purpose of enabling the plaintiff to obtain a marriage certificate which would be of assistance to her in obtaining a theatrical engagement."

As neither plaintiff nor defendant, according to the allegations of the bill, gave their free and willing consent to be bound by the ceremony, or assume towards each other the relation ordinarily implied in its performance, or exercise the duties, obligations, rights, and privileges incident to the relation, and have not

since done any act or performed any such duties or obligations, or exercised such rights and privileges, thereby or otherwise indicating a purpose so to be bound, there appears no reason for refusing to order the annulment of the pretended marriage, and thereby remove any impediment that might otherwise exist

—effect of mock marriage.

by way of embarrassment of any kind or character as the legitimate consequences of the imprudent conduct of the parties, provided, of course, the facts so alleged are proved. Section 8, chap. 64, Code (§ 3643).

As the fraudulent representations or conduct of either party, when proved, vitiate a contract, whatever the subject of the negotiations may

be, so such representations and conduct have the same force and effect upon the validity of a contract of marriage; certainly so, if not consummated, and perhaps, also, even after its consummation, unless the plaintiff has in some manner waived the fraud, or done or performed some act operating as estoppel against subsequent reliance upon it in a court of equity. The application of this doctrine is so general and universal as not to necessitate further discussion.

For these reasons we enter of record our disapproval of the Circuit Court's ruling upon the demurrer, and hold the bill legally sufficient, and direct certification of the result to that court, as required by statute.

Williams, P., absent.

ANNOTATION.

Validity of marriage entered into in jest.

Validity in general.

The few authorities support the conclusion reached in the reported case (CROUCH v. WARTENBERG, ante, 212) to the effect that a marriage ceremony, though legally performed, does not constitute a legal basis for the marriage status, where it is entered into in jest, with no intention of creating a contract, and with the understanding that the parties are not to be bound thereby, or assume toward each other the marital relation.

Thus, in *McClurg v. Terry* (1870) 21 N. J. Eq. 225, which is quoted in the CROUCH CASE, it was expressly held that a marital status was not created by the fact that a marriage ceremony was legally performed, where it also clearly appeared that the marriage was entered into in jest without intent upon the part of either party to consummate a contract of marriage.

And that a marriage in masquerade, where the parties do not know with whom they are united, cannot be supported in the ecclesiastical court in a suit of jactitation or for restitution of conjugal rights, see *Reg. v. Mills*

(1844) 10 Clark & F. 534, per Lord Campbell, at p. 785, 8 Eng. Reprint, 937.

And see *Dorgeloh v. Murtha* (1915) 92 Misc. 279, 156 N. Y. Supp. 181, as quoted in the reported case (CROUCH v. WARTENBERG), but in which, although the marriage was annulled, it appeared that, while the man regarded the whole thing as a joke, there was an actual ceremony performed by a qualified person so that the woman might obtain a marriage certificate for business purposes, it also appearing that both parties were under the impression that a valid marriage was not actually taking place, that there was an absolute lack of intent to enter into a valid marriage, and that the parties thereafter always continued to regard the affair as of no binding effect.

Annulment.

It has been held that a court of equity has power to annul a marriage entered into in jest, and without intent upon the part of either party of creating a marital status. *McClurg v. Terry* (N. J.) supra; CROUCH v. WARTENBERG (reported herewith).

In *McClurg v. Terry* (N. J.) *supra*, the court said: "The fact of marriage can be determined by any court where the question arises, from a justice's court in a suit for goods furnished to the wife, to this court on a question of alimony and the legality of marriage, and the question whether the ceremony was in jest or earnest could in such cases be determined. But the finding would only bind the parties to that suit. Another suit tried the next day between other parties might reach a different result, and the judgment in the first suit could not be received even as *prima facie* evidence in the subsequent suit. It could not nullify the marriage relation. But the proceeding is in *rem*, strictly so-called; it is upon the matter of the marriage, to determine simply whether such marriage exists, and not whether a debt or alimony is due, which depends upon the fact of the marriage. And when a determination is had in a proceeding in *rem*, it binds the whole world and not only the parties to it; it makes it a marriage or no marriage. Marriage itself is a proceeding in *rem*, and constitutes the parties man and wife; divorce is, also; it dissolves an existing marriage. . . . Until the present Constitution was adopted, the legislature had and exercised the pow-

er of divorce and declaring the marriage contract void. A statute for that purpose operated in *rem*, and dissolved the relation. The Constitution took away that power and vested the chancery powers in the chancellor. Among these powers was that of granting divorces as then established. A literal construction of these acts and constitutional provisions would not seem to vest in this court the power of declaring marriages void, except in the cases specified, and yet a liberal construction, guided by what was evidently the design of these provisions, might extend the jurisdiction of this court to this class of cases. In every well-ordered government it is proper that there should be some tribunal or power competent finally to determine the validity of so important a matter as marital relation, so that parties may know their obligations and rights, and that this should not be left to be determined differently by each court, where the question might incidentally arise. And when the power over this subject was taken from the legislature, it is fair to infer it was intended to be left with this court, upon which jurisdiction over most causes of divorce had been directly conferred."

G. J. C.

WEST CACHE SUGAR COMPANY, Respt.,

v.

JOHN A. HENDRICKSON et al.,

and

ZION'S SAVINGS BANK & TRUST COMPANY, Garnishee, Appt.

Utah Supreme Court — June 14, 1920.

(— Utah, —, 190 Pac. 946.)

Garnishment — contents of safety deposit box.

1. The contents of a safety deposit box are subject to garnishment on process against the lessor of the box.

[See note on this question beginning on page 225.]

Courts — power to require opening of safety deposit box.

2. A court having jurisdiction of the parties and subject-matter may require a garnishee to open a safety de-

posit box which the debtor rents of it, where the statute provides that when jurisdiction is conferred on a court, all the means necessary to carry it into effect are also given.

Garnishment — power to require drilling of box.

3. The court may require a safety deposit box to be opened in a garnishment proceeding by drilling to reach the tumblers of the lock, if the hole may be plugged and the box restored to its former condition.

— burden of expense of opening box.

4. A bank garnished for the contents of a safety deposit box may be required to open the box at its own expense.

— necessity of notice.

5. Neither the lessor nor lessee of a safety deposit box, the contents of which have been garnished, is entitled to notice before the making of an order requiring the opening of the box.

— scope of order for delivery of contents of box.

6. The court should not, in requiring a safety deposit box to be opened to which three persons have access,

require the bank, as garnishee of one of them, to deliver all the contents to the sheriff, but merely that which is the property of the one against whom the proceeding is pending.

Judicial notice — uses of safety deposit box.

7. The court takes judicial notice of the uses made of safety deposit boxes.

Garnishment — duty to protect rights of garnishees.

8. It is the duty of the courts and their officers, at all times and under all circumstances, to protect the rights of garnishees and those who may have business relations with them.

— right of garnishee to be present when box is opened.

9. In directing a bank to open a safety deposit box in a garnishment proceeding, it should be permitted to be present when the box is opened, to make an inventory of its contents, and to present to the court any claim which may exist to property not belonging to the debtor.

APPEAL by the garnishee defendant from an order of the District Court for Salt Lake County (Stephens, J.) denying a motion to quash an order requiring it to open defendants' safety deposit boxes and deliver the contents to the sheriff, in a garnishment proceeding to reach property of defendants to satisfy a judgment recovered against them by plaintiff. *Modified.*

The facts are stated in the opinion of the court.

Mr. D. H. Thomas, for appellant:

The order or judgment appealed from was beyond the power of the court and was void.

20 Cyc. 978; Robbins v. Vandermeiden, 182 Mich. 674, 148 N. W. 747; Marriott v. Lewis, 25 Ala. 332; Smith v. Holland, 81 Mich. 471, 45 N. W. 1017; People ex rel. Townsend v. Cass Circuit Judge, 39 Mich. 407; Waters v. Campbell, 7 Alberta L. R. 398, 19 D. L. R. 772; White v. Hobart, 90 Ala. 368, 7 So. 807; Hurst v. Home Protection F. Ins. Co. 81 Ala. 174, 1 So. 209; Ball v. Young, 52 Mich. 476, 18 N. W. 225; Wilder v. Shea, 13 Bush, 128; Stub v. Hein, 129 Minn. 128, 152 N. W. 136; Rood, Garnishment, §§ 307, 314; Hartman v. Olvera, 51 Cal. 501; Lindenthal v. Burke, 2 Idaho, 571, 21 Pac. 419; Everton v. Parker, 3 Wash. 331, 28 Pac. 536; McDowell v. Bell, 86 Cal. 615, 25 Pac. 128; Steele v. Palmer, 41 Miss. 88; Armstrong v. Barton, 42 Miss. 506; Crawford v. Pierce, 56 Mont. 371, 185 Pac. 315; Glover v. Brown, 32 Idaho, 426, 184 Pac. 654.

The box or its contents was not subject to garnishment.

20 Cyc. 1022; Bottom v. Clarke, 7 Cush. 487; Rosenbush v. Bernheimer, 211 Mass. 150, 97 N. E. 984, Ann. Cas. 1913A, 1317.

As against the garnishee, the rights of the creditor do not exceed the rights of the debtor.

20 Cyc. 978.

The court erred in construing the order or judgment, if conceded to be valid, to mean more than that the bank should use its master key to aid in opening the box.

United States ex rel. Watson v. Port of Mobile, 4 Woods, 536, 12 Fed. 770.

Messrs. Cheney, Jensen, & Holman, for respondent:

The court may cause a safe deposit box to be opened to determine the garnishee's liability.

12 R. C. L. 805; Tillinghast v. Johnson, 34 R. I. 136, 41 L.R.A. (N.S.) 764, 82 Atl. 788, Ann. Cas. 1914A, 960; United States v. Graff, 67 Barb. 304, 4 Hun, 634; Trowbridge v. Spinning, 23

Wash. 48, 54 L.R.A. 204, 88 Am. St. Rep. 806, 62 Pac. 125; *Washington Loan & T. Co. v. Susquehanna Coal Co.* 26 App. D. C. 149; *Tillinghast v. Johnson*, 34 R. I. 136, 41 L.R.A. (N.S.) 764, 82 Atl. 788, Ann. Cas. 1914A, 960.

Frick, J., delivered the opinion of the court:

The plaintiff, West Cache Sugar Company, a corporation, obtained judgment in the district court of Salt Lake county against the defendants, John A. Hendrickson and Lorenzo N. Stohl. The judgment not being satisfied, the plaintiff, pursuant to our statute (Utah Comp. Laws 1917, §§ 6730, 6752), caused a writ of garnishment to be issued in said action, which on the 7th day of June, 1919, was served on the Zion's Savings Bank & Trust Company, hereinafter called garnishee.

In addition to the usual statutory interrogatories that are propounded to garnishees, there was also appended the following interrogatory: "Have defendants, or either of them, a safety deposit box in your bank?" The garnishee, after answering in writing and under oath all the statutory interrogatories in the negative, that is, that it was not indebted to the defendants, or either of them, that it had no property or effects of theirs in its possession or under its control, and that it knew of no debts owing to them, or either of them, also under oath, answered the interrogatory relating to the safety deposit box as follows: "Yes; Mr. Lorenzo N. Stohl has."

The answers of the garnishee were duly filed in said district court, and the plaintiff did not deny or controvert them in any way as, under the statute, it might have done within ten days after they were filed. On the 27th day of June, 1909, however, and after more than ten days had elapsed from the time of filing the answers, and after the garnishee's answer, under the statute, had become conclusive, the plaintiff, by its counsel, appeared in said court and made an ex parte application for an order requiring the garnishee to open the safety deposit box referred

to in its answer and to deliver the contents thereof to the sheriff of Salt Lake county. Pursuant to said application the district court issued the order hereinafter set forth. The order, after referring to the garnishee's answer respecting the safety deposit box, and that the plaintiff claimed that said Stohl "has property and securities on deposit" in said box, reads as follows: "Now, therefore, it is hereby ordered and adjudged that the said garnishee defendant cause said box to be opened, and deliver the property therein to the sheriff of Salt Lake county, who shall take and keep such of said property and securities as are liable to garnishment and attachment herein."

The sheriff made return to the effect that he had duly served said order upon the garnishee; that he had "made demand upon O. C. Beebe, cashier" of said garnishee, to comply with said order, and to cause said safety deposit box to be opened, "and the contents of the box delivered to me as sheriff," and that said "O. C. Beebe refused to comply with the order." Thereafter, on the 1st day of July, 1919, counsel for the garnishee served a notice upon plaintiff's counsel to the effect that on the 5th day of said month he would move the court to quash the order upon various grounds, among others, that the district court had exceeded its authority in making the same. The motion was supported by the affidavit of the cashier of the garnishee, in which, among other things, it was stated that the garnishee could not open said box without the key, which was in the possession of said Stohl, unless great force were used to open the same, and such force, if used, would "greatly damage, mutilate, and destroy garnishee's vaults" in which said box was placed.

Thereafter, on the 12th day of July, the garnishee by leave of court filed amendments to the motion to quash, and also amended its original answer filed in the garnishment proceeding. In the amended answer the garnishee averred that said Stohl

was not the only person who had access by means of his key to the said deposit box, but that there were two other persons who had access thereto by means of his key. In the amended motion to quash the writ, the garnishee set forth, among other grounds, that the order to open the safety deposit box was "improvidently issued, in that it was issued without notice," etc., and also set forth the fact that the other persons referred to in its answer had equal right to, and did have access to, said safety deposit box, and that the garnishee had no knowledge respecting the contents of said box, nor whether it contained anything.

At the hearing of said motion to quash, the garnishee produced evidence to the effect that, in addition to said Stohl, two other persons had access to the box, and that the only means by which said box could be opened, according to the knowledge and belief of the cashier and the attorneys of the garnishee, was to force said box open by breaking the hinges or the lock, etc. Upon the other hand, the plaintiff produced evidence that there was a comparatively easy and inexpensive method of opening safety deposit boxes like the one in question by means of drilling a small hole into the lock, through which the tumblers in the lock could be turned, so that by means of the master key alone, which was in the possession of the garnishee, the box could be opened without any substantial injury; that said hole could be plugged, and the combination of the lock changed, and other keys obtained, which, if done, left the box in substantially the same condition for use as it was before it was opened by said method; that said method had been in use for some time in Salt Lake City; that at least several hundred safety deposit boxes had been opened in that way in the different vaults in Salt Lake City, and that there were several experts in said city who opened safety deposit boxes, and that a certain expert had in fact opened some of the garnishee's safety deposit boxes by

that method during the past year. The custodian in charge of the garnishee's safety deposit vaults and boxes conceded that the expert had opened a considerable number of the garnishee's safety deposit boxes, by the method aforesaid. He testified, however, that the cashier was not present when the boxes, or any of them, were opened, and he did not know whether the cashier was aware of the method or not.

The district court denied the garnishee's motion to quash the order to open the safety deposit box, and confirmed the same, to which ruling the garnishee excepted. In due time, and pursuant to the provisions of Utah Comp. Laws 1917, § 6753, the garnishee has appealed to this court, and assigns the ruling of the district court, in the particulars stated, as error, giving numerous reasons which it is not necessary to set forth here.

In his brief, counsel for the garnishee, among other things, insists: (1) That the district court had no power or jurisdiction to make the order requiring the garnishee to open the box, and in that connection counsel expresses serious doubt whether the contents of a safety deposit box are the subject of garnishment process; (2) assuming such power, however, that the garnishee cannot be required to expend its money to open the box, nor to damage its property in doing so, without being indemnified; (3) that the order to open the safety deposit box merely required the garnishee to open the same in the usual manner, namely, by means of the customer's key when used in connection with the master key in its possession, which in this case could not be done, for the reason that the customer was not within this jurisdiction and his key could not be obtained, although the garnishee had made all reasonable efforts to do so; and (4) that the order was "improvidently issued."

The contention that the district court did not have the power or jurisdiction to issue the order requir-

ing the garnishee to open the safety deposit box for the purpose of reaching its contents by the process of

Courts—power
to require
opening of
safety deposit
box.

garnishment is not tenable. The provisions of our statute relating to garnishments are very

broad and comprehensive. This court has held (*Cole v. Utah Sugar Co.* 35 Utah, 148, 99 Pac. 681) that the statute should be liberally construed, and so as to fully effectuate the purpose sought to be attained thereby. Moreover, Utah Comp. Laws 1917, § 1813, provides: "When jurisdiction is, by statute, conferred on a court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of the jurisdiction, if the course of proceeding be not specifically pointed out by statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of the statute or of the Codes of Procedure."

The district court certainly had jurisdiction of the action, and by the service of the writ of garnishment on the garnishee, and the filing of its answers in response to the writ, wherein it stated that the defendant Stohl had rented a safety deposit box in its bank vaults, the court also had jurisdiction of the garnishee, and, in view of the provisions of § 1813, supra, had full power and authority to direct what should be done in the premises, in order to effectuate the object or purpose of the writ of garnishment. Nor can the contention prevail that the contents of a safety deposit box which is rented by a judgment debtor cannot be reached by the process of garnishment or attachment. It is true that, in 20 Cyc. 1022, it is said: "According to the weight of authority, property or funds deposited with a safety deposit company cannot be reached by garnishment proceedings."

The text just quoted, however, was written more than fourteen years ago, and since then a number of courts of last resort have held the

law to be otherwise under statutes the provisions of which are substantially the same as those of this state. If we keep in mind that the relationship existing between the lessor of a safety deposit box and that of his customer is one of bailee and bailor for hire, we should encounter little, if any, difficulty in arriving at the conclusion that the contents of such boxes are subject to the process of garnishment or attachment, and that the boxes themselves may be

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safety deposit
box.

ordered opened by the court for the purpose of reaching their contents. To that effect are the following well-considered cases; *Tillinghast v. Johnson* (1912) 34 R. I. 136, 41 L.R.A. (N.S.) 764, 82 Atl. 788, Ann. Cas. 1914A, 960; *Washington Loan & T. Co. v. Susquehanna Coal Co.* 26 App. D. C. 149; *Trowbridge v. Spinning*, 23 Wash. 48, 54 L.R.A. 204, 83 Am. St. Rep. 806, 62 Pac. 125; *National Safe Deposit Co. v. Stead*, 250 Ill. 584, 95 N. E. 973, Ann. Cas. 1912B, 430; *United States v. Graff*, 67 Barb. 305, 4 Hun, 634.

While, in the foregoing cases, it is squarely held that the contents of such boxes may be reached in garnishment proceedings, yet, as we shall see, in none of the cases was the order to open the box as broad and sweeping as in the case at bar.

In 12 R. C. L. p. 805, § 35, which was issued in 1916, the law is stated thus: "In the case of property placed in a safety deposit box, garnishment against the bank which is the lessor of the box is the proper remedy, by the weight of authority, though a slight conflict must be admitted. In such cases the court may cause the box to be opened to determine the garnishee's liability."

In *Trowbridge v. Spinning*, 23 Wash. 48, 54 L.R.A. 204, 83 Am. St. Rep. 806, 62 Pac. 125, it is said: "Under the broad provisions of this section [speaking of the Garnishment Statute], the court could inquire into the contents of the box by causing the defendant to be examined as a witness, and might even

require an inspection of the contents, to the end that the effects liable to execution should be delivered to the sheriff."

It certainly would be a reproach to our jurisprudence and to the administration of the law if it were held that the law may successfully be defied by human agencies, and that courts cannot make their processes effective merely because valuable property may be locked and concealed in a steel safe or receptacle. The court's orders may not be baffled merely because the lessee or owner of a safety deposit box refuses to surrender the key by which the box, in connection with the master key, is opened. If, therefore, there is any method or device available by means of which such boxes can be opened without destroying them and their contents, the courts have ample power to direct those who have possession and control of

such boxes to open them by any available method, and to deliver the contents thereof into the custody of the law, as hereinafter more specifically pointed out. Nor can the contention prevail that the court was powerless to order the box opened at the expense of the garnishee. The evidence produced in opposition to the motion to quash the writ is to the effect that modern safety deposit boxes, such as the one in question here, can be opened by merely drilling a small hole, about the size of a parlor match, into the lock, through which hole the tumblers which are operated by the customer's key may be turned, and the box may then be opened with the master key, which is in possession of the garnishee. It was also made to appear that the time required to open the box by that method is quite short, and that the usual charge of the expert who opens the boxes by that method was \$2.50, and that the small hole could be closed with a steel plug prepared for the purpose, and after the hole is plugged the box

is just as good as it was originally. If, therefore, a garnishee is required to call in one of the experts to open the box at an expense of \$2.50, that fact, standing alone, would afford no excuse for failing to open the box when ordered to do so by the court. Every garnishee is necessarily put to some inconvenience, and perhaps may be put to some expense, in complying with the order of the court. Such expenses are, however, chargeable as costs, and will be allowed by the court. Such matters are too trivial, however, to be urged as a means of arresting or impeding the due administration of justice. Under our statute, no garnishee can be required to answer the interrogatories until he is paid a fee of \$2, unless he expressly waives such payment. Nor is there any merit to the garnishee's contention that the court should not have made the order without notice to it.

Neither the garnishee nor the judgment debtor is entitled to notice before the order is made and served requiring the box to be opened.

This brings us to the final objection, which, in substance, is that the order of the court was improvidently issued, and that it does not sufficiently protect the interests of the garnishee, etc. We confess that this is the only ground which, to our minds, presents serious difficulties. The order was made ex parte and without notice to the garnishee, and was based entirely upon its answer that the defendant Stohl was the lessee of a safety deposit box. While at the hearing on the motion to quash the writ it was made to appear that at least two other persons had access to the box, yet such fact was unknown to the plaintiff and to the court when the order was made. It will be observed that the terms of the order in question are very sweeping. The garnishee is peremptorily ordered to "cause said box to be opened and to deliver the property therein to the sheriff of Salt Lake county, who shall take and keep such

of said property and securities as are liable to garnishment and attachment herein." It will be seen that the garnishee was thus required to deliver to the sheriff all of the property and securities which may have been in the box, regardless of whose property it was. True, the order provided that the sheriff should "take and keep such of said property and securities as are liable to garnishment and attachment herein." The sheriff, therefore, was required to, and legally could, take only such property and securities as were liable to garnishment under the writ. By the terms of the order, however, he is made the sole judge as to what property and securities are "liable to garnishment." As a matter of law, as we have seen, the relationship between the garnishee and those who have access to the safety deposit box in question was that of bailee and bailor. In view that the garnishee owned the box and had the physical possession and control thereof, it, under the law, is held responsible for the contents to the same effect as any bailee of property would be under the circumstances here disclosed. To that effect are the decisions. See *Lockwood v. Manhattan Storage & Warehouse Co.* 28 App. Div. 68, 50 N. Y. Supp. 974, where it is held that the relation of the company renting a safety deposit box to its customer is "that of bailee or depositary for hire," and that such a relationship "imposed upon it the burden of explaining and excusing the nonproduction of articles intrusted to it. . . ." It being made to appear that at least two others, with the defendant Stohl, had access to the box, and that they may have had valuable articles and securities of their own therein, for which the garnishee might be required to account as bailee, it is but just and fair that the court should protect the interests of the garnishee while enforcing the rights of the judgment creditor. Even though the fact that others had access to the box were not made to appear, yet, in view that

—scope of order
for delivery of
contents of box.

it is a matter of common knowledge that safety deposit boxes are now being generally used for the purpose of safely keeping valuable and precious articles and securities of all kinds, and that the head of a family who rents the box may permit the different members thereof to deposit their valuables in the box with him, or that he may permit a friend to do so, of all of which those who own the safety deposit boxes are well aware, it becomes the duty of the courts to protect the interests of all in case it becomes necessary to order one of those boxes to be opened to ascertain its contents. While it is the duty of all persons in all relations and walks of life to yield prompt obedience to the orders of the courts, which, presumptively at least, are justified by and are based upon the law, yet the same law to which all citizens are required to yield obedience also protects all against preventable injury or loss. In view, therefore, of the uses that at the present time are constantly made of safety deposit boxes, and of which uses the courts, like all others, must take notice, the order in question, in the form it was issued, in one sense, was "improvidently issued."

Judicial notice—
uses of safety
deposit box.

Let us pause a moment to again call attention to the provisions of § 1813, supra. It is there specifically provided that if, in exercising the jurisdiction which by law is conferred upon the courts of this state, "the course of proceeding be not specifically pointed out by statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of the statute or of the Codes of Procedure." Thus there is ample power and authority conferred upon the courts to meet all contingencies, both in enforcing and in protecting the rights and obligations of all. While it is the duty of garnishees to obey the orders of the courts and to aid the officers in executing their orders, judgments, and decrees, yet it is also the duty of the courts and of the officers, at all times and under all

circumstances, to protect the rights and interests of garnishees and those who may have business relations with them. If, therefore, an order is made which requires a garnishee to open a safety deposit box for the purpose of reaching its contents, the order should be so framed as to permit the garnishee to be present by its agents or attorneys, and to make a complete and accurate inventory of the articles that are found in the box when it is opened. In view of the garnishee's liability, it should be given the right, not only to make such an inventory, but in case the articles bear no earmarks respecting ownership, and the garnishee claims an interest or right to any article found in the box, then the garnishee should be permitted to go before the court and assert its right to such articles, or, in case it has reason to believe, and does believe, that some article or articles belong to a person or persons other than the judgment debtor or lessee of the box, the garnishee should be permitted to suggest that fact to the court, to the end that the alleged owner or owners may be notified to come before the court and make known their rights or interest in or to the articles. To follow such a course in no way impedes or interferes with the expeditious and orderly administration of justice, and can in no way interfere with the plaintiff's rights in the premises. While, in pursuing such a course, all the property belonging to the judgment debtor and in the possession or under the control of the garnishee, which is subject to execution, must be surrendered, yet it also safeguards and protects the rights of the garnishee, as well as those who may have or claim some rights to or interests in the property found in the safety deposit box, without in any way interfering with the rights of the plaintiff in the action. It was not necessary in this case, nor, as we

Garnishment—
duty to protect
rights of
garnishees.

—right of
garnishee to be
present when
box is opened.

conceive, is it necessary in any case, that notice be given to the judgment debtor or to any person other than the garnishee that the safety deposit box be opened for inspection, as herein suggested. Such an order may be made upon an ex parte application, but when it is made it should comply with the conditions herein suggested, to the end that all interests and rights may be protected.

We are of the opinion, therefore, that the order in this case is too broad and sweeping, and does not sufficiently guard and protect the rights of the garnishee, or of such persons as may have had access to and may have had property in the safety deposit box. Nor is there, in any of the cases to which we have referred, anything which leads to a different conclusion, unless it be found in the case of *United States v. Graff*, 67 Barb. 305, 4 Hun, 634. In that case it was held to be proper for the sheriff to exclude both parties and their attorneys or agents while he was opening and inspecting the contents of an iron safe. That case was decided forty-five years ago, since which time the use of safety deposit boxes by the general public has been greatly increased, and since which time the law governing safety deposit boxes has been more fully developed. But even though that case were of recent origin, we should, nevertheless, not feel inclined to follow it in that respect. In all of the other cases cited, there is nothing said in the opinions which in any way militates against the views herein expressed. There is, however, considerable said which is in perfect harmony with the foregoing views.

In *Tillinghast v. Johnson*, 34 R. I. 136, 41 L.R.A.(N.S.) 764, 82 Atl. 788, Ann. Cas. 1914A, 960, it is said that under the Garnishment Statute "the court may take such action, in accordance with proper legal procedure, as will enable it to determine the liability of the garnishee. This would warrant the court in directing the garnishee to break the seal upon such parcel, or to open such safety

deposit box and to inspect the contents thereof, that he may disclose the same to the court, and thus enable it to determine as to whether the garnishee is chargeable, and to what extent." What is there said clearly implies that the garnishee, as well as the sheriff, should have access to the contents of the box, and if it claims some interest in the contents, or has reason to believe, and does believe, that the property, or some of it, does not belong to the judgment debtor, the garnishee may make that fact known to the court, and the court may then determine the ownership of the property; that is, in the language of the opinion just quoted from, the court may then "determine as to whether the garnishee is chargeable, and to what extent."

Again, in 12 R. C. L., *supra*, the language of the text is: "In such cases the court may cause the box to be opened to determine the garnishee's liability."

In order to do that, the garnishee, for its own protection, must be given the right to inspect the property deposited in the box, and to direct the court's attention to such as it may claim, or to such as may be the property of someone other than the judgment debtor. The garnishee, under no circumstances, will be chargeable with any property except such as is owned by the judgment debtor, or in which he has a beneficial interest which may be reached by the process of garnishment. Moreover, we think the course herein outlined should be followed for the officer's protection, as well as for the protection of the garnishee. If a full and accurate inventory is made by the garnishee, the officer would also be protected against false or unjust claims by those who may claim an interest in or right to some of the property found in such box.

We do not wish to be understood, by anything we have hereinbefore said, that when it is made to appear, as in this case, that the judgment debtor has a safety deposit box which is under the control of the garnishee, and an application is

made to the court for an order requiring the garnishee to open such box, it would not be proper practice for the court to issue an order requiring the garnishee to appear before the court or judge forthwith, and show cause why the box should not be opened and the contents thereof exhibited as hereinbefore stated. In most cases such a course would avoid all misunderstandings. If such a course had been followed in this case we are convinced that this controversy would have been avoided. It would then have been made to appear that the box could be opened without the judgment debtor's key, and without force or injury to the box, and no doubt the garnishee would have complied with the court's order to open the box after its objections challenging the jurisdiction of the court had been passed on. As it is, the box still remains unopened, and its contents are still undisclosed.

We are of the opinion, therefore, that while the court was authorized to make the order, yet the order is too broad and sweeping, and does not sufficiently protect the rights of the garnishee or of any other person, if there be such, as may have property or some interest in the property deposited in the safety deposit box.

For the reasons last stated the cause is remanded to the District Court of Salt Lake County, with directions to modify the order so as to require the officer to permit the garnishee, by its attorney or agent, or both, to be present when the box is opened, and to take a full and accurate inventory of the contents of the box, and to make any claim, as herein suggested, to any property or articles found in the box, and, in case any claim is made, to present the same to the court for determination at the earliest possible time consistent with orderly procedure.

In view of the whole record, we are of the opinion that one half of the costs of this appeal should be paid by the plaintiff, and the other half by the garnishee. Such is the order.

Corfman, Ch. J., and Weber, Gideon, and Thurman, JJ., concur.

ANNOTATION.

Levy upon or garnishment of contents of safety deposit box.

The majority of the cases which have passed upon the question whether or not the contents of a safety deposit box are subject to levy, attachment, or garnishment have held in accordance with the rule laid down in the reported case (*WEST CACHE SUGAR Co. v. HENDRICKSON*, ante, 216) that the contents of such boxes may be reached.

Thus, in *Washington Loan & T. Co. v. Susquehanna Coal Co.* (1905) 26 App. D. C. 149, under a statute liberally providing for reaching a debtor's "goods, chattels, and credits" by garnishment, and permitting interrogatories concerning any such property to be served upon any garnishee, it was held that property in a safe deposit vault was not exempt from execution or attachment. The court said: "Property of a defendant in a safe deposit box of a trust company is either in the possession of the defendant, or in the possession of the trust company. If it is in the possession of the defendant, under the Code, it appears liable to attachment and execution. If it is in the possession of the trust company, such company may be garnished therefor, as in possession of personal property of the defendant capable of being seized and sold on execution. A mere device to guard from intrusion the defendant's property in the vault of the trust company neither divests the defendant of his property, nor releases the company from its charge of defendant's property. There is no magic in two keys,—a master key and a customer's key,—to put property belonging to a defendant in an attachment beyond the reach of creditors and the process of the courts. If there were a doubt respecting the term 'possession,' there can be no doubt that property deposited by a defendant in a safe deposit box of a trust company is the defendant's property in the hands of, and in charge of, the trust company; and, by the terms of the Code, the trust company is liable to be

11 A.L.R.—15.

garnished therefor. . . . We find no good reason for exempting property of a defendant in a safe deposit vault from execution or attachment." The court also pointed out with some emphasis that, in the District of Columbia, a trust company, as garnishee, may be compelled to disclose whether or not it has in its possession, or under its control, a safe deposit box belonging to a defendant in an attachment proceeding, and its knowledge, if any, of the contents of such box.

And in *Tillinghast v. Johnson* (1912) 34 R. I. 136, 41 L.R.A. (N.S.) 764, 82 Atl. 788, Ann. Cas. 1914A, 960, it was held that the contents of a safe deposit box are not rendered exempt from garnishment in the hands of the company maintaining and renting the right to use it, by the fact that it can be opened without injury only by the use of a key in the possession of the customer, if, under the statutes, the court has power to direct the forcible opening of the box to secure an examination of its contents, which power it has when the statutes authorize examination of the garnishee, and the taking of such action in accordance with proper legal proceedings as will enable the court to determine the liability of the garnishee. This case is also authority for the general proposition that, where the statutes provide a method by which the courts can ascertain the contents of safety deposit boxes, a company maintaining and renting the same can be garnished for the contents thereof.

So, in *Trowbridge v. Spinning* (1900) 23 Wash. 48, 54 L.R.A. 204, 83 Am. St. Rep. 806, 62 Pac. 125, under a statute commanding a garnishee to answer as to the personal property or effects of the defendant in his possession or under his control, it was held that a safe deposit company, having valuables of a debtor in its vaults, was subject to garnishment therefor, although it had no access to the con-

tents of the box in which the valuables were kept.

And in *United States v. Graff* (1875) 67 Barb. (N. Y.) 304, in holding that a court having jurisdiction of an attachment proceeding may properly direct the sheriff to open a safe in the custody of a trust company, containing the defendant's property, and to take and keep the property and evidences of debt liable to attachment found therein, the court said: "There was nothing improper in that portion of the order made which directed the sheriff to open the safe and tin box containing the defendant's property. The process could be effectually served in no other way. It was the duty of the officer acting under it immediately to attach the real and personal estate of the debtor. And that could only be done by taking it into his custody, where the property was tangible in its character. . . .

Neither the safe nor the tin box constituted any portion of the defendant's dwelling, and they were not within the protection which the law affords to that, against an officer acting under civil process. They were simply places of deposit and safe-keeping for the defendant's property, which the sheriff may enter to make the seizure required by law, in the execution of the process in his hands. If that were not so, there would be nothing to prevent a failing or insolvent debtor from turning all his property into valuable securities, or other articles requiring but little space for their custody, and then placing them in the hands of a safe deposit company for preservation, and defying all the efforts of his creditors to satisfy their debts by resorting to them. That would form an expedient for the success of fraudulent devices, which might render the laws of the state for the collection of debts entirely powerless. No such effect could be given to a deposit of that nature, without at once defeating the object plainly designed to be secured by the law, in rendering the debtor's property liable to the process issued in favor of his creditors in actions brought to recover their just debts. Against that, his

dwelling alone is secured against the intrusive action of the officer. And that, in no sense, can be so far extended as to include either the safe or tin box in the custody of the Mercantile Trust Company, for the defendant."

And the reported case (*WEST CACHE SUGAR CO. v. HENDRICKSON*, ante, 216) is authority not only for the proposition that, when the statutes confer upon a court having jurisdiction all the means necessary to carry it into effect, a court having jurisdiction of a garnishment proceeding may require the garnishee to open a safety deposit box which the defendant rents of it, but also for the proposition that the court may require a safety deposit box to be opened by drilling, that the garnishee may be required to open the box at its own expense, that neither the garnishee nor the defendant is entitled to notice before the making of an order requiring the opening of the box, and that in ordering the opening of a box the court must safeguard not only the rights of the garnishee, but also those of the defendant and others, if any, interested in the box or its contents,—the latter by permitting the garnishee to be present when the box is opened, and to make an inventory of its contents, and to present to the court any claim which may exist to property not belonging to the defendant.

However, there is authority to the effect that the contents of a safe deposit box cannot be subjected to attachment. Thus, in *Gregg v. Hilson* (1871) 8 Phila. (Pa.) 91, where a safe deposit company rented a vault under a contract expressly providing that only in case of refusal to surrender the keys and give up possession at the expiration of the lease was the company authorized to break open the safe, it was held that the rented safe and its contents were not "a debt due to the defendant, or a deposit of money," etc., within the meaning of the Pennsylvania Attachment Statutes, the court saying that the contents of the safe in question were in the actual possession of the renter of the safe, and had not been deposited with the garnishee.

G. J. C.

FLETCHER B. GIBBS, Respt.,
v.
CLARENCE ALMSTROM, Appt.

Minnesota Supreme Court — January 30, 1920.

(145 Minn. 35, 176 N. W. 178.)

Damages — excess — submission to operation.

1. The damages are not excessive. Plaintiff was not obliged to submit to an operation in order to reduce his damages.

[See note on this question beginning on page 230.]

Evidence — sufficiency.

2. The evidence sustains a verdict that plaintiff, injured in an automobile collision, was injured by the negligence of defendant, and that plaintiff was free from contributory negligence.

[See 2 R. C. L. 1195.]

Workmen's compensation — driving automobile — course of employment.

3. Defendant was an employer, and was under the Compensation Act, and was engaged in the conduct of his business. Plaintiff and his employer were likewise under the Compensation

Act. Plaintiff was driving an automobile belonging to his employer. The automobile had been assigned to another employee of the same employer, but one doing business in other territory, and was being taken by plaintiff from a railroad station at the request of this fellow employee, and solely as an accommodation to him. The evidence sustains a finding that the accident did not arise in the course of plaintiff's employment, and that the case is not within the third-party provision of the Compensation Act.

Headnotes by HALLAM, J.

APPEAL by defendant from orders of the District Court for Hennepin County (Leary, J.) denying motions for judgment notwithstanding a verdict for plaintiff, or for new trial, or for findings under the Workmen's Compensation Act, in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Denegre, McDermott, & Stearns, for appellant:

Plaintiff was guilty of contributory negligence as a matter of law.

Moore v. St. Paul City R. Co. 136 Minn. 315, 162 N. W. 298; Carlson v. Duluth Street R. Co. 111 Minn. 244, 126 N. W. 825.

The damages are so excessive as to have been given by the jury under passion and prejudice.

Zuponic v. Val Blatz Brewing Co. 131 Minn. 112, 154 N. W. 790, 11 N. C. C. A. 255; Larson v. Wisconsin R. Light & P. Co. 138 Minn. 158, 164 N. W. 666; Slette v. Great Northern R. Co. 53 Minn. 341, 55 N. W. 137; Gahagan v. Aeromotor Co. 67 Minn. 252, 69 N. W. 914, 1 Am. Neg. Rep. 92; Johnson v. St. Paul City R. Co. 67 Minn. 240, 36 L.R.A. 586, 69 N. W. 900, 1

Am. Neg. Rep. 93; Bennett v. E. W. Backus Lumber Co. 77 Minn. 198, 79 N. W. 682; Torske v. Commonwealth Lumber Co. 86 Minn. 276, 90 N. W. 532; Northrup v. Hayward, 99 Minn. 299, 109 N. W. 241.

The court erred in denying the motion of defendant to dismiss plaintiff's action, or to make findings under the Compensation Act allowing or disallowing compensation, and in submitting the question to the jury.

Mahowald v. Thompson-Starrett Co. 134 Minn. 113, 158 N. W. 913, 159 N. W. 565; State ex rel. Breckenridge v. District Ct. 136 Minn. 151. — A.L.R. —, 161 N. W. 388; Harris v. Hobart Iron Co. 127 Minn. 399, 149 N. W. 662, 7 N. C. C. A. 44; Johnson v. Nelson, 128 Minn. 158, 150 N. W. 620; Hade v.

Simmons, 132 Minn. 344, 157 N. W. 506.

Plaintiff sustained an injury by accident arising out of and in the course of his employment.

State ex rel. Virginia & R. L. Co. v. District Ct. 138 Minn. 132, L.R.A. 1918C, 116, 164 N. W. 585; State ex rel. Rau v. District Ct. 138 Minn. 250, L.R.A. 1918F, 918, 164 N. W. 916; State ex rel. Duluth Brewing & M. Co. v. District Ct. 129 Minn. 176, 151 N. W. 912; State ex rel. People's Coal & Ice Co. v. District Ct. 129 Minn. 502, L.R.A. 1916A, 344, 153 N. W. 119, 9 N. C. C. A. 129; Mahowald v. Thompson-Starrett Co. 134 Minn. 113, 158 N. W. 913, 159 N. W. 565; State ex rel. Anseth v. District Ct. 134 Minn. 16, L.R.A. 1916F, 957, 158 N. W. 713; State ex rel. Fari-bault Woolen Mills Co. v. District Ct. 138 Minn. 210, L.R.A. 1918F, 855, 164 N. W. 810, 15 N. C. C. A. 520; Parker v. Hambrook, Ann. Cas. 1913C, 4, note; Plumb v. Cobden Flour Mills Co. Ann. Cas. 1914B, 498, note; Parker v. The Black Rock, Ann. Cas. 1916B, 1293, note; Milwaukee v. Miller, L.R.A. 1916A, 40, note; Schroetke v. Jackson-Church Co. L.R.A. 1917D, 80, note; Humphrey v. Employers' Liability Assur. Corp. L.R.A. 1918F, 202, note; Larke v. John Hancock Mut. L. Ins. Co. 90 Conn. 303, L.R.A. 1916E, 584, 97 Atl. 320, 12 N. C. C. A. 308; Munn v. Industrial Bd. 274 Ill. 70, 118 N. E. 110, 12 N. C. C. A. 652.

Even if plaintiff was not employed to do the particular thing he was doing when injured, he nevertheless is under the Compensation Act, for the reason that Herron had implied authority to instruct plaintiff to drive the automobile at the time and place in question.

31 Cyc. 1398; Fox v. Chicago, St. P. & K. C. R. Co. 86 Iowa, 368, 17 L.R.A. 289, 53 N. W. 259; LaFayette R. Co. v. Tucker, 124 Ala. 514, 27 So. 447; M'Quibban v. Menzies [1900] 2 Sc. Sess. Cas. 5th series, 732; Ferguson v. Brick & Supplies, 7 B. W. C. C. 1054; Goslan v. Gillies [1907] S. C. 68, 44 Scot. L. R. 71; Sina v. Carlson, 120 Minn. 283, 139 N. W. 601; Tobin v. Hearn [1910] 2 Ir. R. 639, 44 Ir. L. T. 197; Greer v. Thompson [1912] W. C. Rep. 272, 5 B. W. C. C. 586; Whitehead v. Reader, 3 W. C. C. 40.

if at the time in question the driving of the automobile was not one of plaintiff's duties because of an emergency, if plaintiff departed from his

employment, he was again reinstated in his employment by the act of Herron in asking him to care for the automobile, for the reason that he had implied authority to make this request.

State ex rel. Nienaber v. District Ct. 138 Minn. 417, L.R.A. 1918F, 200, 165 N. W. 268; Devine v. Caledonian R. Co. 36 Scot. L. R. 877; Rees v. Thomas [1899] 1 Q. B. 1015, 68 L. J. Q. B. N. S. 539, 47 Week. Rep. 504, 80 L. T. N. S. 578, 15 Times L. R. 301; Hapelman v. Poole, 2 B. W. C. C. 48, 25 Times L. R. 155; St. Louis & S. F. R. Co. v. Bagwell, 33 Okla. 189, 40 L.R.A. (N.S.) 1180, 124 Pac. 320; Aga v. Harbach, 127 Iowa, 144, 109 Am. St. Rep. 377, 102 N. W. 838; 4 Ann. Cas. 441, 18 Am. Neg. Rep. 71; Georgia P. R. Co. v. Propst, 83 Ala. 518, 3 So. 764, 13 Am. Neg. Cas. 9; Gunderson v. Eastern Brewing Co. 71 Misc. 519, 130 N. Y. Supp. 785; Milwaukee v. Miller, L.R.A. 1916A, 62; Jesson v. Bath, 113 L. T. Jo. 206, 4 W. C. C. 9; Geary v. Ginzler & Co. [1913] W. C. & Ins. Rep. 314, 108 L. T. N. S. 286, 6 B. W. C. C. 72; Stat-ham v. Galloways, 109 L. T. Jo. 133, 2 W. C. C. 149; Brown v. Scott, 1 W. C. C. 11; Sloan v. Central Iowa R. Co. 62 Iowa, 728, 16 N. W. 331; Cannon v. Fargo, 138 App. Div. 20, 122 N. Y. Supp. 576; Yongue v. St. Louis & S. F. R. Co. 133 Mo. App. 141, 112 S. W. 985; Young v. Northern California Power Co. 12 N. C. C. A. 310, note; Geibel v. Elwell, 19 App. Div. 285, 46 N. Y. Supp. 76.

Messrs. S. R. Child and Sherman Child for respondent.

Hallam, J., delivered the opinion of the court:

On June 21, 1918, plaintiff, while driving an automobile on Harmon place in Minneapolis, came into collision with an automobile driven by defendant, on Twelfth street, at its intersection with Harmon place. Plaintiff was injured. The jury gave him a verdict for damages. Defendant appeals.

1. The evidence is in conflict, but it sustains a verdict that defendant was negligent. Defendant was approaching plaintiff from his left. Plaintiff, therefore, had the right of way. Chapter 119, Laws 1917, § 22 (Gen. Stat. Supp. 1917, § 2552). Plaintiff's testimony is that, when his

Evidence—
sufficiency.

front wheels were just beyond the sidewalk line, he saw defendant, his front wheel just about crossing the sidewalk line, in other words that plaintiff was nearer the point of intersection than defendant. Defendant concedes that, when he reached the center of the street, plaintiff was but 10 or 15 feet to his right. Marks on the cars, showing that the front of defendant's car struck the rear left wheel of plaintiff's car, tend to corroborate plaintiff's evidence that he was first at the point of intersection. Plaintiff testified that defendant did not slacken his speed, and from the fact that plaintiff's car "rolled over a couple of times" the jury might infer that defendant's car struck it with force.

Nor do we think the case depends on the question of who struck the sidewalk line first. The statute does not warrant drivers of vehicles in taking close chances. When a driver approaches a street intersection, if he sees a vehicle approaching from his right, and near enough so that there is reasonable danger of collision if both proceed, then it is his duty to yield the right of way.

The question of plaintiff's negligence was a jury question. Plaintiff testified that he was driving cautiously at about 9 miles an hour. Witnesses for defendant placed his speed much higher. The determination of this fact was for the jury. We cannot say that plaintiff's testimony was not true.

2. The damages are not excessive. The verdict was for \$2,600. Plaintiff was twenty-seven years old. His actual expenses were about \$300. He was disabled for six weeks, but lost no salary. Besides other painful lacerations and bruises, the bridge of his nose was broken, causing stoppage of the nasal passage, and causing disfigurement and a defect in speech. Defendant contends that this condition of the nose may be cured by an operation. This contention requires scant comment. We recognize the principle that a person injured is required to exercise

reasonable precaution to keep down damages caused by the acts of the wrongdoer, but no man is required to risk his life upon the operating table for any such purpose. This proposition has been decisively settled in this state. *Maroney v. Minneapolis & St. L. R. Co.* 123 Minn. 480, 49 L.R.A.(N.S.)756, 144 N. W. 149; *Otos v. Great Northern R. Co.* 128 Minn. 283, 150 N. W. 922, 13 N. C. C. A. 1045; *Peterson v. Branton*, 137 Minn. 74, 77, 162 N. W. 895.

Damages—
excess—sub-
mission to
operation.

3. Defendant contends that plaintiff cannot maintain a common-law action for damages, but that his claim is limited by the "third-party" provision of the Compensation Act. Gen. Stat. 1913, § 8229. Defendant claimed to be an employer of labor, and subject to the Compensation Act, and that he was engaged in the conduct of his business when the accident occurred. The jury so found. Plaintiff was in the employ of the United States Gypsum Company. This company was under the Compensation Act. The court submitted to the jury the special question: "Did this accident arise out of and in the course of the employment by plaintiff by the United States Gypsum Company?"

The record before us does not show whether the jury answered that question, but defendant's counsel in their brief concede that it was answered "No."

If this answer stands, the verdict must stand. We think the evidence sustains the jury's finding. The United States Gypsum Company was engaged in the sale of building material. Plaintiff was its city salesman in Minneapolis. He was in charge of the company's Minneapolis office. The employees there were a stenographer and himself. He worked on a salary. He received his instructions from the Chicago office of the company. In general, his duties were to make quotations, accept orders, and solicit business in Minneapolis and St Paul. He traveled

all about these cities. An automobile was assigned to him by the company. This car the company bought and maintained. Plaintiff kept it in a garage at his residence.

The car plaintiff was driving at the time of the accident was not the car assigned to him. It had been assigned to L. M. Herron, a country salesman for the same company, and was to be maintained by the company. Herron also lived in Minneapolis. He had no connection with the Minneapolis office. He traveled about the country. He too received his orders from the Chicago office. Herron had been advised that a car had been shipped to him for his use and was expected to arrive in Minneapolis. He expected to be out of the city when the car arrived, and had asked plaintiff, as a personal favor to him, to look after the car. Later he sent plaintiff the bill of lading and the key, and asked him to advance the freight, and take the car to plaintiff's garage until he could call for it. Plaintiff had taken the car from the freight house, bought gasoline, supplied some trifling parts, and was complying with the request received from Herron when the accident happened. He expected Herron to reimburse him for the expenses

incurred, and Herron did so. Plaintiff had the use of a double room in a garage, and he expected to let part of the space to Herron. Plaintiff had no instructions from the company as to this car. He was discharging no duty owed by him to the company. So far as appears, what he did was of no consequence or concern to the company. It was purely a favor to Herron. It was not in furtherance of the employer's business, as in *State ex rel. Duluth Brewing & M. Co. v. District Ct.* 129 Minn. 176, 151 N. W. 912. He was not working overtime to save his master's property, as in *Munn v. Industrial Bd.* 274 Ill. 70, 113 N. E. 110, 12 N. C. C. A. 652. Herron was not authorized to call upon plaintiff to do this duty for the company, and there was no emergency which warranted him in so doing, as in *State ex rel. Nienaber v. District Ct.* 138 Minn. 416, L.R.A. 1918F, 200, 165 N.

W. 268. The question whether plaintiff was in the course of his employment was submitted without objection to the jury. The evidence sustains their verdict.

Order affirmed.

Workmen's compensation—driving automobile—course of employment.

ANNOTATION.

Duty of injured person to submit to operation to reduce damages.

The cases arising under the Workmen's Compensation Acts as to the duty of injured employees to submit to operations, or to take measures to restore their earning capacity, are treated in the annotation to *O'Brien v. Albert A. Albrecht Co.* 6 A.L.R. 1260.

And in a late workmen's compensation case, *Simpson v. New Jersey Stone & Tile Co.* (1919) 93 N. J. L. 250, 107 Atl. 36, it was held that an injured employee who sought an allowance for total disability under the Compensation Act was not required to undergo a serious operation, such as an amputation of the arm at the shoulder.

It is a general rule that one injured

through the negligence of another must exercise ordinary care to effect a cure, and to prevent aggravation of the injury, but that he is bound to submit to an operation only when a reasonably prudent man under the circumstances would do so.

Alabama.—*Birmingham R. Light & P. Co. v. Anderson* (1909) 163 Ala. 72, 50 So. 1021.

District of Columbia.—*American Realty Co. v. Thompkins* (1911) 37 App. D. C. 87.

Kentucky.—*Stewart Dry Goods Co. v. Boone* (1918) 180 Ky. 199, 202 S. W. 487.

Minnesota.—*GIBBS v. ALMSTROM* (reported herewith) ante, 227.

New York. — *Williams v. Brooklyn* (1898) 33 App. Div. 539, 53 N. Y. Supp. 1007; *Wolf v. Third Ave. R. Co.* (1902) 67 App. Div. 605, 74 N. Y. Supp. 336.

Rhode Island.—*O'Donnell v. Rhode Island Co.* (1907) 28 R. I. 245, 66 Atl. 578.

Texas.—*Gulf, C. & S. F. R. Co. v. Coon* (1888) 69 Tex. 730, 7 S. W. 492; *Missouri, K. & T. R. Co. v. Hanning* (1897) — Tex. Civ. App. —, 41 S. W. 196, reversed on other grounds in (1897) 91 Tex. 347, 43 S. W. 508.

In determining whether or not he will submit to an operation involving danger and uncertainty, the injured person may exercise his judgment. *Birmingham R. Light & P. Co. v. Anderson* (1909) 163 Ala. 72, 50 So. 1021; *Stewart Dry Goods Co. v. Boone* (1918) 180 Ky. 199, 202 S. W. 489; *Maroney v. Minneapolis & St. L. R. Co.* (1913) 123 Minn. 480, 49 L.R.A.(N.S.) 756, 144 N. W. 149; *Baer v. Lehigh & H. River R. Co.* (1919) 93 N. J. L. 85, 106 Atl. 421, affirmed on other grounds in (1919) 93 N. J. L. 446, 108 Atl. 253; *Williams v. Brooklyn* (1898) 33 App. Div. 539, 53 N. Y. Supp. 1007; *Blate v. Third Ave. R. Co.* (1899) 44 App. Div. 163, 60 N. Y. Supp. 732; *Mattis v. Philadelphia Traction Co.* (1897) 19 Pa. Co. Ct. 106, 6 Pa. Dist. R. 94; *Kehoe v. Allentown & L. Valley Traction Co.* (1898) 187 Pa. 474, 41 Atl. 310.

On this point, the court said in *McNamara v. Metropolitan Street R. Co.* (1908) 133 Mo. App. 645, 114 S. W. 50: "We do not think plaintiff should be criticized and punished on account of his failure to undergo a surgical operation. He should be accorded the right to choose between suffering from the disease all his life, or taking the risk of an unsuccessful outcome of a serious surgical operation. Certainly, defendant, whose negligence produced the unfortunate condition, is in no position to compel plaintiff again to risk his life in order that the damages may be lessened. To give heed to such contention would be to carry to an absurd extreme the rule which requires a person damaged by the wrong of another to do all that rea-

sonably may be done to minimize his damages."

The court, in *Louisville & N. R. Co. v. Kerrick* (1917) 178 Ky. 486, 199 S. W. 44, said that as a general rule one injured must make his damages as light as possible, but that this rule does not apply where an operation would be serious and critical, and likely to be attended with some risk, a possible failure, and probable death, and held that one who had sustained a hernia was not required to submit to an operation or suffer his damages to be reduced, where the evidence showed that an operation might not prove successful and might possibly result in death to the patient.

And to the same effect is *Stewart Dry Goods Co. v. Boone* (1918) 180 Ky. 199, 202 S. W. 489, where it was held that, although one's leg possibly could have been remedied by an operation, his failure to submit to one would not preclude his recovering substantial damages, where the operation would not have been a minor, but a serious one.

And in *Freeman v. Chicago, M. & St. P. R. Co.* (1916) 52 Mont. 1, 154 Pac. 912, 12 N. C. C. A. 591, it was held that one who was injured in a railway accident, and had had one operation performed which was unsuccessful, was not bound, in order to reduce damages, to have another major operation performed, the results of which were problematical. The court said: "We recognize the rule that an injured person must use ordinary diligence to effect a cure, and thus to minimize the damages . . . ; but it would be carrying this rule to an absurd extreme to hold that a man who has submitted to one operation, which failed, must take such chances with his life and his health as may be involved in a second, risking failure in that as well, in order that the damages caused by another's negligence may possibly be reduced." And to the same effect is *Martin v. Pittsburgh R. Co.* (1913) 238 Pa. 528, 48 L.R.A.(N.S.) 115, 86 Atl. 299.

And in *Snyder Ice, Light & P. Co. v. Bowron* (1913) — Tex. Civ. App. —, 156 S. W. 550, where the plaintiff

exercised ordinary care in securing treatment, and there was no question but that the treatment given was proper, it was held that ordinary care to reduce the damages did not require that he have an elbow which was fractured rebroken, in order to eliminate the stiffness by breaking the cartilaginous mass which formed around it.

And in *Bateman v. Middlesex County* (1911) 24 Ont. L. Rep. 84, it was held that it was not unreasonable for a doctor fifty-five years old to refuse to submit to an operation for a fallen kidney, where there was medical authority that such an operation should not be performed on one over fifty years of age, although the attending physician advised an operation.

And in *Mattis v. Philadelphia Traction Co.* (1897) 6 Pa. Dist. R. 94, 19 Pa. Co. Ct. 106, it was held that although a surgical operation would practically bring the plaintiff complete relief, he was not bound to submit to it, where it was an operation of comparatively recent date, and the medical profession was not settled in regard to it, or the best method of performing it.

And in *Schneider v. South Tacoma Mill Co.* (1911) 65 Wash. 590, 118 Pac. 750, it was held that the injured person might be found free from fault in failing to submit to a recommended operation, where he did so upon the advice of a surgeon, between whom and another surgeon there was a dispute as to what would have been the proper treatment.

And in *Lobban v. Wabash R. Co.* (1911) 159 Mo. App. 464, 141 S. W. 440, where an injured person refused to submit to an operation advised by a physician through fear of fatal results, on account of the condition of his heart, and another physician testified that he examined the plaintiff's heart and discouraged an operation, an instruction confining the jury's consideration to whether the first physician's advice was reasonably proper was held correctly modified so as to include a consideration of the other physician's opinion.

In *Stokes v. Long* (1916) 52 Mont. 470, 159 Pac. 29, it was held that an

injured person was not necessarily bound to submit to a major surgical operation which might or might not result in a betterment of his condition, but that it is a question for the jury, under the facts disclosed in each case, whether the plaintiff has used ordinary care to reduce the damages.

In *Atlantic Coast Line R. Co. v. Wallace* (1911) 61 Fla. 93, 54 So. 893, it was held that the plaintiff was not necessarily precluded from recovering the added damages accruing from his delay in submitting to an operation advised by physicians.

It has been held that a recovery for death is not defeated by the fact that the deceased refused to act upon his physician's advice to have his injured leg amputated, where the physician testified that such an operation would merely have improved the chances of recovery. *Sullivan v. Tioga R. Co.* (1889) 112 N. Y. 643, 8 Am. St. Rep. 793, 20 N. E. 569.

In *Guild v. Portland R. Light & P. Co.* (1913) 64 Or. 570, 131 Pac. 310, it was held that the fact that a hernia caused by the defendant's negligence might possibly be cured by an operation did not prevent the recovery of damages as for a permanent injury. It is held that, if an operation involving but slight inconvenience and small expense will relieve the condition, it is the plaintiff's duty to submit to the same; and that, if he fails or neglects to do so, he cannot recover damages for the consequences which might thus be avoided. *Bailey v. Centerville* (1899) 108 Iowa, 20, 78 N. W. 831; *White v. Chicago & N. W. R. Co.* (1910) 145 Iowa, 408, 124 N. W. 309.

And in *Leitzell v. Delaware, L. & W. R. Co.* (1911) 232 Pa. 475, 48 L.R.A. (N.S.) 114, 81 Atl. 543, where a charge was requested that if the jury believed that the condition of the plaintiff could be relieved by a simple surgical operation, which an ordinarily prudent man would undergo, such fact should be taken into consideration as an element which would reduce the amount of damages, it was held that it should have been given, and that it was error for the court to state that the charge was affirmed,

providing the jury found that the proposed surgical operation was not a serious or dangerous one, and could be performed without any risk of failure or danger to the plaintiff. The court said: "We think the point should have been affirmed without qualification. It referred to 'a simple surgical operation which an ordinarily prudent man would undergo.' The answer ignored the feature as to what an ordinarily prudent man would do, and instructed the jury not to consider the matter, unless they found that the proposed operation was not serious or dangerous, and could be performed without any risk of failure or danger to the plaintiff. This we think was going too far. The plaintiff, of course, was entirely at liberty to refuse to submit to an operation; but if the effect of his refusal would be to retain permanently a condition which might be removed by a simple operation, which an ordinarily prudent man would, under the circumstances, undergo, that matter should certainly be taken into consideration by the jury in estimating the damages."

And in *Joseph Schlitz Brewing Co. v. Duncan* (1897) 6 Kan. App. 178, 51 Pac. 310, it was held that, if the plaintiff could be certainly cured by an operation that was safe and inexpensive, the recovery must be decreased to the extent that the certainty, safety, and inexpensiveness of the cure could be assured.

And it has been held that recovery for the loss of the sight of one eye cannot include damages for the probable loss of sight of the other eye, where it appeared that an operation removing the eye originally injured would save the other, as such an operation was one which reason and common sense would require the plaintiff to undergo. *Freeman v. Wilson* (1912) — Tex. Civ. App. —, 149 S. W. 413.

And in *Donovan v. New Orleans R. & Light Co.* (1913) 132 La. 239, 48

L.R.A.(N.S.) 109, 61 So. 216, where the plaintiff refused to submit to an operation which involved little danger, the court, because of such refusal, reduced the damages.

In *Ward v. Ely-Walker Dry Goods Bldg. Co.* (1913) 248 Mo. 348, 45 L.R.A.(N.S.) 550, 154 S. W. 478, where there was evidence that an operation which was more or less dangerous would probably give relief, an instruction was sustained that it is the duty of one injured to take such steps as an ordinarily careful and prudent man would take in the exercise of ordinary care under the same circumstances, to reduce his damages to the minimum; that if the plaintiff could have had an operation which would have improved his condition, and was advised by a competent surgeon that such operation was necessary in order to improve his condition, and if such an operation would have greatly lessened his pain and mental anguish and improved his health, and by refusing to have it he failed to exercise ordinary care to improve his condition, he could recover only such sum as his damages would have aggregated if he had had the operation performed.

In *Allen v. Bear Creek Coal Co.* (1911) 43 Mont. 269, 115 Pac. 673, evidence was held admissible, in mitigation of damages, to show that the plaintiff's physician offered to perform, without charge, an operation which would straighten an injured finger.

In *Missouri, K. & T. R. Co. v. Hagan* (1906) 42 Tex. Civ. App. 133, 93 S. W. 1014, it was held that, having been denied recovery for the developments that could have been prevented by an operation to which the plaintiff, contrary to the dictates of ordinary prudence, refused to submit he was, conversely, entitled to added damages for the suffering and uncertainty of success which would attend such an operation. J. T. W.

CHARLES JOHNSON, Appt.,

v.

JAMES BURGHORN.

Michigan Supreme Court — September 30, 1920.

(— Mich. —, 179 N. W. 225.)

Waters — right to trap in navigable water.

1. The public has no right to anchor traps by stakes driven into the submerged land of navigable rivers the soil of which belongs to the riparian owner, nor to cut holes in the ice formed over such land and fix stakes thereto for the purpose of holding traps to catch fur-bearing animals inhabiting the waters.

[See note on this question beginning on page 241.]

— ownership of bed of navigable river.

2. The owner of the land bordering on a navigable river owns the submerged land to the thread of the stream.

[See 27 R. C. L. 1362-1364.]

Ice — on navigable water — ownership.

3. The owner of land under a navigable river owns the ice formed on the surface over his property.

[See 14 R. C. L. 2.]

Injunction — against trespass on submerged land.

4. Injunction lies to prevent continued trespass upon the submerged lands of a riparian owner in a navigable river, for the purpose of fixing traps by stakes to the submerged land or to the ice, to catch fur-bearing animals inhabiting the water.

[See 12 R. C. L. 691.]

APPEAL by plaintiff from a decree of the Circuit Court for Ottawa County in Chancery (Cross, J.), in his favor in part only, in a suit brought to restrain defendant from trapping and taking fur-bearing animals from certain property belonging to plaintiff. *Decree enlarged and modified.*

The facts are stated in the opinion of the court.

Messrs. Daniel F. Pagelsen and Gerrit J. Diekema, for appellant:

The owner of the shore lands owns the submerged lands connected therewith to the thread of the stream.

Lorman v. Benson, 8 Mich. 18, 77 Am. Dec. 435; *Clark v. Campau*, 19 Mich. 325; *Bay City Gaslight Co. v. Industrial Works*, 28 Mich. 182; *Fletcher v. Thunder Bay River Boom Co.* 51 Mich. 277, 16 N. W. 645; *A. M. Campau Realty Co. v. Detroit*, 162 Mich. 240, 139 Am. St. Rep. 555, 127 N. W. 365; *Sterling v. Jackson*, 69 Mich. 488, 13 Am. St. Rep. 405, 37 N. W. 845.

The owner of the land not only owns the submerged lands to the thread of the stream, but also owns the ice covering the surface of the water covering the lands, and any interference with these rights constitutes a trespass.

Lorman v. Benson, 8 Mich. 18, 77 Am. Dec. 435; *People's Ice Co. v. The*

Excelsior, 44 Mich. 229, 38 Am. Rep. 246, 6 N. W. 636; *Clute v. Fisher*, 65 Mich. 48, 31 N. W. 614; *Bigelow v. Shaw*, 65 Mich. 341, 8 Am. St. Rep. 902, 32 N. W. 800; *Hoag v. Place* (*Mansfield v. Place*) 93 Mich. 450, 18 L.R.A. 39, 53 N. W. 617; *Grand Rapids Ice & Coal Co. v. South Grand Rapids Ice & Coal Co.* 102 Mich. 227, 25 L.R.A. 815, 47 Am. St. Rep. 516, 60 N. W. 681.

The gravel in the bed of the navigable streams is owned by the abutting property owner to the thread of the stream.

Archer v. Greenville Sand & Gravel Co. 233 U. S. 60, 58 L. ed. 850, 34 Sup. Ct. Rep. 567; *Wear v. Kansas*, 245 U. S. 154, 62 L. ed. 214, 38 Sup. Ct. Rep. 55, Ann. Cas. 1918B, 586; *McMorran Mill. Co. v. C. H. Little Co.* 201 Mich. 301, 167 N. W. 990.

The waters in question are admitted to be a part of Grand river, and, as such, plaintiff has the exclusive

right of hunting and fishing and, necessarily, trapping thereon.

Ainsworth v. Munoskong Hunting & Fishing Club, 159 Mich. 61, 123 N. W. 802, 153 Mich. 185, 17 L.R.A. (N.S.) 1236, 126 Am. St. Rep. 474, 116 N. W. 992, 15 Ann. Cas. 706; *Hall v. Alford*, 114 Mich. 165, 38 L.R.A. 205, 72 N. W. 137; *Sterling v. Jackson*, 69 Mich. 488, 13 Am. St. Rep. 405, 37 N. W. 845; *Schulte v. Warren*, 218 Ill. 108, 13 L.R.A. (N.S.) 745, 75 N. E. 783; *State v. Mallory*, 73 Ark. 236, 67 L.R.A. 773, 83 S. W. 955, 3 Ann. Cas. 852; *State v. Shannon*, 36 Ohio St. 423, 38 Am. Rep. 599.

The party whose private possession has been interfered with has a right of action for the protection of his property, and is entitled to at least nominal damages which are presumed to follow for such invasion of his rights.

Giddings v. Rogalewski, 192 Mich. 319, 158 N. W. 951; *Winans v. Willetts*, 197 Mich. 512, 163 N. W. 993; *Marsh v. Colby*, 39 Mich. 626, 33 Am. Rep. 439; *Burroughs v. Whitwam*, 59 Mich. 279, 26 N. W. 491.

The right of hunting and fishing (trapping) is a property interest, and not a mere privilege.

St. Helens Shooting Club v. Barber, 150 Mich. 571, 114 N. W. 399.

Mr. Charles E. Misner also for appellant.

Mr. Louis H. Osterhaus, for appellee:

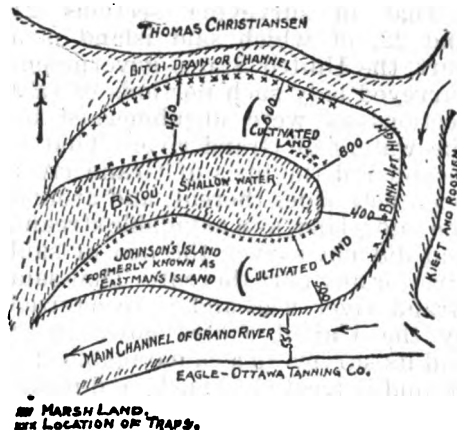
The rights of hunting and fishing on all public navigable waters belong in common to all the members of the public.

19 Cyc. 992; 29 Cyc. 330; 11 R. C. L. 1025, 1029; *Carson v. Blazer*, 2 Binn. 475, 4 Am. Dec. 463; *Winans v. Willetts*, 197 Mich. 512, 163 N. W. 993; *Beach v. Hayner*, 207 Mich. 93, 5 A.L.R. 1052, 173 N. W. 487; *Hall v. Alford*, 114 Mich. 165, 38 L.R.A. 205, 72 N. W. 137; *State v. Lake St. Clair Fishing & Shooting Club*, 127 Mich. 580, 87 N. W. 117; 12 R. C. L. 688; *Lincoln v. Davis*, 53 Mich. 375, 51 Am. Rep. 116, 19 N. W. 103; *Stuart v. Greanyea*, 154 Mich. 132, 25 L.R.A. (N.S.) 257, 117 N. W. 655; *Ainsworth v. Munoskong Hunting & Fishing Club*, 153 Mich. 185, 17 L.R.A. (N.S.) 1236, 126 Am. St. Rep. 474, 116 N. W. 992, 15 Ann. Cas. 706; *Bickel v. Polk*, 5 Harr. (Del.) 325; *Yard v. Carman*, 3 N. J. L. 937; *State, Roberts, Prosecutor, v. Jersey City*, 25 N. J. L. 525; *Polhemus v. Bate-*

man, 60 N. J. L. 163, 37 Atl. 1015; *Sherwood v. Stephens*, 18 Idaho, 399, 90 Pac. 345; *Bell v. Smith*, 171 N. C. 116, 87 S. E. 987; *Barboro v. Boyle*, 119 Ark. 377, 178 S. W. 378; *State ex rel. Thompson v. Parker*, 132 Ark. 316, 200 S. W. 1014; *Meredith v. Triple Island Gunning Club*, 113 Va. 60, 38 L.R.A. (N.S.) 236, 73 S. E. 721; *Ann. Cas. 1913E, 531*; *Payne v. Providence Gas Co.* 31 R. I. 295, 77 Atl. 145, *Ann. Cas. 1912B, 65*; *Burns v. Crescent Gun & Rod Club*, 116 La. 1038, 41 So. 249; *Hume v. Rogue River Packing Co.* 51 Or. 237, 31 L.R.A. (N.S.) 396, 131 Am. St. Rep. 732, 83 Pac. 391, 92 Pac. 1065, 96 Pac. 865; *Flisrand v. Madson*, 35 S. D. 457, 152 N. W. 796; *Kaudson v. Hull*, 46 Utah, 114, 148 Pac. 1070; *Forestier v. Johnson*, 164 Cal. 24, 127 Pac. 156; *Diana Shooting Club v. Hustling*, 156 Wis. 261, 145 N. W. 816, *Ann. Cas. 1915C, 1148*.

Stone, J., delivered the opinion of the court:

The bill of complaint herein was filed to restrain the defendant from trapping and otherwise taking muskrats and other fur-bearing animals from the property known as Eastman's or Johnson's island, in Grand river, in the county of Ot-tawa. The appended map or plat,



taken from the record, was introduced and used in evidence upon the hearing of the case. It will aid in an understanding of the situation. We compile from the stipulated statement of facts the following:

That the plaintiff is the owner by grant and in actual possession of the

lands described in the bill of complaint, and has been in such actual possession, and has occupied said lands for farming purposes, for twenty-five years and upwards. That he obtained title to said premises by deed of conveyance, under date of December 28, 1892, from the owners of the lands adjoining to and abutting upon Grand river. That said premises form an island in Grand river, between the village of Spring Lake and the city of Grand Haven, and were formerly a part of the submerged lands owned by the owners of the upland abutting upon Grand river, and are opposite to such lands. That said island is bounded along the northerly side by a channel or ditch dredged through the island as it originally existed many years ago, from the open water of Grand river at the westerly or down-river end to the up-water of Grand river at the easterly or up-river end, by the then owner of the island, and on the westerly, southerly, and easterly sides by the waters of Grand river, and that the main channel of said Grand river is at the westerly and southerly boundaries of said land.

That in surveying sections 21 and 22, of which said island is a part, the United States government surveyed only such portions of said sections as were unsubmerged by the waters of Grand river. That it meandered the lines of Grand river upon both sides thereof, and around the said island, as a navigable stream, and did not survey the bed of said river or any part thereof. That said Grand river was and is recognized by the United States government and its surveyors as a navigable river, and is treated as such, and it has ever been and is now navigable in fact and within the meaning of the law. That the United States government never, by express grant, sold or conveyed to the state of Michigan, or anyone else, the bed of said river, or the soil of sections 21 and 22 submerged thereby, but conveyed, granted, and sold only such fractional portions of said sections as were

unsubmerged by the waters of the river.

That plaintiff claims ownership of the bed of the river, and the soil submerged thereby adjacent to and adjoining his lands, to the thread or middle of the stream. He does not take the same by express grant or patent or act of Congress from the United States, or from the state of Michigan, but by virtue of his conveyance and as an incident to his ownership of a part of the surveyed fractional section to the center line or thread of the stream such ownership and title are conceded by the defendant.

That the plaintiff, by virtue of his aforesaid ownership of and title to the bed of the stream adjacent to said lands to the thread of such stream, claims an exclusive right to trap for muskrats and other aquatic animals in and upon the waters of Grand river covering the soil submerged by the waters adjacent to his lands to the thread of said stream, and denies to the public any interests in or rights upon the said submerged lands and waters covering the same, other than the right of navigation.

That upon said island there is a bayou extending from the open water of Grand river at the westerly end of said island up approximately through the center of said island, $\frac{1}{2}$ of a mile long, and varying in width from 200 to 400 feet. That the center of the down-river end of the bayou at its opening into the main channel is from 3 to 5 feet deep, and slopes and shoals so that at the easterly end of the bayou it is not over 6 inches in depth. There may be places in the bayou where it is deeper, but in these it rarely exceeds 3 feet, and that the entire bayou is covered with grass and weeds during the greater portion of the year, but the same may at all times be navigated by small boats. That said plaintiff, about the middle of the month of December, 1919, placed and caused to be placed notices upon said premises, informing the public and this defendant that no

trapping or hunting was to be permitted thereon, in accordance with the statute in such case made and provided. That said defendant knew that said signs had been placed upon said premises, and had been informed by the plaintiff that he must not trap upon said premises, and must not in any manner invade said premises. That said lands in the upland and said submerged lands are valuable for the taking of muskrats and other aquatic animals whose hides may be used for fur, and that this plaintiff has realized large sums of money from the taking of muskrats by means of traps from said premises, to the extent of \$1,000. That said defendant, after the notices were placed upon said premises, and after he had been notified by the plaintiff not so to do, did enter in and upon said premises, and did place traps upon said premises, and did take therefrom a large number of muskrats, all of the value of, to wit, \$500. That said defendant, even after he knew of the notices and after he had been notified by said plaintiff so to do, has refused to remove his traps from said premises, and continued to maintain traps thereon until he was enjoined by the order and injunction of the court, and that since said time he has removed his traps from said premises.

The defendant claims no right, either in himself or in the public, to trap in the waters of the channel or ditch forming the northerly boundary of said lands, which ditch was established by the act of a previous owner, and now forms the northerly boundary and a portion of said lands to which plaintiff has absolute title by grant and conveyance, and claims no right, either in himself or in the public, to trap upon any part of the premises described in the bill of complaint above the ordinary high-water mark of Grand river along the westerly, southerly, and easterly sides thereof, and concedes plaintiff's right to restrain him and any of the public from hunting or trapping thereon, without his con-

sent. The defendant denies that the plaintiff has any exclusive right in, over, and upon the water of Grand river along the westerly, southerly, and easterly sides of said island, and claims that the public has a right to navigate the said waters, to fish therein, to shoot duck and other wild fowl, and to otherwise hunt thereon, and to trap for muskrats and other fur-bearing aquatic animals therein, on all parts of the same between the ordinary high-water mark and the thread of the stream, either from boats during the open season of the year, or through the ice during the seasons when the river is frozen over; and claims that plaintiff's title of ownership of and control over the soil under the waters of said Grand river are subservient to the public right of navigation, fishing, hunting, and trapping in and upon said waters, and over and upon such submerged soil, either from boats in the open hunting and fishing season, or upon and through the ice in the winter season.

That the particular and only question involved in this case, and to be determined herein and hereby, is, as claimed by defendant, whether or not the public, against the objection of the riparian owner, who, by virtue of and as incident to his ownership, grant, and conveyance of land bordered by the navigable waters of Grand river, and similar navigable waters and rivers in this state, has title to the bed of the stream to the thread thereof, subject to the public rights in, over, and upon such waters for the purpose of navigation, the right to fish, and the right to hunt and trap in, over, and upon such waters, between the ordinary high-water mark thereof and the thread of the stream, as an incident to, or in addition to, a right to navigate such waters; and, in so fishing, hunting, and trapping, to anchor a boat to the bed of the stream, and to anchor or attach a trap to the submerged lands, and to place a trap thereon for the purpose of securing aquatic animals therein, either by

stakes to the bed of the stream or to the ice formed thereon, to cut holes in the ice covering such submerged lands for the purpose of placing such traps upon the submerged lands, contrary to the wishes and in direct opposition to notice given to him by the owner of the lands.

At the hearing, the learned circuit judge, after stating that it was admitted the defendant had no right to hunt or trap upon the uplands of plaintiff, but that he claimed the right to hunt, trap, and fish upon the navigable waters of Grand river, even though plaintiff owns the land to the thread of the stream as an incident to his ownership of the land along the banks of said river, was of the opinion that the defendant and all other persons have the right to use the navigable waters of this state between ordinary high-water marks, for boating, fishing, trapping, and hunting purposes, "if access is gained to said waters without committing a trespass." The trial court therefore ordered that a permanent injunction should issue, restraining the defendant from hunting, fishing, or trapping upon all of the lands of the plaintiff, as described in the bill of complaint, except over and upon the navigable waters of Grand river between ordinary high-water mark along the westerly, southerly, and easterly sides of said land; and a decree was entered accordingly. From this decree the plaintiff has appealed.

It is practically admitted by the defendant that the plaintiff is the owner of, and in possession of, the lands described in the bill of complaint, and that the description covers the lands in question where the defendant had set his traps; that the plaintiff is the absolute owner in fee of the upland and the submerged land covered by the waters of Grand river, subject only to the easement of navigation which the public may have therein.

It is the claim of the plaintiff that the defendant placed traps upon the lands of said plaintiff, as described

in the bill of complaint; and also placed them on the shores of said land in the waters of Grand river, where said waters were from 2 to 6 inches deep; that he placed such traps in the so-called cut or ditch on the northerly side of said island, along the shores of said bayou extending within said island, and on the easterly end of said island; that the waters of Grand river, the main channel thereof, flow along the westerly, southerly, and easterly sides of said island, and a portion of such waters form a shallow bayou extending some $\frac{1}{2}$ of a mile into this island, and that this bayou, in the summer time, is filled with weeds and grass, and that the entire island is surrounded with weeds and grass extending from its shores.

Defendant admits that he has no right to place his traps in the ditch, drain, or channel on the northerly side of said island, nor in the non-navigable waters about said island, but claims a right to place his traps on the submerged lands of the river, and to anchor a boat to the bed of the stream in the submerged land, and in the ice covering such submerged lands in the winter time, for the purpose of trapping for such animals in the navigable portions of Grand river.

It will be observed, on an examination of the record, that by the answer and statement of facts, together with the findings and decree of the court below, it is sought to inject into the case the questions of hunting and fishing. Under the bill of complaint and facts as agreed upon, there is no question before this court regarding hunting and fishing, and the only question for this court to decide is in regard to trapping, and we shall confine ourselves to that question.

As we understand the case, there are two propositions for this court to pass upon:

- (1) Who is the owner of the submerged lands bordering on navigable waters, such as Grand river?
- (2) Who has the exclusive right

to trap and take the fur-bearing animals in such waters?

We have spent much time in examining the numerous decisions of this court upon the questions here involved, and kindred questions.

1. As has been stated, it is conceded in the answer and in the statement of facts that the plaintiff is the owner of the lands described in the bill of complaint, and that said description covers all of the property shown in the map or plat hereto attached.

The owner of the shore lands owns the submerged lands connected therewith to the thread of the stream. *Lorman v. Benson*, 8 Mich. 18, 77 Am. Dec. 435; *Clark v. Campau*, 19 Mich. 325; *Bay City Gaslight Co. v. Industrial Works*, 28 Mich. 182; *Fletcher v. Thunder Bay River Boom Co.* 51 Mich. 277, 16 N. W. 645; *Sterling v. Jackson*, 69 Mich. 488, 13 Am. St. Rep. 405, 37 N. W. 845; *A. M. Campau Realty Co. v. Detroit*, 162 Mich. 243, 139 Am. St. Rep. 555, 127 N. W. 365.

The owner of the land not only owns the submerged lands to the thread of the stream, but also owns the ice covering the surface of the water over the submerged lands, subject to such rights, if any, that other riparian owners may have, and any interference with these rights constitutes a trespass. *Lorman v. Benson*, supra; *People's Ice Co. v. The Excelsior*, 44 Mich. 229, 38 Am. St. Rep. 246, 6 N. W. 636; *Bigelow v. Shaw*, 65 Mich. 341, 8 Am. St. Rep. 902, 32 N. W. 800; *Hoag v. Place* (*Mansfield v. Place*) 93 Mich. 450, 18 L.R.A. 39, 53 N. W. 617; *Grand Rapids Ice & Coal Co. v. South Grand Rapids Ice & Coal Co.* 102 Mich. 227, 25 L.R.A. 815, 47 Am. St. Rep. 516, 60 N. W. 681.

It also has been held by this court that the gravel in the bed of a navigable stream, as between private parties, is owned by the abutting property owner to the thread of the

stream. This also has been the holding of the United States Supreme Court. *McMorran Mill Co. v. C. H. Little Co.* 201 Mich. 301-317, 167 N. W. 990; *Archer v. Greenville Sand & Gravel Co.* 233 U. S. 60, 58 L. ed. 850, 34 Sup. Ct. Rep. 567; *Wear v. Kansas*, 245 U. S. 154, 62 L. ed. 214, 38 Sup. Ct. Rep. 55, Ann. Cas. 1918B, 586.

2. Counsel have discussed the question: Who has the exclusive right to trap and take fur-bearing animals in these waters? The industry of counsel and our own examination have failed to find much direct authority upon the subject of trapping on submerged lands. It is virtually conceded in this case that in order to trap upon these submerged lands it is necessary to anchor the traps, by stakes or otherwise, to the submerged lands if the waters are not frozen over, and to cut holes in the ice covering such submerged lands for the purpose of placing such traps, in the winter season.

It is claimed by plaintiff that this court has held that the riparian owner has the exclusive right of hunting upon the submerged lands covered by navigable streams, and a clear distinction is made between lands bordering on navigable streams and lands bordering on the Great Lakes. *Ainsworth v. Munoskong Hunting & Fishing Club*, 153 Mich. 185, 17 L.R.A.(N.S.) 1236, 126 Am. St. Rep. 474, 116 N. W. 992, 15 Ann. Cas. 706; *Ainsworth v. Munoskong Hunting & Fishing Club*, 159 Mich. 61, 123 N. W. 802.

In the last-cited case, as reported in 159 Mich., this court, speaking through Justice Grant, said: "The sole question now before us is whether Munoskong bay is included in the waters of Lake Huron, or whether it borders on the river. If the former, the defendant has no exclusive rights of hunting and fishing, and the decree of the court is right. If the latter, then the defendant owns the subaqueous land to the middle thread of the river, and the decree is wrong."

See also *Hall v. Alford*, 114 Mich. 165, 38 L.R.A. 205, 72 N. W. 137; *Sterling v. Jackson*, 69 Mich. 488, 13 Am. St. Rep. 405, 37 N. W. 845.

It is the contention of plaintiff, and in this we think he is correct, that the defendant had no right to anchor his traps in the submerged

Waters—right to trap in navigable water.

lands, or to cut holes in the ice and fix stakes thereto, holding traps. That the party whose private possession has been thus interfered with has a right of action for the protection of his property has, we think, been passed upon and sustained by this court. *Giddings v. Rogalewski*, 192 Mich. 319, 326, 158 N. W. 951; *Winans v. Willetts*, 197 Mich. 512-518, 163 N. W. 993; *Marsh v. Colby*, 39 Mich. 626, 33 Am. Rep. 439; *Burroughs v. Whitwam*, 59 Mich. 279, 26 N. W. 491. We think the right of trapping is a property interest. *St. Helen Shooting Club v. Barber*, 150 Mich. 571, 114 N. W. 399.

That plaintiff has suffered such an irreparable injury as invokes the aid of a court of equity is, we think, clear. *Ainsworth v. Munoskong Hunting & Shooting Club*, 153 Mich. 185, 190, 17 L.R.A. (N.S.) 1236, 126 Am. St. Rep. 474, 116 N. W. 992, 15 Ann. Cas. 706; 22 Cyc. 763, 764.

The learned trial judge, in his findings and decree, held that "the defendant and all other persons have the right to use the navigable waters of this state between ordinary high-water marks for boating, fishing, trapping, and hunting purposes, if access is gained without committing a trespass."

Just what the learned trial judge meant by the expression, "without committing a trespass," it is difficult to understand, for it seems to be conceded that, in order for the defendant to successfully trap for muskrats upon the property in question, he must fasten his traps, by means of stakes or otherwise, to the submerged lands, or to the ice covering the same. This would consti-

tute a trespass by "invading the close" of the plaintiff.

In *Sterling v. Jackson*, *supra*, Justice Champlin, in the prevailing opinion, said: "The defendant claims that he had the right to shoot the wild fowl from his boat, because, as the waters were navigable where he was, he had the right to be there; that, there being no property in wild fowl until captured, if he committed no trespass in being where he was, no action will lie against him for being there and shooting the wild duck. There is a plausibility in the position which, considered in the abstract, is quite forcible, and, if applied to waters where there is no private ownership of the soil thereunder, would be unanswerable. But, so far as the plaintiff is concerned, defendant had no right to be where he was, except for the purpose of pursuing the implied license held out to the public of navigating the waters over his land. So long as that license continued, he could navigate the water with his vessel, and do all things incident to such navigation. He could seek the shelter of the bay in a storm, and cast his anchor therein; but he had no right to construct a 'hide,' nor to anchor his decoys for the purpose of attracting ducks within reach of his shotgun. Such acts are not incident to navigation, and, in doing them, defendant was not exercising the implied license to navigate the waters of the bay, but they were an abuse of such license."

In our opinion the decree of the court below should be enlarged and modified, and one entered here, restraining the defendant from entering upon the lands

of the plaintiff, and from attaching his traps to the submerged lands, or to the ice covering the same, upon the premises described in the bill of complaint, giving the plaintiff the exclusive right to trap thereon.

We refrain upon this record from

Injunction—against trespass on submerged land.

passing upon the questions of shooting and fishing, as not being involved in this case, and as presenting a moot question.

The decree will therefore be enlarged and modified, and one entered here in accordance with this opinion, with costs to the plaintiff.

ANNOTATION.

Right to trap in navigable stream.

The reported case (JOHNSON v. BURGHORN, ante, 234) appears to be the only direct authority upon this question. It was unsuccessfully contended in that case that the public, against the objection of a riparian owner who has title to the bed of a navigable stream to the thread thereof, have the right to fish, hunt, and trap in, over, and upon such stream between the ordinary high-water mark and the thread thereof, as an incident to, or in addition to, the right of navigation. That the right to fish, and, surely, the right to trap, are not an incident to the public right of navigation, appears from the following statement in 11 R. C. L. 1030: "There is no necessary connection between a common right of fishing and a common right of navigation; the public easement of navigation does not of itself sustain a common right of fishing in the waters. The right of the public to fish and the right to navigate are separate and distinct. One has no more right to catch fish as an incident of navigation, than has a traveler on a public road to shoot game, cut grass, or dig minerals in the highway." And in *State ex rel. Thompson v. Parker* (1917) 132 Ark. 316, 200 S. W. 1014, the court said: "The common right of hunting and fishing in such navigable waters is not reserved to the public as a right attached and incident to the right of navigation, but it is one that inheres in the public in our state, because the state, in trust for the public, is the owner of the soil in navigable waters to high-water mark, and the common right of hunting and fishing is incident to such ownership, as well as the other common right of navigation."

Whether the public have the right to hunt, in addition to the right to navigate, is well answered in 12 R. C. L. 11 A.L.R.—16.

688, as follows: "The right to shoot waterfowl from a boat is analogous to the right to take fish from the water. The public have a right to resort to public waters and take fish or shoot waterfowl; but, in the case of private waters, the public have no fishing or fowling rights. The right to shoot fowl on a private body of water is vested exclusively in him who owns the soil beneath the water, in the same way as he is entitled to enjoy alone the hunting privileges on his private lands, and even in the case of public waters, a hunter must not pass over private property to reach the public shooting grounds. . . . It has been contended that navigable waters are open to hunting and fowling by all members of the public, subject to such regulations as may be imposed by the state; but in the cases in which the question has actually been adjudicated, it is held that the real test as to the public right of fowling is the public or private ownership of the soil beneath the waters, and if it is shown that the soil is privately owned, the owner has the exclusive right of fowling. The mere fact that one has the right to pass along a stream in a boat gives him no right to shoot fowls where the soil beneath the water is privately owned."

It was held in the reported case (JOHNSON v. BURGHORN) that the owner of land along a navigable river, whose title extends to the thread of the stream, has the exclusive right to trap for muskrats and other aquatic animals in and upon the part of the river covering the soil submerged by the waters adjacent to his land, to the thread of the stream, and that the anchoring by another of traps to such submerged land, or to the ice covering the same, in order to catch such ani-

mals, constitutes a trespass, which will be enjoined at the instance of the riparian owner.

It seems, therefore, that the answer to this question depends upon the own-

ership of the land beneath the water; i. e., if owned by the state, the public has the right to trap, but if the title is in the riparian owner, he alone has the right.
G. V. L.

STATE OF MINNESOTA EX REL. THERESA SCHERBER, Appt.,
v.

PROBATE COURT of Hennepin County et al., Respts.

Minnesota Supreme Court—April 16, 1920.

(145 Minn. 344, 177 N. W. 354.)

Executors and administrators — effect of fraudulent representations — nonclaim.

1. Even if the fraudulent representations of the administrator induced a creditor of the decedent to omit to present his claim to the probate court within the limitation above stated, there is no remedy against the estate, for by no act of the administrator can the bar of the Nonclaim Statute be waived or lifted, after once closed.

[See note on this question beginning on page 246.]

— when claims presented.

2. Claims against estates of decedents are not "presented" to the probate court until placed in the custody of the court, or until filed, or made a matter of record therein. Handing to and leaving such claims with the administrator is not a compliance with the law.

[See 11 R. C. L. 192.]

— authority to permit presentation after time.

3. The probate court is without power to permit a claim to be presented for allowance after the expiration of one year and six months from the making of the order limiting the time for creditors to present claims and the publication of the notice of such order.

[See 11 R. C. L. 212.]

Headnotes by HOLT, J.

APPEAL by relator from an order of the District Court for Hennepin County (Steele, J.) quashing a writ of certiorari granted to review an order of the Probate Court denying relator's petition for extension of time to present a claim against a certain estate. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. George R. Smith and H. Stanley Hanson, for appellant:

Fraud, either actual or constructive, perpetrated by a debtor, or his or its duly accredited representative, suspends the operation of the Statutes of Limitation, whether there be any specific exception in the statutes or not.

Webster v. Reid, 11 How. 437, 13 L. ed. 761; Buswell, Limitations & Adverse Possession, §§ 22, 106, 385; Baart v. Martin, 99 Minn. 197, 116 Am. St. Rep. 394, 108 N. W. 945; Henry v. White, 123 Minn. 182, L.R.A.1916D, 4, 143 N. W. 324; Riley v. Pearson, 120

Minn. 210, L.R.A.1916D, 7, 139 N. W. 361; Story, Agency, §§ 368 et seq.; Wellner v. Eckstein, 105 Minn. 444, 117 N. W. 830; State ex rel. Union Nat. Bank v. Probate Ct. 103 Minn. 325, 115 N. W. 173; State v. Rollins, 80 Minn. 217, 83 N. W. 141; Smith v. People, 47 N. Y. 330; Riggs v. Palmer, 115 N. Y. 506, 5 L.R.A. 340, 12 Am. St. Rep. 819, 22 N. E. 188; 18 Cyc. 297; Able v. Chandler, 12 Tex. 88, 62 Am. Dec. 518.

The acts, representations, and conduct of the administrator not only constituted constructive fraud, suspending the operation of the statute relied

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on as barring claimant's right to relief, but also operated as an estoppel against the estate to assert the statute as bar.

Brand v. Brand, 63 L.R.A. 206, summary of notes; Bigelow, Estoppel, p. 682.

Mr. Daniel F. Foley, for respondents:

No constructive fraud exists.

20 Cyc. 9; 16 Cyc. 87; 1 Bigelow, Fr. 10.

An administrator has no principal who can be bound by fraudulent acts.

Taylor v. Davis (Taylor v. Mayo) 110 U. S. 330, 28 L. ed. 163, 4 Sup. Ct. Rep. 147; Story, Agency, §§ 280-286.

The administrator's fraud cannot bind the estate.

Roberts v. Spencer, 112 Ind. 85, 13 N. E. 129; 18 Cyc. 471; Woerner, Administration, 2d ed. § 402; Spaulding v. Suss, 4 Mo. App. 541; Kells v. Lewis, 91 Iowa, 128, 58 N. W. 1074.

Even if the court had power to extend the time for filing claims, relator has shown no such facts as would justify such an order.

State ex rel. Lukes v. Williams, 123 Minn. 57, 142 N. W. 945; State ex rel. Anderson v. Ross, 133 Minn. 172, 157 N. W. 1075.

The statutes which provide for filing claims are mandatory.

Gilman v. Maxwell, 79 Minn. 377, 82 N. W. 669; State ex rel. Thompson v. Probate Ct. 66 Minn. 246, 68 N. W. 1063; Berryhill v. Peabody, 77 Minn. 59, 79 N. W. 651; Hantzch v. Massolt, 61 Minn. 861, 63 N. W. 1069; Brown v. Farnham, 55 Minn. 27, 56 N. W. 352; Schurmeier v. Connecticut Mut. L. Ins. Co. 69 C. C. A. 22, 137 Fed. 42.

Holt, J., delivered the opinion of the court:

The district court of Hennepin county quashed a writ of certiorari granted by it to review an order of the probate court of said county denying relator's petition to extend the time to present a claim against an estate, then in course of administration in that court. The relator appeals.

The order of the probate court does not indicate the ground upon which the petition was denied. However, in the return to the writ of certiorari, the probate judge stated that he considered the petition sufficient to warrant the relief asked, but deemed the court without power

to act, because more than eighteen months had expired since the order was made for creditors to present claims. Without stopping to consider or decide whether this recital by the judge in his return to the writ presents an error which a reviewing court may lay hold of, when the record otherwise shows no ground for reversal, we come directly to the questions argued by counsel in this court, viz:

(1) May the presentation of a claim against an estate to the administrator thereof be held a compliance with § 7320, Gen. Stat. 1913?

(2) If not, has the probate court the power to extend the time for receiving a claim after the expiration of more than eighteen months from the time the order to present claims was made and published?

The record discloses that the administrator herein was appointed February 7, 1917, and on the same day the court made and filed the order for creditors to present claims, which order was duly published. The petition states that on March 19, 1917, relator verified an itemized claim against the estate, and handed the same to the administrator, believing that by so doing she had complied with the law, and relying also upon the assurance of the administrator that nothing more need be done by her with reference to presenting the same to the court. She made no other attempt to present her claim to the court until this petition was filed on December 23, 1919.

Under the common-law practice, and also under statutory regulations in some states, the presentation of claims against the estates of deceased persons is to the executor or administrator; and he passes on the validity thereof. Not so under our Code. The provisions pertinent to the questions here presented are found in §§ 7320 to 7327 inclusive, Gen. Stat. 1913. Section 7320 provides that the probate court, upon granting letters testamentary, shall make an order limiting the time for creditors to present claims against

the estate and fixing the time and place when and where proofs will be heard, and such claims examined and adjusted. The time so limited shall not exceed one year. Notice of the order is given by publication (§ 7321). That, under our probate practice, presentation of claims against an estate must be made to the court, and not to the administrator, is clear from the fact that the administrator may not pay any claim or receive credit therefor in his account, unless the court, within the time limited by the order referred to, acted thereon. The probate court is a court of record, so that, if anything is presented to such a court for action, it is made a matter of record therein. Claims of the sort now in controversy must be itemized and verified; hence are written documents. The time of presentation is ordinarily indorsed on the claims, and they are left in the custody of the court. The order in this case required the creditors to file their claims with the court. That this was a proper order, under the practice that obtains in this state, may not be doubted. That presentation means a filing of the claim in court is indicated by §§ 7324 and 7325; the

Executors and administrators—when claims presented.

first of which requires the administrator to file in court a statement, in writing, of any offsets he claims "against any of the claims filed," and the second provides that "no claim or demand, or offset thereto, shall be allowed which was barred by the Statute of Limitations when filed."

We cannot hold the presentation to the administrator a compliance with the statute.

Relator insists that § 7322 confers power to extend the time to present claims, even after the expiration of the eighteen-month period therein mentioned. The section now reads: "For cause shown, and upon notice to the executor or administrator, the court, in its discretion, may receive, hear, and allow a claim when presented before the final settlement of the administrator's or executor's ac-

count, and within one year and six months after the time when notice of the order was given."

The application of the last clause stands out clearer in the language of the statute in force before the Revised Laws of 1905 took effect. Chapter 82, Laws 1899, amended § 102 of the Probate Code (chap. 46, Laws 1889). That section contained provisions now found in §§ 7320 and 7322, Gen. Stat. 1913. The sentence and part of a sentence in the amendment pertinent to the present inquiry, and which the revisers recast into a section by itself (7322), are: "No claim or demand shall be received after the expiration of the time so limited, unless for good cause shown. The court may in its discretion receive, hear and allow such claim upon notice to the executor or administrator, but no claim shall be received or allowed unless presented within one year and six months from the time when notice of the order is given, as provided in the next section, and before final settlement," etc.

The "next section" referred to concerns the publication of the order. Mere change in phraseology and rearrangement of the law in the Revision of 1905 was not intended to work a change in the meaning thereof, unless such a purpose is discernible from the conflict in the language between the provisions in the Revised Laws and the prior statutes. The latter may always be resorted to as an aid to the correct interpretation of the revision. Our conclusion is that the law, while it invests probate courts with wide discretion to accept belated claims up to the expiration of one year and six months after the order for creditors to present claims has been made and published (*State ex rel. Musgrave v. Probate Ct.* 79 Minn. 257, 82 N. W. 580), withholds the power to receive such claims, if presented after the expiration of said period. In *Gilman v. Maxwell*, 79 Minn. 377, 82 N. W. 669, this court designated the Nonclaim Statute of our

—authority to permit presentation after time.

Probate Code as mandatory. See, also, the view taken of this provision by both the majority and minority opinions, in *Schurmeier v. Connecticut Mut. L. Ins. Co.* 96 C. C. A. 107, 171 Fed. 1, particularly in the forceful dissenting opinion of Judge Sanborn. When the Nonclaim Statute has run as against claims of decedents, the estate passes free from such claims to the heirs or legatees. In *Pullman v. Pullman* (C. C.) 10 Fed. 53, the distinction between the ordinary statutes of limitation and the nonclaim statutes relating to claims against decedents is clearly set out. It is there said that an administrator may waive the former, but not the latter, which are rules of property, as well as statutes of limitation. This decision is approvingly referred to in *Security Trust Co. v. Black River Nat. Bank*, 187 U. S. 211, 23 Sup. Ct. Rep. 52, 47 L. ed. 147, where effect was given to our Nonclaim Statute. Statutes of nonclaim are applied more rigorously than the general statutes of limitation. 2 *Woerner, Administration*, 2d ed. § 402; *Winter v. Winter*, 101 Wis. 494, 77 N. W. 883.

But appellant suggests that the administrator was guilty of constructive fraud by receiving her claim and assuring her that she had done all that was needful to assert her rights when she handed it to him. *Baart v. Martin*, 99 Minn. 197, 116 Am. St. Rep. 394, 108 N. W. 945, is cited to the proposition that a statutory bar does not save even a decree to one who has obtained it by fraud. Overlooking the meager allegations of facts tending to show constructive fraud in the petition, and the absence therein of any excuse for the delay, we do not think the case at bar can be made to parallel the case cited. The administrator has no authority to represent the heirs or creditors in the administration of an estate, except in so far as

he is required to conserve the estate for all interested therein. He is not personally affected by the adjudication upon claims. Nor has he any power to waive the Nonclaim Statute (§ 7323), which provides that "all claims against the estate of a decedent, arising upon contract, whether due, not due, or contingent, must be presented to the court for allowance, within the time fixed by the order, or be forever barred."

In *Nagle v. Ball*, 71 Miss. 330, 13 So. 929, it is held: "The administrator cannot waive the absolute bar created by statute for the protection of estates of decedents. He cannot abrogate a positive rule of law requiring probate of claims within the prescribed period by conduct of his own, however misleading or designing."

In *Gilman v. Maxwell*, *supra*, this court said: "It is not within the power of the administrator of an estate to waive compliance with the statute, and the authorities cited by appellant are not in point, because of this mandatory statute."

See also *Roberts v. Flatt*, 142 Ill. 485, 32 N. E. 484; *Miner v. Aylesworth*, 18 Fed. 199; 18 Cyc. 500.

If the statute cannot be waived, the means employed in the attempt are of no consequence. The persons interested in relator's claim are those entitled to participate in the estate after certain preferred claims are paid. It is not pretended that any of these interested persons practised either actual or constructive fraud upon relator, nor are they chargeable with the administrator's deception, if any, towards her. We conclude that the Probate Court was without power to receive the claim, and that it was barred at the time relator presented her petition.

The order is affirmed.

—effect of
fraudulent rep-
resentations—
nonclaim.

ANNOTATION.

Effect of conduct of personal representative preventing filing of claim against estate within time allowed by the statute of nonclaims.

The decided weight of authority upon the question under consideration herein, except where modified by special statutory provision, is in accordance with the general rule that a personal representative cannot waive or suspend the so-called special nonclaim or administration statute of limitations. The following cases, which involve the question of the effect of conduct preventing the filing of a claim against an estate within the statutory period, support this rule:

Alabama.—Decatur Branch Bank v. Donelson (1848) 12 Ala. 741; Lowe v. Jones (1849) 15 Ala. 545.

Colorado. — Re Hobson (1907) 40 Colo. 332, 91 Pac. 929.

Maine.—Littlefield v. Eaton (1883) 74 Me. 516.

Minnesota.—STATE EX REL. SCHERBER v. PROBATE CT. (reported herewith) ante, 242.

Mississippi.—Nagle v. Ball (1893) 71 Miss. 330, 13 So. 929; Cockrell v. Seasongood (1902) — Miss. —, 33 So. 77.

Missouri. — Hinshaw v. Warren (1912) 167 Mo. App. 365, 151 N. W. 497.

Nevada. — Douglass v. Folsom (1893) 21 Nev. 441, 33 Pac. 660.

New Hampshire. — Amoskeag Mfg. Co. v. Barnes (1868) 48 N. H. 25, on subsequent appeal in (1870) 49 N. H. 312; Judge of Probate v. Ellis (1885) 63 N. H. 366.

New Jersey. — Lewis v. Champion (1885) 40 N. J. Eq. 59.

Vermont.—Powell v. Moore (1919) — Vt. —, 108 Atl. 398.

Washington.—Seattle Nat. Bank v. Dickinson (1913) 72 Wash. 403, 130 Pac. 372.

Applying the principle that since statutes of nonclaim are for the purpose of compelling an early settlement of the estates of deceased persons, they, in the absence of statutory exception, work a practical extinguishment of claims, it has been held that no promise upon the part of a per-

sonal representative is sufficient to prevent the bar of the statute as to a claim not filed within the statutory period. See Littlefield v. Eaton (1883) 74 Me. 516; Hinshaw v. Warren (1912) 167 Mo. App. 365, 151 S. W. 497; Amoskeag Mfg. Co. v. Barnes (1868) 48 N. H. 25, cited with approval on subsequent appeal in (1870) 49 N. H. 312; Judge of Probate v. Ellis (1885) 63 N. H. 366; Lewis v. Champion (1885) 40 N. J. Eq. 59; and Seattle Nat. Bank v. Dickinson (1913) 72 Wash. 403, 130 Pac. 372. To illustrate: In Hinshaw v. Warren (1912) 167 Mo. App. 365, 151 S. W. 497, it was held that an agreement by an administrator to waive service of notice of claim did not prevent the running of the Statute of Nonclaim. And in Lewis v. Champion (1885) 40 N. J. Eq. 59, the executor told a creditor that his claim was all right, and that it would be paid, but such statement was held not to excuse the formal filing of the claim. In Powell v. Moore (1919) — Vt. —, 108 Atl. 398, it was held that an "understanding" obtained from a personal representative by a claimant, that a claim filed by a company formed by him was to be regarded as his individual claim, did not excuse a failure formally to file the individual claim as such.

And upon the theory that an executor or administrator is the representative of the estate, and cannot accept employment from, or act as the agent of, a creditor in presenting a claim against the estate, it has been held that a delay in presenting a claim cannot be excused by proof that the creditor presented his claim to the executor, with a request that the latter should take such action as was necessary to have the claim properly filed, and that the executor agreed to do so, even if it were within the power of an executor to waive the statutory provision. Re Hobson (1907) 40 Colo. 332, 91 Pac. 929.

And it has been held that the fact

that the executor or administrator removes himself and continues absent from the state, after a Statute of Nonclaim which imposes upon the creditor the necessity of presenting his claim has commenced running, does not prevent the bar of the statute, at least where the statute itself makes no exception for such a case. *Decatur Branch Bank v. Donelson* (1848) 12 Ala. 741; *Lowe v. Jones* (1849) 15 Ala. 545. And it is especially true that absence of the personal representative from the state does not suspend the running of the Statute of Nonclaim, where the law permits claims to be filed at his place of business, notwithstanding he be absent at the time. *Douglass v. Folsom* (1898) 21 Nev. 441, 33 Pac. 660. In New Hampshire, upon the theory that the question is whether or not the absence of a personal representative from the state prevented or defeated the exhibition of a claim, so that by reasonable diligence the claimant could not present it, it has been held that a temporary absence of a personal representative from the state does not suspend or stop the Statute of Limitations, but that, on the other hand, his extended absence from the state, whereby the presentment of claims within the statutory period is prevented, will extend the time limit. *Walker v. Cheever* (1859) 39 N. H. 420.

The reported case (*STATE EX REL. SCHERBER v. PROBATE CT.* ante, 242) is authority for the proposition that, in the absence of statutory exception, even fraudulent misrepresentations upon the part of the personal representative do not excuse a failure to file a claim within the statutory period. In this case the court assumed constructive fraud, in that the administrator received the claim and assured the claimant that she had done all that was necessary, but ruled broadly that by no act of a personal representative, even though it prevented a claimant filing his claim, can the bar of a Statute of Nonclaim be lifted or waived. And in *Nagle v. Ball* (1898) 71 Miss. 330, 13 So. 929, it was again held, applying the rule that an administrator cannot waive the absolute bar

created by a Statute of Nonclaim, that no conduct of his own, however misleading or designing, could excuse the filing of a claim within the statutory period. In this case the administrator had merely informed the claimant that it would not be necessary to probate the account in question, as he had a right to settle it, but the court assumed for purposes of argument that the administrator had practised fraud which prevented the claimant from probating his claim. And in *Cockrell v. Seasongood* (1902) — Miss. —, 33 So. 77, where fraud on the part of an administrator was alleged to have prevented the filing of a claim within the short statutory period, it was held that the case was "controlled perfectly" by *Nagle v. Ball* (Miss.) supra.

But in some of the states a more liberal rule obtains. This, however, is generally the result of statutory exceptions.

Thus, in Indiana, under a statute providing for the reopening of a final settlement of an estate for illegality, fraud, or mistake in the settlement or prior proceedings, at the suit of one adversely affected, it has been held that where an administrator, by fraudulent promises to pay a claim to a creditor who had no disinterested friends, and who by reason of sickness could not give personal attention to the filing of the claim, thereby throws the creditor off his guard so that he does not file his claim, and the administrator, without notice to the creditor, makes final settlement without including the claim of such creditor, the latter may have the settlement vacated. *Chase v. Beeson* (1888) 92 Ind. 61. The court said: "It is not the duty of the administrator to assist claimants in the filing and allowance of their claims, nor to keep the estate open for the filing of such claims. As to all unfounded or doubtful claims, it is his duty to make resistance. On the other hand, as to all bona fide creditors, the administrator holds the estate in trust, and it is clearly not his duty, by any kind of unfair dealing, deceit, or fraud, to defeat the filing and allowance of their claims. To practise such fraud or de-

ceit, and thereby prevent the filing, allowance, and payment of such claims, is a clear violation of duty on the part of an administrator. Such a practice will not be allowed to inure to his benefit, or to the benefit of the estate he may represent. The purpose of the above statute is to prevent such wrong. The portion of the petition above set out, the truth of which, of course, is admitted by the demurrer, shows very clearly, as we think, that, by false statements and promises, Diana P. Morgan, while away from friends and sick in the debtor's family, was led to believe that no action on her part was required to procure the adjustment and payment of her claim. Such being the case, her representatives are entitled to have the final settlement set aside and the estate reopened, that they may have an opportunity to prove the claim, and have it paid out of the assets of the estate." And it seems that fraudulent concealment of the existence of the claim by the executor would toll the Indiana statute. See *Roberts v. Spencer* (1887) 112 Ind. 85, 13 N. E. 129, holding, however, that the claim must be promptly filed after its discovery.

And in Iowa, under a statute providing that claims against an estate, if not filed within a specified period, are forever barred unless pending in court, or "unless peculiar circumstances entitle the claimant to equitable relief," it has been held that it would be inequitable to defeat a claim because of delays which were in fact indulgences to the personal representative, granted at his special request. *Brayley v. Ross* (1871) 33 Iowa, 505. And it was held that the bar of the statute should be removed for "peculiar circumstances," in *Baldwin v. Dougherty* (1874) 39 Iowa, 50, where it appeared that the administrator notified a creditor residing in a distant state that his claim had been properly filed, and subsequently impliedly assured the creditor's personal representative that the claim would be paid, all of which resulted in the claim not being actually filed within the statutory period. And again, in *Burroughs v. McLain* (1873) 37 Iowa,

189, where the failure to file a claim was caused by reliance upon the promise of the administrator to allow and pay it and his statement that it was unnecessary to file it, together with partial payment by the representative, it was held that "peculiar circumstances" warranting equitable relief existed. On the other hand, it has been held that a mere unconditional promise by the personal representative to pay a claim does not constitute "peculiar circumstances" within the meaning of the Iowa statute. *Colby v. King* (1885) 67 Iowa, 458, 25 N. W. 704. Nor do mere "suppositions and understandings" on the part of a creditor that his claim has been allowed and filed warrant equitable relief,—at least, in the absence of a showing that he had good reason, arising from the action of the administrator, so to suppose or understand; mere erroneous suppositions and understandings not based on reasonable grounds not amounting to legal fraud, accident, or mistake. *Ferrall v. Irvine* (1861) 12 Iowa, 52. And in *Manning v. Stout* (1895) 93 Iowa, 233, 61 N. W. 963, it was held that the fact that an executor told a creditor not to file his claim, reference being had to an account, as he wished to pay it, did not excuse the failure to file a note which the executor did not know existed.

And in Massachusetts, under a statute allowing an equitable action where the claim is not presented within the period prescribed by the special Statute of Limitations, "where justice and equity require" relief, and the claimant "is not chargeable with culpable neglect," it has been held that equitable relief will not be granted upon a showing that the executor knew of the claim, and admitted it to be a valid one, and expressed a wish and intention to pay it out of expected funds, and assured the creditor that no further legal proceedings were necessary, in reliance upon which representations the claimant failed to sue within the statutory period. *Wells v. Child* (1866) 12 Allen (Mass.) 330. But for an inference that in Maine, under a statute authorizing equitable relief at the suit of a creditor whose

claim has not been presented within the nonclaim statutory period, where the court is of "opinion that justice and equity require it," and that the creditor is not chargeable with culpable neglect, the agreement of an administrator to include and pay an account is sufficient to excuse delay in filing the same, see *Holway v. Ames* (1905) 100 Me. 208, 60 Atl. 897.

In *Missouri*, while admitting that an executor or administrator cannot revive a demand against an estate which has once been barred under the Administration Law, it has been held that he may validly contract in good faith for an extension of an existing obligation, so that where such an extension prevents the proving of a claim within the statutory period after publication of notice for filing of claims, the creditor may maintain an action when the renewal obligation matures, although such two-year period has fully elapsed. *North v. Walker* (1877) 66 Mo. 453, affirming (1876) 2 Mo. App. 174, and following *Smarr v. McMaster* (1864) 35 Mo. 351.

In *Bell v. Mills* (1903) 59 C. C. A.

104, 123 Fed. 24, in applying a California statute which required that every claim allowed by executors and approved by the superior court must be filed within thirty days thereafter, it was held, where a claim had been allowed and approved but not filed, that the default was that of the executors, and that their omission to file the claim within the statutory period could not injuriously affect the right of the creditor. Here, however, the court seems to have regarded it as the duty of the executors, rather than the creditor, to file the claim.

In *Hamilton v. Wright* (1905) 27 Ky. L. Rep. 1144, 87 S. W. 1093, where an executor prevented reference of a settlement suit to a commissioner by affidavits showing that a delay would be beneficial, assured the claimant that his claim would be paid in full, and requested him not to sue, thereby preventing the filing of the claim within the statutory period, it was held that the executor was estopped to set up the Statute of Nonclaim as a ground of forfeiture of right to interest. G. J. C.

LYON & HOAG

v.

RAILROAD COMMISSION et al.

California Supreme Court — June 11, 1920.

(— Cal. —, 190 Pac. 795.)

Constitutional law — compelling public utility to operate at loss.

The state has no power to compel the continued operation of a public utility at a loss, where the owner of the utility is willing to and does in fact abandon to the public all its property that has been devoted to the public use.

[See note on this question beginning on page 252.]

APPLICATION for a writ of certiorari to review an order of the Railroad Commission requiring petitioner to re-establish its service of domestic water in a certain residence district. *Order annulled.*

The facts are stated in the opinion of the court.

Messrs. J. E. McCurdy and Walter H. Linforth for petitioner.

Mr. Douglas Brookman, for respondents:

Petitioner is a public utility under the Constitution and statutes of California.

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Cal. 68, 8 A.L.R. 249, P.U.R.1919A, 398, 175 Pac. 466; Palermo Land & Water Co. v. Railroad Commission, 173 Cal. 380, P.U.R.1917A, 447, 160 Pac. 228; Del Mar Water, Light & P. Co. v. Eshleman, 167 Cal. 666, 140 Pac. 591, 948; Magee v. Pacific Improv. Co. 98 Cal. 678, 35 Am. St. Rep. 199, 33 Pac. 772.

Petitioner is subject to the jurisdiction of the Railroad Commission.

Civic Center Asso. v. Railroad Commission, 175 Cal. 441, P.U.R.1917E, 697, 166 Pac. 351.

Mr. Hugh Gordon also for respondent Commission.

Messrs. Stoney, Rouleau, Stoney, & Palmer, for other respondents:

The state has power, either through its Railroad Commission or a city board of supervisors, to compel a public utility to continue operation, even at a loss.

Re Denver, L. & N. R. Co. 3 Colo. P. U. C. 316, P.U.R.1917F, 744; Culver v. St. Joseph & G. I. R. Co. 4 Mo. P. S. C. 381, P.U.R.1917B, 574.

Petitioner has made to no one a bona fide offer of its property and plant.

Fellows v. Los Angeles, 151 Cal. 52, 90 Pac. 137.

Ownership by a public utility of the source of water supply is immaterial.

Napa Valley Electric Co. v. Calistoga Electric Co. 174 Cal. 411, 163 Pac. 497.

Wilbur, J., delivered the opinion of the court:

Petitioner seeks the review of an order of the Railroad Commission, requiring it to re-establish its service of domestic water in a certain residence district of the city and county of San Francisco, known as Lincoln Manor. Petitioner subdivided this tract, and, for the purpose of furnishing domestic water to the purchasers of lots therein, laid water pipes in the streets thereof, purchased water from the Spring Valley Water Company, and, by means of a pumping system, distributed it to the purchasers of lots within the tract. As fast as lots were sold and water connections desired for residences located thereon, the same were made. The same water rates were charged by the petitioner as by the Spring Valley Water Company. As soon as all the lots in the tract were sold, the petitioner discontinued said water service, and offered

to give its water system free of charge to the Spring Valley Water Company for the purpose of a continuance of such service by the latter company. Inasmuch as said service required an expenditure for pumping the water, the latter company refused to accept the responsibility. The lot owners appealed to the Railroad Commission for relief, and, upon the hearing of their petition, an order was made requiring the petitioner to resume such service.

Petitioner claims that it is not a public utility. It also claims, if it is a public utility, that the control over it is vested in the board of supervisors of the city and county of San Francisco, and not in the Railroad Commission. In view of our conclusion that the state has no power, either directly or through the board of supervisors of the city and county of San Francisco or the Railroad Commission of the state of California, to make the order in question, it is unnecessary to determine either of the foregoing points raised by the petitioner.

The state has no power to compel the continued operation of a public utility at a loss, where the owner of that utility is willing to and does in fact abandon to the public all its property that has been

Constitutional law—compelling public utility to operate at loss.

devoted to the public use. Since the submission of this case the Supreme Court of the United States has passed upon this question, and for that reason a discussion of the various decisions cited by the respondent in support of the order of the Railroad Commission is unnecessary. That court decided that "a carrier cannot be compelled to carry on even a branch of its business at a loss, much less the whole business of carriage." Brooks-Scanlon Co. v. Railroad Commission, 251 U. S. 396, 64 L. ed. 323, P.U.R.1920C, 579, 40 Sup. Ct. Rep. 183. A similar conclusion was suggested by our earlier decision in Fellows v. Los Angeles, 151 Cal. 52, 64, 90 Pac. 141, where it

was said: "We do not mean to say that a corporation engaged in the distribution of water to public uses may not abandon its property and quit the business, without being subject to mandatory proceedings to compel it to continue to carry it on. It may find it impossible to go on. Its supply may become exhausted or be insufficient for paramount needs; the rates fixed by law may be too small to enable it to operate at a profit or without substantial loss; or it may conclude, without reason which the law would consider sufficient, that it will not continue. In case of a natural person, it might become physically impossible. We do not intend to declare that, in any such case, mandatory process would be issued to compel the personal performance of the duty. These questions are not now involved, and we express no opinion concerning them."

The basis of the conclusion that the state cannot compel the operation of a public utility at a loss is that such an order is a taking of property without compensation, and therefore violates the 14th Amendment to the Federal Constitution. *Brooks-Scanlon Co. v. Railroad Commission*, supra; *Northern P. R. Co. v. North Dakota*, 236 U. S. 585, 59 L. ed. 735, L.R.A.1917F, 1148, P.U.R.1915C, 277, 35 Sup. Ct. Rep. 429, Ann. Cas. 1916A, 1; *Norfolk & W. R. Co. v. Conley*, 236 U. S. 605, 59 L. ed. 745, P.U.R.1915C, 293, 35 Sup. Ct. Rep. 437. The theory on which the state exercises control over a public utility is that the property so used is thereby dedicated to a public use. The dedication is qualified, however, in that the owner retains the right to receive a reasonable compensation for use of such property and for the service performed in the operation and maintenance thereof. Where, as in this case, the owner is willing to and does in fact abandon all the dedicated property to the public, there is no further basis upon which the regulatory power can be predicated. To

require the former owner, after such abandonment, to continue to operate the property at a loss, for the benefit of the public, would be a taking of such excessive cost of operation from such owner without compensation. The numerous cases cited by the respondent merely hold that a public corporation can be required to operate certain portions of its system at a loss, where the general business of which such system forms a part can be profitably operated. *State ex rel. Caster v. Kansas Postal Teleg.-Cable Co.* 96 Kan. 298, P.U.R.1915E, 222, 150 Pac. 544; *State ex rel. Public Service Commission v. Missouri Southern R. Co.* — Mo. —, P.U.R.1919F, 575, 214 S. W. 381; *People ex rel. Hubbard v. Colorado Title & T. Co.* 65 Colo. 472, P.U.R.1919A, 542, 178 Pac. 6.

No case has been cited in which it has been held that authority exists to compel a public utility to operate at a loss on its whole system and investment, and the foregoing decisions of the Supreme Court of the United States determine that it cannot be done. This, we understand, is fully conceded by the respondent *Railroad Commission*. It contends, however, that the petitioner should be compelled to continue the service for a reasonable time pending its application to the *Railroad Commission* for leave to abandon its service, or for increased rates to enable it to profitably continue such service. No such question was raised before the *Railroad Commission*. There the whole controversy was as to whether or not the petitioner was a public utility corporation and subject to the jurisdiction of the *Railroad Commission*. The commission found that petitioner had wholly abandoned its water pipes and pumping plant August 10, 1918, and that thereafter the same had been operated and used by the *Spring Valley Water Company* at the request of the city officials of *San Francisco* and of the *Railroad Commission*. The order of the *Railroad Commis-*

sion under review was made June 10, 1919. We conclude that after such a complete abandonment to the public of all its property devoted to a public use, the Railroad Commission is powerless to compel the petitioner to resume operations at a loss. The order of the Railroad Commission required the petitioner to resume service, without additional compensa-

tion, and therefore at a continued loss.

The order under review is annulled.

We concur: Angellotti, Ch. J.; Shaw, J.; Lennon, J.; Sloane, J.; Lawlor, J.; Olney, J.

Petition for rehearing denied July 8, 1920.

ANNOTATION.

Right of public utility company to discontinue its entire service.

As indicated in the title hereto, the present discussion is confined to the right of a public utility company to discontinue its entire service, and does not include the right to discontinue a part of its service, such as the right of a railroad company to discontinue a branch line, or of a street railway company to abandon its line on certain streets. It is, however, difficult to determine in all cases what is sought to be abandoned, and some cases in which there is not a total abandonment have doubtless been included. The subject under annotation resolves itself into the question whether a company, having once undertaken to serve the public with some public utility, can thereafter abandon its undertaking.

The power of a court to authorize the discontinuance of a public service corporation upon foreclosing a mortgage on its plant is discussed in the note in 8 A.L.R. p. 238.

The right of a public service corporation to judicial relief from contract rates which have become inadequate is discussed in *Columbus R. Power & Light Co. v. Columbus*, 6 A.L.R. 1648, and note thereto at page 1659.

That a public utility company which has once commenced operation is under some duty to the public to continue has been stated generally in a number of cases. In *Gates v. Boston & N. Y. Air Line R. Co.* (1885) 53 Conn. 333, 5 Atl. 695, a suit for an injunction by the holder of bonds of a railroad company, to restrain the railroad company in the exercise of some

of its public functions, the court says: "It is true that the charter is permissive in its terms, and probably no obligation rests upon the corporation to construct the railroad; the option to exercise the right of eminent domain and other public rights is granted. And when that option has been made, and the corporation has located and constructed its line of track, exercising the power of the state in taking property of others, and, in so locating and constructing its road, has invited and obtained subscriptions upon the implied promise to construct and operate its road,—has commenced to operate the road under the granted powers, thereby inducing the public to rely in their personal and business relations upon that state of affairs,—by so accepting and acting upon the chartered powers, a contract exists to carry into full effect the objects of the charter, and the capital stock, franchises, and property of the corporation stand charged primarily with this trust. The large sovereign powers given by the state to railroad corporations are granted and exercised only upon the theory that these public rights are to be used to promote the general welfare. Having exercised those powers, the corporation has no right, against the will of the state, to abandon the enterprise, tear up its track, and sell its rolling stock and other property, and divide the proceeds among the stockholders. The possible effects of the exercise of such a claimed power are utter disaster to the great interests of the state, certain destruction of private property in which whole

communities, created and existing upon the faith of the continuous use of the chartered powers, are interested; and, indeed, the life of the citizen as well as his property rights are thus jeopardized. Upon principle it would seem plain that railroad property once devoted and essential to public use must remain pledged to that use, so as to carry to full completion the purpose of its creation; and that this public right, existing by reason of the public exigency, demanded by the occasion, and created by the exercise by a private person of the powers of a state, is superior to the property rights of corporations, stockholders, and bondholders." It is stated in *State ex rel. Railroad Comrs. v. Bullock* (1919) — Fla. —, 8 A.L.R. 232, P.U.R.1920A, 406, 82 So. 866, that the public has such an interest in the operation of a common carrier railroad that, when once undertaken, it may not be discontinued by a proceeding in which the state is not represented, when such discontinuance has not been consented to by the state. This case is approved and followed in *Anderson v. Dent* (1920) — Fla. —, 85 So. 151. In *Talcott v. Pine Grove Twp.* (1872) 1 Flipp. 145, Fed. Cas. No. 13,735, there is dictum to the effect that a railroad cannot be abandoned after it has become one of the thoroughfares of the country, and that the company will, by proceeding on behalf of the state, be forced to continue its road and perform all its duties to the public. A railroad company that has constructed and maintained and operated its road under powers and privileges granted it in its charter cannot thereafter, at its option, abandon the road. *Farmers' Loan & T. Co. v. Henning* (1878) 17 Am. L. Reg. (N. S.) 266, Fed. Cas. No. 4,666. The court says that, having entered upon the exercise of its charter franchises, it then owed a duty to the public which it might not, at its caprice, abandon; and further, that in equity and good conscience the obligation was still greater where the company had been the recipient of land grants and subsidies to aid in the construction of its road. In compelling a street railway com-

pany by mandamus to operate its line of street railway, the court, in *Potwin Place v. Topeka R. Co.* (1893) 51 Kan. 609, 37 Am. St. Rep. 812, 38 Pac. 309, says: "By the provisions of the ordinance the rapid transit company obtained the right to construct its roadway in the public streets, to maintain and operate it, to transport passengers and parcels by means of electrical power, to collect charges and tolls therefor. These privileges were not granted to the company solely for the company's benefit, but rather that the citizens of the plaintiff city might have the benefit of an improved mode of travel,—that they might enjoy the benefit of one of the inventions of the age. By the terms of the ordinance the rights of the company were defined and its duties to the public declared. The company accepted the provisions of the ordinance and constructed its road under the leave thereby obtained. May it now disregard the obligations imposed on it by its terms? May it still encumber the streets of the city with its track, poles, wires, etc., and refuse to operate its road? It is said that the performance of only charter obligations can be compelled by mandamus,—that the charter of the defendant company does not require it to operate a line of railway in the city of Potwin Place. . . . Having accepted the rights and privileges conferred by the ordinance, we think the duty rests on them in favor of the plaintiff city and its citizens to render them the service for which the privilege was granted." In *Burgess v. Brockton* (1920) 285 Mass. 95, 126 N. E. 456, a case in which the revocation of the license for jitney busses was involved, the court, in arguing in favor of the revocation because of its interference with the income of the street railway company, says that "private property invested in the street railway has been in a sense devoted to a public use; that it cannot be withdrawn at the pleasure of the investors."

A railroad company which accepted a charter authorizing it to construct and maintain and operate a railroad at a time when a statutory

provision provided that the main track of any railroad, once constructed and operated, should not be abandoned or moved, cannot, after it has once constructed its tracks, remove the same. *State v. Enid, O. & W. R. Co.* (1917) 108 Tex. 239, 191 S. W. 560. To prohibit it from effecting the removal does not take its property without due process of law. The court says, with reference to the obligation of a railroad company which has accepted a charter such as above mentioned, that "the charter, when so issued and accepted, constituted a contract between the state and the railway company, and, like other contracts, its provisions and covenants are binding upon each party thereto; likewise they are binding upon the purchasers at receiver's sale, the defendants in error herein. Granting the charter by the state conferred a valuable right upon the railway company, but such right was not granted as a favor, but upon condition that the company would pay a valuable consideration to the state of Texas for the right granted to construct, maintain, and operate a railway between the towns of. . . . The permission to so construct the road and enter the railway business was given by the state of Texas, and the consideration paid therefor was, by promise made to the state by the railway company, to construct, maintain, and operate the railroad. By the terms of the contract the state procured for its citizens the benefit to be derived by the public from the use and operation of the railroad. The courts cannot absolve the defendants in error from this duty. The courts enforce contracts, but cannot nullify them. . . . Only by consent of the parties could the contract be modified so as to relieve the defendants in error from their obligation to maintain and operate the road, and not to move the track. . . . It may be as ably contended by the defendants in error that the courts cannot compel the operation of a railroad when it is financially unable to operate it. If so, the courts might refuse to require the operation of the road, which question we need not decide, but it would

not be on the ground that defendants in error have a right to refuse to discharge the duty resting upon them, to faithfully comply with their contract to operate the road, but would be because the courts are impotent to enforce the contract, on account of the insolvency of the corporation."

The obligation of the lessee of a railroad to maintain and operate the road during the term of the lease is a necessary implication where the road was built with the aid of county subscriptions to secure railroad connections with the county seat; and with the expectation of making the lease, which provided for such equipment as might be necessary to its use and enjoyment, and for applying the receipts to the annual expenses of running the road and keeping it in repair, then to reimburse the lessee for the annual rent, etc., although there was no express covenant requiring the operation of the road; consequently it was held that the lessee could not abandon the road. *Southern R. Co. v. Franklin & P. R. Co.* (1899) 96 Va. 693, 44 L.R.A. 297, 32 S. E. 485.

A city which continues to hold property appropriated for a water supply cannot refuse to supply water. *Fellows v. Los Angeles* (1907) 151 Cal. 52, 90 Pac. 137. This was an action to enjoin a city from shutting off water from flowing in a pipe to the plaintiff's premises, and to compel the defendant to furnish water to certain other premises belonging to the plaintiff; the court states that the question presented is whether or not, "under the circumstances of this case, as presented in the complaint, the city, after thus acquiring this water system, can now discontinue its operation, cease to furnish the water or any water to the persons theretofore receiving and entitled to receive it, from said system, retain title, possession, control, and management of all the property composing the system, and allow the water previously devoted to the public use to run to waste." Answering the question, the court says: "It is clear that this cannot be allowed. If there are facts or circumstances which absolve it from the duty to continue the

water service, they must be shown in defense. The water, as we have seen, was appropriated to a public use, of which plaintiff was and is a beneficiary. The city cannot thus continue to hold and control property so appropriated to public use and at the same time refuse to perform the public duty which such possession and control imposes." Discussing generally the right of a corporation to abandon its business, the court says: "We do not mean to say that a corporation engaged in the distribution of water to public uses may not abandon its property and quit the business without being subject to mandatory proceedings to compel it to continue to carry it on. It may find it impossible to go on. Its supply may become exhausted, or be insufficient for paramount needs; the rates fixed by law may be too small to enable it to operate at a profit, or without substantial loss; or it may conclude, without reason which the law would consider sufficient, that it will not continue. In case of a natural person it might become physically impossible. We do not intend to declare that, in any such case, mandatory process would be issued to compel the personal performance of the duty. These questions are not now involved, and we express no opinion concerning them."

See the reported case (*LYON & HOAG v. RAILROAD COMMISSION*, ante, 249).

It is generally held, however, that a public utility company may not be required to operate, where operation results in a loss. *Brooks-Scanlon Co. v. Railroad Commission* (1920) 251 U. S. 396, 64 L. ed. 323, P.U.R.1920C, 579, 40 Sup. Ct. Rep. 183; *Bullock v. Florida* (U. S. Adv. Ops. 1920-21, p. 223) — U. S. —, 65 L. ed. —, 41 Sup. Ct. Rep. 193; *Jack v. Williams* (1902) 113 Fed. 823, affirmed in (1906) 76 C. C. A. 165, 145 Fed. 281; *Gilchrist v. Waycross Street & Suburban R. Co.* (1917) 246 Fed. 952; *Railroad Commission v. Saline River R. Co.* (1915) 119 Ark. 239, P.U.R.1915E, 191, 177 S. W. 896; *LYON & HOAG v. RAILROAD COMMISSION* (reported herewith) ante, 249; *State ex rel. Little*

v. Dodge City, M. & T. R. Co. (1894) 53 Kan. 329, 24 L.R.A. 564, 86 Pac. 755; *New York Trust Co. v. Buffalo & L. E. Traction Co.* (1920) 112 Misc. 414, 183 N. Y. Supp. 278; *Gress v. Ft. Loramie* (1916) — Ohio St. —, 8 A.L.R. 243, 125 N. E. 112.

The United States Supreme Court has taken the broad stand that, "apart from statute or express contract, people who have put their money into a railroad are not bound to go on with it at a loss if there is no reasonable prospect of profitable operation in the future. . . . No implied contract that they will do so can be elicited from the mere fact that they have accepted a charter from the state, and have been allowed to exercise the power of eminent domain. Suppose that a railroad company should find that its road was a failure, it could not make the state a party to a proceeding for leave to stop, and whether the state would proceed would be for the state to decide. The only remedy of the company would be to stop; and that it would have a right to do without the consent of the state, if the facts were as supposed. Purchasers of the road by foreclosure would have the same right." *Bullock v. Florida* (U. S. Adv. Ops. 1920-21, 222) — U. S. —, 65 L. ed. —, 41 Sup. Ct. Rep. 198.

The power of the public service corporation to require a railroad which had a short line, and which did a very small business, to operate its road at a loss, was denied in *Railroad Commission v. Saline River R. Co.* (1915) 119 Ark. 239, P.U.R.1915E, 191, 177 S. W. 896, but this lack of power to require operation was held not to establish the railroad company's right to take up its rails, dispose of them, and abandon the road on its own motion. The court, in *State ex rel. Little v. Dodge City, M. & T. R. Co.* (1894) 53 Kan. 329, 24 L.R.A. 564, 86 Pac. 755, refused to order by mandamus a railroad company to repair and relay certain portions of its track and roadbed, where it appeared conclusively that the road could not be operated except at a loss, and the railway company was bankrupt. And it has been held that where the receipts

of a railroad are insufficient to meet its operating expense, operation at a loss will not be compelled, and it may be abandoned unless forbidden by the express terms of its charter, in the absence of special circumstances. *Jack v. Williams* (1902) 113 Fed. 823, affirmed in (1906) 76 C. C. A. 165, 145 Fed. 281. This theory furnishes the foundation for the decision in *Gilchrist v. Waycross Street & Suburban R. Co.* (1917) 246 Fed. 952, where the power of the court upon a foreclosure proceeding to enter as a part of the judgment that the purchaser might abandon the road was sustained.

That a court of equity, having taken jurisdiction for the purpose of enforcing the performance of a contract to operate a street or interurban railroad, will retain jurisdiction for the purpose of authorizing the owner of such road to discontinue its operations, where no contractual obligation is found to exist, and there is no prospect that the road can be made to earn a fair return upon the investment, is held in *Gress v. Ft. Loramie* (1916) — Ohio St. —, 8 A.L.R. 243, 125 N. E. 112.

A corporation which, in connection with its sawmill and lumber business, had operated a railroad on which it has done a small business as a common carrier, cannot be compelled to continue the operation of the railroad after it has ceased to be profitable, merely because a profit would be derived from the entire business, including the operation of the railroad. *Brooks-Scanlon Co. v. Railroad Commission* (1920) 251 U. S. 396, 64 L. ed. 323, P.U.R.1920C, 579, 40 Sup. Ct. Rep. 183. Such a compulsory operation of the railroad is held to be a taking of property without due process of law.

A coal mining company which, by its charter, is authorized to construct or purchase a railroad to enable it to send its products to market, the charter reserving at the same time to the citizens of the state and other companies the right to transport their produce over the road when built, may abandon the road or any part of it whenever the business of the company does not justify that it longer be

operated. And so it will not be compelled to maintain and operate the road for the benefit of other companies who have made connections with it. *Montell v. Consolidation Coal Co.* (1876) 45 Md. 16. This case involved the construction of the charters of two mining companies, each containing similar provisions; one, the charter of the company which originally built the road; the other, the charter of the defendant coal company, which purchased such road from that company. The charter of the first company "authorizes the company to construct or purchase a railroad leading from its mines to some point on the Chesapeake & Ohio canal, at Cumberland, to enable it to transport the produce of its mines and the produce of the counties through which its road should pass, to market, with a proviso reserving to the citizens of the state and other corporations the right to connect with its road if, in the opinion of the commissioners of Allegany county, or, by the amended charter, the commissioners of public works, no prejudice would be done by such connection to the road of the company." In construing this charter the court said: "Here, then, is a charter granted to a company for the purpose of carrying on the business of manufacturing iron and the mining of coal, with the right to build a railroad from its mines to the canal to enable it to send its products to market, reserving at the same time to the citizens of the state and other companies the right to transport their produce over the road when built, at certain rates fixed by the charter. So the question presented in this case is not whether any railroad chartered for the general purpose of transporting freight and passengers may, by its own election, and in order to promote its own interests, abandon or discontinue the use of part of its road, but whether the appellee, under its charter, or under the charter of the Cumberland Coal & Iron Company, both being primarily coal mining companies with the privilege of constructing a railroad from their mines to the canal, to enable them thereby to send their products to mar-

ket, are bound to maintain and operate such road for the benefit of others who have formed connections with it, and irrespective of their own interests. It cannot be said that such an obligation is imposed in express terms by the charter of the Cumberland Coal & Iron Company. No provision is to be found in the charter requiring it to maintain and operate the road for the benefit of others, nor can such an obligation be fairly inferred. The charter is the contract between the state and the company, and in its construction we must be governed by the well-settled rules of interpretation applicable to all other contracts. Incorporated as a coal mining company, with the incidental privilege of constructing a railroad from its mines to the canal, we can hardly suppose the company accepted such a provision with the understanding that it would be obliged to maintain and operate such road in all time to come, without regard to its business requirements, and irrespective of its own interests. Nor can it be said by any fair rule of construction, that a burden so unjust and unreasonable is imposed by its charter. So long as the company operated the road for its own use, in transporting to market the produce of its mines and lands, it was bound to carry the produce of other companies and of the counties through which the road passed. If its mines, however, became exhausted, or if the business of mining coal and manufacturing iron became unprofitable, or the best interests of the company required that it should abandon the road or discontinue its use, there is no obligation upon it to operate the road in the interest of others. The fact that the appellants made a connection with it by means of a tramroad, and built a dump house, and paid \$200 for a right of way over its lands, does not in any manner affect the question. The appellants did not thereby acquire a perpetual right to compel the company to maintain the road for their benefit. The declaration does not allege the \$200 was paid for a right of way over the company's road, but was paid for a right merely over its land,

to connect with the road. In making a connection they knew, or are presumed to have known, that their right to transport freight over the road was subordinate to the paramount right of the company to discontinue the use of the road whenever its interests required it; and that the utmost they could claim by such connection was the right to transport their freight so long as the company used the road for transporting their own coal and produce." With reference to the charter of the defendant corporation, the court said: "Here, again, we find a coal-mining company authorized to build or purchase a railroad to enable it to send its coal to market, requiring it, at the same time, to transport persons and freight at the rates charged by the Baltimore & Ohio Railroad Company. There is not a line in its charter from which it can be inferred that the legislature, in granting it, intended to compel the company to operate this railroad one day longer than their own interests required it. On the contrary, it is plain that the power to build a railroad was conferred primarily for the benefit of the company, with the privilege reserved to others to send their products over the road so long as the company saw proper to use it for itself. If, however, their business no longer justified them to operate the road, or if they saw fit to adopt some other more convenient and less expensive mode of sending the products of their mines to market, they had the right to discontinue the use of it, and this, too, without incurring any liability to the appellants."

That the legislature has the power to consent to an abandonment is assumed in *People ex rel. Hubbard v. Colorado Title & T. Co.* (1918) 65 Colo. 472, P.U.R.1919A, 542, 178 Pac. 6, holding that a court has no jurisdiction, in foreclosing a mortgage on a railroad, to order its abandonment without the consent of the state or a public utilities commission to which this question has been delegated.

The theory has been followed in some cases involving gas and water companies that the duty of such com-

panies is a matter of contract; that, independent of contract, there is no duty which prevents the company from abandoning its service. *Laighton v. Carthage* (1909) 175 Fed. 145; *East Ohio Gas Co. v. Akron* (1909) 81 Ohio St. 33, 26 L.R.A.(N.S.) 92, 90 N. E. 40, 18 Ann. Cas. 332. And see *Bullock v. Florida* (U. S. Adv. Ops. 1920-21, p. 223) — U. S. —, 65 L. ed. —, 41 Sup. Ct. Rep. 193, *supra*, a case taking the view in relation to a railroad. That a gas company which is under no contractual obligation to furnish gas may quit seems to be assumed in *Zanesville Gaslight Co. v. Zanesville* (1889) 47 Ohio St. 36, 23 N. E. 60. This theory is well explained in *East Ohio Gas Co. v. Akron* (1909) 81 Ohio St. 33, 26 L.R.A.(N.S.) 92, 90 N. E. 40, 18 Ann. Cas. 332, in which a city was denied an injunction against a gas company to prevent the discontinuance of a supply of gas to the city and its inhabitants. The gas company in question was under no obligation imposed by its charter or by the statute to furnish the gas, and had merely accepted an ordinance from the city, permitting it to operate within the city, but no stipulation was made and accepted as to the time when the use of the streets for the purposes of the gas company should end. Upon this state of facts, the court says: "In the absence of limitation as to time, the termination of the franchise is indefinite; and to preserve mutuality in the contract the franchise can continue only so long as both parties are consenting thereto. Or, to state it concretely, the contract being silent as to the duration of the franchise, and the ten-year agreement as to the price of gas having expired, the city may, under its power of regulation, impose new conditions as to price, and the gas company may accept or reject these. If the refusal to comply is final, the company necessarily incurs the penalty of forfeiture of its franchise to serve the people of the city; but, on the other hand, there being no provision to that effect in the original contract, the city cannot, directly or indirectly, deprive the gas company of its property without due

process of law when the latter withdraws from the further exercise of its franchise. . . . So long as the gas company continues to exercise its franchise within the city, the council may fix the price for any period not exceeding ten years, and so on, until the gas company discontinues. This is in accord with the judgment of this court in *Zanesville Gaslight Co. v. Zanesville* (Ohio) *supra*. . . . The defendant in error seems to be insistent that, inasmuch as the plaintiff in error is a corporation serving the public, it in some way becomes absolutely subject to control by the public which it serves. The answer to this claim is very well expressed by the Supreme Court of the United States, speaking through Chief Justice Waite, in *Munn v. Illinois* (1877) 94 U. S. 113, 126, 24 L. ed. 77, 84: 'Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control.' The Ohio case is approved and followed in *Laighton v. Carthage* (1909) 175 Fed. 145, in which a city was enjoined from interfering with a water company in removing its water plant, machinery, water mains, pipes, and hydrants from the streets of the city. The court in this case says that the water company "is under no obligation to continue at the pleasure of the public, and it may elect to quit." In this case the franchise contract between the water company and the city had expired by limitation, but the water company by consent had continued to furnish water supply to the city for some time thereafter.

It has been held that a street railway company, having only the right or license to operate its tracks in a public street until revoked or terminated

by the public authorities, may cease to use the permission granted, and discontinue the operation of the whole track covered by a particular location under which it was built, at its pleasure, in the absence of any agreement to the contrary. *Amesbury v. Citizens' Electric Street R. Co.* (*Stiles v. Citizens' Electric Street R. Co.*) (1908) 199 Mass. 394, 19 L.R.A. (N.S.) 865, 85 N. E. 419.

In *Rex v. Severn & W. R. Co.* (1819) 2 Barn. & Ald. 646, 106 Eng. Reprint, 501, 21 Revised Rep. 433, 7 Eng. Rul. Cas. 455, a railway company which had been incorporated to construct a railway, all persons to have free liberty to pass upon and use the railway with wagons or other carriages constructed as described in the articles of incorporation, had afterwards taken up the railway, and it was held that, because of the beneficial use that the public had therein, mandamus might

issue to compel the company to reinstate and lay down its line, but not to maintain it. But in *Reg. v. Great Western R. Co.* (1893) 62 L. J. Q. B. N. S. (Eng.) 572, 69 L. T. N. S. 572, 9 Reports, 127, mandamus to compel the reinstatement of a disused road, out of repair, was denied, the court stating that the act under which it was incorporated neither expressly nor impliedly imposed the duty to maintain and keep the line open for traffic. The court said that *Rex v. Severn & W. R. Co.* (Eng.) *supra*, was an old-fashioned case, and that it seemed to have been misreported; stating that the provisions of the act under which the company was incorporated were not correctly transcribed in the report, and, if looked at, it would be found that there was an express obligation imposed upon the railway company to complete and maintain the road. W. A. E.

ANNA MELLICKER

v.

JOHN SEDLACEK, SR., Appt.

Iowa Supreme Court—October 4, 1920.

(*Mellicker v. Sedlacek*, — Iowa, —, 179 N. W. 197.)

Animals — liability for overturning automobile.

1. The owner of a dog which is not vicious is not liable for the overturning of an automobile striking him in the highway in the night, where upon the approach of the car he jumped from a low bank at the side of the road onto the roadway in front of the car.

[See note on this question beginning on page 270.]

— right of dog in highway.

2. A dog, unless vicious, has a right in the highway.

— viciousness — barking at automobile.

3. A dog is not shown to be vicious so as to render the owner liable for injuries done by him, by evidence that a few times he barked at passing automobiles, running along in front of

them and snapping at the tires, and that he caused injury by jumping in front of a machine which collided with him and was overturned.

Appeal — right of appellee to complain of instruction.

4. Upon appeal by defendant, plaintiff cannot complain of an instruction placing too great a burden of proof upon him.

(Weaver, Ch. J., and Ladd and Arthur, JJ., dissent.)

APPEAL by defendant from a judgment of the District Court for Johnson County (Popham, J.) in favor of plaintiff in an action brought to

recover damages for personal injuries to plaintiff and her husband, and to his automobile, alleged to have been caused by a collision between it and a dog owned or harbored by defendant. *Reversed.*

Statement by Preston, J.:

Action to recover damages to the person of plaintiff and her husband, and to the Ford automobile of the latter, by reason of the automobile striking a dog alleged to have been owned or harbored by the defendant. The first count claimed damages for personal injuries to the plaintiff, and the second count for injuries to her husband and damages to his car, and alleging that her husband's cause of action had been assigned to her. Trial to a jury, which resulted in a verdict for plaintiff in the sum of \$200, upon which judgment was rendered by the court. The defendant appeals.

Messrs. Hart & Hart, for appellant:

Dogs have a right to the use of the public streets, and the master is in no way held culpable for their appearance upon the public streets.

Brown v. Moyer, — Iowa, —, 171 N. W. 297.

Knowledge on the part of defendant of the viciousness of an animal is necessary to render him liable.

Alexander v. Crosby, 143 Iowa, 50, 119 N. W. 717; State, Smith, Prosecutrix, v. Donohue, 49 N. J. L. 548, 60 Am. Rep. 652, 10 Atl. 150, 1 Am. Neg. Cas. 167; Bomm v. Hollenbeck, 259 Ill. 382, 102 N. E. 782, Ann. Cas. 1914B, 1272; Warrick v. Farley, 95 Neb. 565, 51 L.R.A.(N.S.) 45, 145 N. W. 1020; Thornton v. Layle, 33 Ky. L. Rep. 382, 17 L.R.A.(N.S.) 1233, 111 S. W. 279; Miller v. Shufeldt, 114 N. Y. Supp. 1012; Shaw v. Craft, 37 Fed. 317; Fritsche v. Clemow, 109 Ill. App. 355; Klingman v. Smith, 12 Ky. L. Rep. 96; Norris v. Warner, 59 Ill. App. 300; Partlow v. Haggarty, 35 Ind. 178, 9 Am. Rep. 679; Laverty v. Hogan, 2 N. Y. City Ct. Rep. 197; Barclay v. Hartman, 2 Marv. (Del.) 351, 43 Atl. 174; Feldman v. Sellig, 110 Ill. App. 130; Trumble v. Happy, 114 Iowa, 624, 87 N. W. 678; De Gray v. Murray, 69 N. J. L. 458, 55 Atl. 237, 14 Am. Neg. Rep. 396; Strubing v. Mahar, 46 App. Div. 409, 61 N. Y. Supp. 799; Fettman v. Hencken & W. Co. 91 N. Y. Supp. 773; West Chicago Street R. Co. v. Walsh, 73 Ill. App. 595; Ward v. Danzeizen, 111 Ill. App. 163; Warner v. Chamberlain, 7

Houst. (Del.) 18, 30 Atl. 638; Harvey v. Buchanan, 121 Ga. 384, 49 S. E. 281; Ahlstrand v. Bishop, 88 Ill. App. 424; Dockerty v. Hutson, 125 Ind. 102, 25 N. E. 144; Delisle v. Bourriague, 105 La. 77, 54 L.R.A. 420, 29 So. 731; Carroll v. Marcoux, 98 Me. 259, 56 Atl. 848, 15 Am. Neg. Rep. 566; Speckmann v. Krieg, 79 Mo. App. 376; Gladstone v. Brinkhurst, 70 N. J. L. 130, 56 Atl. 142, 15 Am. Neg. Rep. 131; Duval v. Barnaby, 75 App. Div. 154, 77 N. Y. Supp. 337, 11 N. Y. Anno. Cas. 227; Boler v. Sorgenfrei, 86 N. Y. Supp. 180.

The gist of the action is not the keeping of the dog with knowledge of his dangerous nature, but rather the negligent failure to restrain the animal and to keep him so safely that he may not injure anyone who is lawfully at the place.

Hayes v. Smith, 62 Ohio St. 161, 56 N. E. 879, 7 Am. Neg. Rep. 493; Fake v. Addicks, 45 Minn. 37, 22 Am. St. Rep. 716, 47 N. W. 450, 1 Am. Neg. Cas. 150; DeGray v. Murray, 69 N. J. L. 458, 55 Atl. 237, 14 Am. Neg. Rep. 396; Parsons v. Manser, 119 Iowa, 88, 62 L.R.A. 132, 97 Am. St. Rep. 283, 93 N. W. 86; Alexander v. Crosby, 143 Iowa, 50, 119 N. W. 717; Guenther v. Fohey, 26 Ind. App. 93, 59 N. E. 182, 9 Am. Neg. Rep. 152.

If the driver was negligent, and the party sought to be charged was engaged with him in a common enterprise at the time of the happening of the act upon which negligence is predicated, the party charged is equally guilty with the negligent doer of the act, the same as if he had negligently done the act himself.

Collinson v. Cutter, — Iowa, —, 170 N. W. 420; Carpenter v. Campbell Automobile Co. 159 Iowa, 52, 140 N. W. 225, 4 N. C. C. A. 1; Beemer v. Chicago, R. I. & P. R. Co. 181 Iowa, 642, 162 N. W. 43; Daggy v. Miller, 180 Iowa, 1146, 162 N. W. 854, 14 N. C. C. A. 453.

Messrs. Dutcher, Davis, & Hambrecht, for appellee:

At common law one who harbored a dog not knowing him to be vicious, as well as the owner in possession, was liable for the injuries committed by him.

Alexander v. Crosby, 143 Iowa, 50, 119 N. W. 717; Marsel v. Bowman, 62 Iowa, 57, 17 N. W. 176; Sanders v.

O'Callaghan, 111 Iowa, 574, 82 N. W. 969.

The liability for such trespass is imposed not because of ownership, but because of possession and the duty to care for the animal.

Alexander v. Crosby, 143 Iowa, 50, 119 N. W. 717.

It is not necessary that the owner of the dog have actual express notice. It is sufficient to show that by the exercise of due care he might have known of the vicious nature of the animal.

3 C. J. p. 97, § 327; Knowles v. Mulder, 74 Mich. 202, 16 Am. St. Rep. 627, 41 N. W. 897; Turner v. Craighead, 83 Hun, 112, 31 N. Y. Supp. 369; Hayes v. Smith, 62 Ohio St. 161, 56 N. E. 879, 7 Am. Neg. Rep. 493.

The owner of a dangerous animal is liable for any damages caused by the same, after notice of one instance of similar misbehavior on the part of such animal.

Kittredge v. Elliott, 16 N. H. 77, 41 Am. Dec. 717.

If a dog becomes mischievous and inclined to injure the property of others, his owner is bound to restrain him on the notice, and is liable for mischief he may thereafter do to property of any kind.

Woolf v. Chalker, 31 Conn. 121, 81 Am. Dec. 175, 1 Am. Neg. Cas. 65.

Preston, J., delivered the opinion of the court:

The petition alleges in substance that defendant was the owner of, or harbored on his premises, a vicious dog; that the dog was in the habit of running out in the highway, and barking and biting at automobiles traveling thereon, and running in front thereof, greatly endangering the occupants of the car; that this fact was well known to defendant prior to the transaction in question, and that defendant made no effort to restrain the dog from continuing such practice, but continued to keep and harbor him; that about 9:30 o'clock in the evening of October 27, 1918, plaintiff was riding along the highway near the premises of defendant, in a Ford car belonging to, and being driven by, her husband; that a short distance from the house of defendant the dog jumped from the roadside in front of the car, and

began barking and biting at the front wheel; that the dog so jumped in front of the car without warning to plaintiff, and ran directly in front of the car, and through no fault of plaintiff or her husband the front wheel of the car struck the dog, and caused the car to be thrown from the roadway into a ditch, and against an embankment, turning the car over; that plaintiff and her husband sustained injuries; that she was confined to her bed for a time, and was unable to do her ordinary work; that she suffered severe pain, was damaged in the sum of \$50 for loss of time and inability to perform her usual labor, and incurred a doctor's bill of \$50, and claims damages for pain and suffering by reason of the negligence of defendant. The second count describes her husband's injuries, and that he lost two weeks' time, by which he was damaged in the sum of \$25; that the car was broken and damaged in the sum of \$173.75. Defendant denied any responsibility, denied ownership of the dog, denied knowledge of its evil propensities, if any, and alleged that the injuries sustained, if any were sustained, were caused by the negligence of plaintiff and her husband.

There is no dispute as to some of the facts, and at other points there is a conflict. According to defendant's contention, on the night in question, plaintiff and her husband drove out to visit her parents, passing defendant's farm. The night was dark, and mist was falling as they started home, about 9:30 P. M. They had passed over this road earlier in the evening. The road was slippery, and at the place of the accident, and for some distance in either direction, had been recently worked, leaving clods in the center. It was a narrow road, 25 to 30 feet wide, winding, one fairly smooth track on the south side; that the road was made darker by reason of timber on the north side of the road. The general direction of the road was northwest and southeast. They were going west or northwest, at the rate of 12 or 15 miles an hour.

The road was slippery and rough, out of the beaten path. The accident happened at a point about 80 rods from defendant's home. On the other hand, appellee contends that the evidence does not show that the road was particularly winding where the accident occurred; that it is shown that at the point in question the road bears to the northwest. Plaintiff also claims that the evidence does not show that the road was darkened by trees, since plaintiff's husband testified there was no timber where he hit the dog. They also claim the evidence shows it did not rain until after the accident, and they deny that the road was slippery; that the road had been worked a month before, and that it was a fairly well-traveled road, the main portion at the point of the accident along the south side, and in a well-beaten track. But there is evidence that the traveled track was pretty good, but that the road in the middle was rough. There is evidence that on the following morning a witness saw the track of plaintiff's car where it crossed the roadway diagonally, immediately before the accident. This, too, is denied by other witnesses.

The plaintiff's husband testified in regard to this:

Q. Isn't it a fact that you were on the north side of the road at that time, just before you turned to where you had the accident?

A. I cannot state; I don't remember.

Q. You can't remember? Don't you know that you were on the north side of the traveled section of that road, and darted to the southwest, where you had the accident?

A. No, sir; I was driving on the south side of the road.

Q. Then why did you say, why did you just answer, that you couldn't say?

A. I was driving on the south side of the road when I hit the dog.

Q. Will you swear to this jury that you were not on the north side of that traveled track?

A. I didn't cut across to the south-

west, diagonally to the southwest, when I hit the dog.

Q. Before you hit the dog?

A. I cannot state to that. The road was graded up, and I don't know which side the track was on.

It is undisputed that plaintiff and her husband were driving at 12 to 15 miles, and that it was about 9:30 P. M.

As to the immediate transaction of the striking of the dog, plaintiff's husband says: That the general direction of the road in front of defendant's house is northwest. There is a bend in the way. The general direction turns from the north to the west, a bend. After passing his house, one goes west for a way, and then there is a gradual bend to the northwest. As he passed defendant's house, he did not see the dog; first saw him 60 or 70 rods west of the house. "We were driving along, and we got to the gate, and the dog jumped off the bank, 4 feet distant, and just barked, and we hit the dog with the front wheel of the car. There wasn't sufficient time to try to avoid striking the dog. The left front wheel struck the dog. When the wheel struck, it bent the steering bar on the right wheel, causing the car to run to the left, and up the bank. The front wheels were up on the bank, and the hind wheels in the road. When the right wheel hit the bank, it struck the front spring and upset the car, and we were both under." After he got his wife out, he didn't see the dog, but heard him howling. The dog was lying in the road, and witness thought he had killed him, the way he was howling, then started to move up the road east towards defendant's house; says he saw the dog distinctly, so he could recognize him; larger than a medium-sized dog, dark brown on the back, yellow on the legs, white breast, 16, 18, or 20 inches high; lit a match, and could see his wife was hurt; she was bloody; took her to John Sedlacek's house, three blocks off the road; sent for the doctor; describes her injuries and his, and the damage to the car. The

next day went to defendant's home, saw and conversed with him, saw the dog there in the yard, and recognized it as the same dog he struck; didn't examine the dog to see whether he was hurt or not. He was limping, can't say which foot, thinks the left hind foot; says defendant wanted to know how it happened; told him, and asked defendant what he was going to do about it. Defendant said he didn't know. Defendant said he wouldn't do anything about paying the damages. Defendant asked if witness knew it was that dog, and witness said he had seen the dog before, and it was, and that the dog had run out at him before; that the defendant admitted that the dog had run out at people, but not that far from the house. He said the dog belonged to his son; that he wouldn't stay at his son's house, and went back and forth, and stayed there with him. The dog had run out at witness as he passed there before, nearly every time he went by; thinks the car went a rod or two after he saw the dog before the contact. "He jumped in front and barked, and jumped in front of the front wheel, and I hit him with the front wheel, and the car ran over him. He lay there in the road afterwards."

Q. Now, that is all the dog did, just as you testified here?

A. Yes, sir.

Q. And that was that he barked at the front wheel, and after he did you struck him with the automobile?

A. Yes, sir; it turned the car to the left.

Q. Now, when you saw the dog coming, what did you do, if anything?

A. I didn't have a chance to do anything. I hit him so quick. Threw the clutch out, and put on the brake, and tried to stop, but there was no chance. The traveled road was all right up close to the bank. The wheel track was close to the bank, 2 feet or 3 from the bank. The bank was probably 4 feet high, and the dog was on that side of the road, on the south side of the car,

and I was 2 feet from the edge of the bank. The bank was a bank sloping down, not straight up. The wheel didn't run over the dog. It hit him, and threw him under the car. I think just the middle part of the car ran over him. The dog still lay there, after I got out from under the car. After I got my wife out, I went to see the dog, and he was going up the road squealing. That is the dog I saw at defendant's the next morning.

Q. When the dog came towards you, you knew it was the Sedlacek dog?

A. I wasn't quite sure. I thought it was his dog. I wasn't sure. His nephew told me it was his. I seen the dog just before I hit him. I got his description just before I hit him.

Q. You tell this jury that you minutely examined this dog when he was coming at you, and you were turning off the gas, and throwing out the clutch, and putting on the brakes, and that you took this dog's inventory, and found that he was a brown dog 18 or 20 inches tall, and had a white ring around his neck?

A. No; I didn't. I say I seen the size and the color of the dog. I couldn't just exactly tell. I seen him jump off the bank.

Q. You didn't know, then; whether that was the Sedlacek dog, or not, that jumped off the bank?

A. No; only what his nephew told me.

Q. That is all you did know about it, then, what his nephew told you?

A. No, I knew it was his dog; but to make sure I asked him, and he told me.

Q. Why did you ask him?

A. I thought maybe it was somebody else's. I didn't see the dog there before he jumped out of the weeds off the bank. The next morning defendant said that the dog was his son's, but that he stayed down at his place. John F. Sedlacek said that this dog belonged to his uncle John. There was nothing said about the dog running out at automobiles.

Mrs. Mellicker, testifying with less detail, says: She saw the dog. "He just ran off the bank in front of the car, and that is all I saw. There was not much time between the time I saw the dog jump off the bank in front of the car before the car struck him; didn't see the dog in the road after the accident; heard him squealing; had a moment's glance of him when he jumped down in front of the car; noticed he was brown, with a white collar around his neck, and a white breast. He ran off the bank and right toward the car, in front of the car. He started to bark, and then ran in front of the car, and that is all I saw. I have told all the dog did there at that time."

She also describes her injuries, where they had been, where they were going, and so on. Another witness testifies to being with plaintiff's husband at defendant's home the next day; says there was quite a conversation, but witness did not remember much of it; did not pay much attention. Defendant said he did not think his dog would go out that far from the house. The dog was there; says the dog was a medium dog, dark on the back, brown and white around the neck. Defendant said his dog wouldn't run that far from the house; said the dog would run out and bark at people in front of the house, but would not go that far; said it was his son's dog, but the dog made his home there at the present time, the defendant's house; says the dog ran out and barked at his front wheel twice that summer. Witness passed defendant's eight or ten times during the two months; thinks defendant's son Frank was present at the conversation. Another witness says: A dog, which he describes as a brownish dog, yellow back and white collar, a little white on his neck, came out twice as he passed defendant's place. He would come bouncing, as if he would chew the tire off the car; would follow for a rod or so, and if you would speed up he would slow up and go back.

"This was in the summer of 1918. We were out pleasure riding. I was going 12 or 15 miles an hour, and the dog couldn't catch me. I would be pretty far along before the dog got to run out there. He wouldn't follow far."

This is the substance of plaintiff's testimony in regard to the transaction itself, although we have not attempted to go into any detail as to the injuries, damages, and so on.

Defendant testifies: That the next day after the accident, when plaintiff's husband came, his son and John F. were there. Witness examined the dog, to see if there were any wounds or sore spots, or that the dog flinched. There were none, and the dog did not flinch or limp. He tells how the dog came to be on his premises; that his brother-in-law rented his farm, and brought the dog with him. The brother-in-law lived there about a year and a half, and moved to town, and a neighbor took the dog. A hog bit the dog at the neighbor's, and he ran away, and went to another neighbor's, adjoining defendant's farm, and this dog came to his place. Defendant's son was to move on the neighbor's place, but, not having yet moved, was living with defendant. "The dog, after staying a week or so at the neighbor's, without anything to eat, came to my place, don't know whether he followed us, or the other dogs that were with us." Defendant's son moved to the neighbor's place about the 1st of January. "After my son moved, I took the dog over there and tied him up. After he kept coming back, I took a switch and switched him, trying to drive him back to where he used to stay; switched him five or six times. I did not have knowledge that this dog had the habit of running out after cars. Twice I saw him run out into the road and bark at an automobile. The last time was in the spring of 1918; never saw him run out and snap at automobiles. The second time he ran out, I called him back and switched him. Since then, I have taken particular notice

to see whether he went out, and I never saw him."

He denies the conversation testified to by Mr. Mellicker the next day, and gives his version of it, and says the dog might have been at his place for a little more than eight months before the accident. After witness switched the dog to make him go away, he would not go, but after that he stayed at defendant's place all the time. He did not feed him; his folks did; has one dog there, besides this one; says he thought he had broken the dog of running out. The dog has stayed at defendant's place since the accident. Some days, Sunday afternoons, there would be twenty-five cars pass by, and the dog paid no attention; knows this of his positive knowledge.

Witness Dehner says: He was at the place of the accident about five minutes afterwards. It was dark, and a foggy night, misting heavily, more like rain. It was impossible to see through the wind shield. (Last answer stricken on plaintiff's motion.) Says he has passed defendant's place seventy-five or one hundred times during the year 1918; saw the brown and white dog in the yard. He never ran out at the automobile of the witness. "I am forty-six, my eyes are good, and I say it would be impossible to see more than 2 feet out in the dark that night, and see an object."

Another witness testifies to having passed defendant's place many times, fifty or one hundred, in 1918, and at none of these times did the dog ever run out or bark, or attempt to bite the car; noticed the dog there in the yard. Other dogs had run out and barked at his automobile. Other witnesses gave similar testimony.

John F. Sedlacek denies telling Mr. Mellicker that the dog was his uncle's; examined the dog at defendant's house the next day, and there were no bruises, and there was no flinching; made a careful, critical examination; has passed defendant's place ten to twenty times a

month prior to the accident. Sometimes he saw the dog in the yard, and sometimes he would not. The dog never came out to chase his automobile, and never followed him. Mellicker and wife came to the house of witness after the accident; went out with a lantern. They had no light. They told of the accident; mentioned the accident, and said the automobile ran into a little brown dog; examined the dog the next day, and there was nothing the matter with him.

Defendant's son Frank, nineteen years of age, says he saw the dog examined the next day, and saw him walk and run, and there were no signs of lameness. In the conversation next day, Mr. Mellicker complained of the roads being rough. Another witness says the road was rough, with sods in the middle; the next morning was at the place of the accident, and noticed where the automobile was sitting, and that the tracks came diagonally from the north side of the road to the south side, across the rough part, over the sods. The automobile had been turned back on its wheels; heard a conversation the next morning between someone who gave his name as Mellicker, and another, Ellis, who lived at the county farm, where plaintiff and husband lived, as follows: "This is Mellicker talking." He said he couldn't come back to work the next morning; that he had an accident; and Ellis says: "You better sell the damn thing; that's not the first one you had."

He testifies further that there was a little bank on each side of the road at the place of the accident, and a small depression on each side of the roadway, for the water to run; a good track on each side of the road, one side as good as the other; could see no reason why a man driving along there should cross over to the other side. The track going across there went up to the automobile, and did not go any farther.

Another witness says the dog in question was more than twelve years old. He has known him that

long. Twelve years ago the dog was at Dvorsky's, his neighbor across the road, and is the neighbor referred to by defendant. During the twelve years he has known the dog, never saw him run out at automobiles. He barks, and that is about all; never saw him outside the house yard; lives about a mile and a half from defendant.

In rebuttal, Mr. Mellicker denies the phone conversation, and denies crossing the road diagonally.

By the errors assigned, the defendant challenges the sufficiency of the evidence to sustain the verdict; that the court erred in not sustaining the motion to direct a verdict for defendant at the close of plaintiff's testimony, and all the testimony; that the court erred in admitting and excluding evidence; erred in refusing instructions asked by the defendant and in the instructions given.

1. Appellant argues at some length that he is not liable under § 2340 of the Code. They cite *Brown v. Moyer*, — Iowa, —, 171 N. W. 297, and other cases, to sustain their position that to authorize a recovery under the statute it must be shown that the dog was worrying, maiming, or killing a domestic animal, or that it was attacking or attempting to bite a person. Counsel state in argument that the purpose of arguing that the case is not within the statute is that there is no statement in the record by appellee that they are not claiming under the statute, and that they therefore argue the question, lest it may be presented by appellant. There is no evidence in the record to show that the dog in question was doing any of the things enumerated in the statute. It will not be necessary to consider this question, because appellee says that the plaintiff is not claiming under the statute, but that a recovery is sought under the common-law rule; that there is no claim that the dog in question attacked or attempted to bite a person. Appellee contends that the owner, or one who harbors a vicious dog, is liable for the in-

juries committed by it, and that the liability is imposed, not because of ownership, but because of possession and the duty to care for the animal. They cite *Alexander v. Crosby*, 143 Iowa, 50, 119 N. W. 717; *Marsel v. Bowman*, 62 Iowa, 57, 17 N. W. 176; *Sanders v. O'Callaghan*, 111 Iowa, 574, 82 N. W. 969. Appellee concedes that it is the law in this state that at common law the owner of the dog cannot be held responsible for the acts of the dog, unless it is made to appear that the dog was vicious, and that the owner had either actual or constructive notice of its vicious propensities. *Brown v. Moyer*, supra.

They further contend that the common-law rule is changed by the statute in but two particulars, namely, that it makes the owner alone responsible, and dispenses with proof of scienter, and that in this action it is immaterial whether the defendant was the owner or harbinger of the dog; his liability remains the same; and that the difference is the question of scienter, which they contend has been established by the evidence.

2. The dog in question had a right in the highway, unless it was a vicious dog within the meaning of the law, and in that case he would be a nuisance, or perhaps there would be negligence in failing to restrain him, and if the defendant, as the owner or harbinger, had knowledge of its vicious propensities, and plaintiff was injured because of such viciousness, defendant would be liable, unless, perhaps, he was excused by the fault of the plaintiff. *Ibid.*; *Alexander v. Crosby*, 143 Iowa, 50, 52, 119 N. W. 717. If the dog was not a vicious dog, it follows, of course, that defendant could have no knowledge thereof. Was the dog a vicious dog? Plaintiff's evidence shows that about four times, during the summer, the dog ran out from defendant's yard into the highway and barked or chased automobiles, and on one occasion attempted to bite the wheel. There is

Animals—right
of dog in
highway.

not a word of evidence in the entire record that the dog ever attacked or attempted to bite any person or any domestic animal. On the other hand, a number of witnesses testify to having passed the place hundreds of times, and the dog did nothing. On the occasion in question, plaintiff's husband testifies in greater detail as to what the dog did, and says: "He just jumped off the bank about 4 feet from me, and just as he barked I hit him with the front wheel on the inside."

And again:

Q. Now, that is all the dog did, just as you testified here?

A. Yes, sir.

Q. And that was, that he barked at the front wheel, and after he did, you struck him with the automobile?

A. Yes, sir.

The wife testifies: "He started to bark, and then ran in front of the car, and that is all I saw."

This is the sum and substance of it all. Appellee says in argument: "If a person has a dog in his possession for a considerable length of time and such dog has all that time been in the habit of rushing into the highway, in front of the owner's residence, and of barking at, chasing, worrying, or attacking a passing team in a ferocious manner, a question is presented to the jury to find whether the owner was aware of such habit," etc.

And again: "It is immaterial whether the dog was attacking a person, or some other animal, the liability for the damages remains the same."

But it does not appear that this animal was attacking any person or animal, or chasing or worrying or attacking passing teams, in a ferocious manner. An animal, a horse or team for instance, might be frightened by a dog running at, or biting. Not so with an automobile. Most of the cases are where there was an attack of some kind by worrying or biting, or the appearance of a ferocious attack, and we assume it is for that reason that the definitions for "vicious," or "vicious ani-

mal," are not plentiful. One naturally gets the idea that there is an element of savagery or fierceness, ferociousness or mischievousness, as in worrying other animals, as a sheep-worrying dog, etc. In 40 Cyc. 203, note, it is said, quoting from a Georgia case, that "a vicious animal is any individual of a vicious species, or a vicious individual of a harmless species."

And at the same page it is said that a vicious propensity is not confined to a disposition on the part of a dog to attack every person he might meet, but includes as well a natural fierceness or disposition for mischievousness, as might occasionally lead him to attack human beings without provocation. In 2 Cyc. 415, it is said that one may kill a vicious animal in necessary defense of himself or the members of his household, or under circumstances which indicate danger that property will be injured or destroyed unless the aggressor is killed; but it seems that such a killing is justified only where the animal is actually doing injury. See also *Marshall v. Blackshire*, 44 Iowa, 475. The right to kill is, of course, controlled by the statute more or less; but we are speaking now only of the meaning of the word "vicious." In *Merritt v. Matchett*, 135 Mo. App. 176, 181, 115 S. W. 1068, an instruction was approved in this form: "The jury are instructed that what is meant by the term, 'a vicious propensity' in an animal, is such a propensity that the dog might attack or injure the safety of persons without being provoked so to do."

In 4 C. J., at page 104, it is said that under the common law it is incumbent on one complaining of the savage act of a dog to prove its vicious propensity, etc. In *Sanders v. Teape*, 51 L. T. N. S. 263, cited in note at page 99, in 3 C. J., where a dog playing in a garden jumped over a wall and struck plaintiff, who was digging a hole, it was held that the owner of the dog was not liable. 3 C. J., p. 104, note citing *Briscoe v. Alfrey*, 61 Ark. 196, 30 L.R.A. 607,

54 Am. St. Rep. 203, 32 S. W. 505, and other cases, state that "the vicious dog in general, and the odious sheep killer in particular, are under the laws of special condemnation."

In 1 R. C. L. 1116, we find: "But a cross and savage disposition on the part of a dog is not necessary in order to impose liability on its owner for its assault; he is equally responsible where it appears that the dog had a propensity to bite only in play, if he knew of such mischievous habit, and injury results."

And at page 1117: "Also, if a dog is not always dangerous, but is likely, as its owner knows, to bite either man or beast only at particular seasons, or under particular circumstances, then, against those seasons and circumstances, and that kind of mischief to be apprehended in them, the owner insures at his peril."

The same thought is carried into the statute (§ 2340) making it lawful for any person to kill a dog caught in the act of worrying or killing domestic animals, or attacking or attempting to bite persons, and so on. Clearly the accident in this case was not caused by any vicious act of the dog.

**-viciousness—
barking at
automobile.** At most, he simply barked at the machine, and jumped down from the bank. He may have been, and doubtless was at that time of night, asleep on the top of the bank, and surprised, provoked by the approach of the auto close to him, then jumped down and barked.

**-liability for
overturning
automobile.** These circumstances were somewhat different from those testified to by plaintiff's two witnesses, about the dog running out from the yard, and, it seems to us, so different that, even though defendant should be held to have had notice of what the dog had done before, it would not be notice of the alleged vicious propensity of the dog at the time in question, or put the defendant on his guard, and require him, as an ordinarily prudent person, to anticipate the injury which did happen. In 3 C. J. 96, in

the note to the citation given, it is said that under such circumstances it is not enough to show constructive knowledge, but that it must be actual knowledge, particularly in the absence of proof that the animal was of a savage and ferocious nature. In 3 C. J., at page 92, § 321, it is said: "It may be necessary further to take into consideration the question whether the act complained of is one which the owner could or could not have anticipated."

See also same volume, p. 95, § 326. See also *Malony v. Bishop*, — Iowa, —, 2 L.R.A.(N.S.) 1188, 105 N. W. 407, 19 Am. Neg. Rep. 230.

And in 1 R. C. L. 1117, on the question of scienter, it is said that knowledge that a dog is ferociously disposed toward cattle is ordinarily not notice that it will attack persons, and that under the modern doctrine it is sufficient to show that the animal would be likely to commit an injury similar to the one complained of.

Many cases are cited by appellant on the question of scienter, but in view of what we have said we deem it unnecessary to discuss that question further. It should be said in this connection that there is a suggestion in the testimony of plaintiff or her husband, which is in the nature of a conclusion, that the dog came from the cornfield at the side of the road; but neither testify that they saw that, but, on the contrary, both say that the first they saw of the dog he was on the bank. The dog did not run into the automobile, but, on the contrary, the automobile ran into the dog. The same result would have happened if the dog was not vicious, or whether it was a sheep or a hog. At any rate, the theory upon which the case was tried was along the lines we have suggested as to the vicious character. The court instructed along that line in three or four instructions. In instruction 5 the court said: "(5) It is the law of this state that if a person owns or harbors a vicious dog at his place, which he permits to run at large and on

the public highway near his place, and that he knows or should have known by the exercise of reasonable care that said dog was vicious and likely to attack and injure persons while passing along said highway, then and in that event the person who owns or harbors said vicious dog is liable for the injuries committed by it."

Again, in the same instruction, the court placed the burden of proof upon plaintiff to show that defendant "knew, or should have known by the exercise of reasonable care, that said dog was vicious and likely to attack and injure persons while passing along the said public highway, and that the dog did attack the car in which plaintiff was riding," and so on. The same thought is in some of the other instructions. There is no evidence that the dog did attack the car. There is no evidence in the record to show, or from which defendant had or should have had knowledge, that this dog was likely to attack and injure persons while passing along the highway. The in-

struction is the law of the case, and the plaintiff did not establish by evidence matters which she was required to show, under the instructions. And this is so, even though it be argued that the trial court placed a greater burden upon plaintiff than should have been done. Appellant makes the further complaint of the instructions just referred to, that it is error to instruct on matter not pleaded, or on which there is no evidence, and they cite Zellmer v. McTague, 170 Iowa, 534, 538, 153 N. W. 77.

Furthermore, the jury may have reasoned that the court thought, and intended to intimate, that, because plaintiff's evidence showed that on a few occasions the dog had run out and chased automobiles, it was likely

to attack persons. As said, there was no evidence that the dog had ever attacked any person or domestic animal. It is clear that it cannot be said from the evidence that this dog was in the habit of doing what he did. We hold that under the record the dog was not a vicious dog within the meaning of the law, and that the evidence does not support the verdict, under the evidence and the law, and under the instructions given by the court. It seems to us that, if a showing is warranted here, nearly every farmer in Iowa owning a shepherd dog would be liable several times a year. We may say, in passing, that it is a close question whether plaintiff and her husband were able, under the circumstances, to identify the dog as the dog kept by defendant. Possibly this was a question for the jury, and we do not determine the question. It is claimed by appellant that plaintiff's husband drove the car across the road at the dog, and for this reason, and because of the speed of the car on a road that was rough in the middle, and the other circumstances, plaintiff and her husband were guilty of contributory negligence. It occurs to us there is force in some of these suggestions; but there was a conflict in regard to some of these matters, and they were for the jury.

Other questions are argued, some of which are in regard to rulings on evidence, offered instructions, and so on, which are not likely to occur on a retrial of the case, if there should be another trial. As to some of the other questions, it is unnecessary to determine, in the view we take of the case.

For the reasons given, the cause is reversed and remanded.

Stevens, Evans, and Salinger, JJ., concur.

Weaver, Ch. J., and Ladd and Arthur, JJ., dissent.

ANNOTATION.

Liability for damages due to dog interfering with travel in highway.

The annotation does not purport to cover cases where a dog has inflicted injuries by actually biting a person.

Generally.

One who keeps a dog with knowledge that it is in the habit of running out and barking at wayfarers, and at teams passing along the highway, will be liable for injuries occurring as the result of the dog running out and barking at a horse, causing it to become frightened and run away. *Jones v. Carey* (1891) 9 Houst. (Del.) 214, 31 Atl. 976; *Cameron v. Bryan* (1893) 89 Iowa, 214, 56 N. W. 434, 1 Am. Neg. Cas. 103; *Knowles v. Mulder* (1889) 74 Mich. 202, 16 Am. St. Rep. 627, 41 N. W. 896; *Carlson v. McEwen* (1912) Rap. Jud. Quebec 41 S. C. 473, 3 D. L. R. 787, Ann. Cas. 1912D, 995; *Vital v. Tetreault* (1888) 33 Lower Can. Jur. 20, 4 Montreal L. R. 204; *Reed v. King* (1858) 30 L. T. (Eng.) 290; *Birdsall v. Merritt* (1917) 38 Ont. L. Rep. 587, 35 D. L. R. 260.

One who, with knowledge that her dog made a practice of jumping at horses' noses, took the dog with her while she was traveling on a public highway, was held in *Putnam v. Wigg* (1891) 59 Hun, 627, 37 N. Y. S. R. 304, 14 N. Y. Supp. 90, to have been properly held liable for the injuries resulting to the driver of a horse which became frightened when the dog jumped at his nose, and while backing was struck by the driver with a whip, after which the horse gave a sudden jerk and the driver was thrown from the buggy and injured.

And in order that one may recover for damages caused by a dog frightening a horse, it is not necessary that the dog should have bitten or attacked the horse, but it is sufficient that the horse was frightened by the dog barking at him. *Schmid v. Humphrey* (1878) 48 Iowa, 652, 30 Am. Rep. 414.

So, too, in *Crowley v. Groonell* (1901) 73 Vt. 45, 55 L.R.A. 876, 87 Am. St. Rep. 690, 50 Atl. 546, where a dog jumped up at an old man walking

along a highway, and putting his feet upon him threw him to the ground, injuring him, the court held that the fact that an assault committed by a dog in jumping upon a stranger and injuring him resulted merely from its mischievous or playful propensities will not absolve the owner from liability, if he knew of the dog's disposition to commit such injuries, or knew enough of its habits to convince a man of ordinary prudence of its inclination to commit them.

On the other hand, it has been held that one who owns a dog that chases and jumps in front of bicycles or motorcycles will not be liable for injuries sustained by a rider, as a result of being thrown from his machine when it comes in contact with the dog, where there is no evidence that the owner of the dog knew of such dangerous or vicious propensities. *Milligan v. Henderson* [1915] S. C. (Scot.) 1030, court of sessions cited in *Mews' Dig.* 1911-15, p. 22; *Robertson v. Boyce* [1912] South African L. R. A. D. 367, cited in 2 English & Empire Dig. p. 233, note.

And in an action to recover for injuries sustained by being struck by a team frightened by a dog, in which the complaint alleges negligence upon the part of the owner of the dog in keeping it with knowledge of its vicious propensities, the plaintiff must prove that the defendant was the owner of the dog with knowledge of its vicious propensities, or prove circumstances from which it must appear to all reasonable persons that he must have had such knowledge. *Mabrey v. Haverstick* (1912) 175 Ill. App. 309.

So, it was held that there could be no recovery, as there was no evidence that the owner of the dog knew of its propensity to run out and bark at passing teams, and the evidence showed that the owner of the team was negligent in his driving. *Ibid.*

So, too, the owner of a dog, known to him to be in the habit of barking at and chasing persons or horses in

the highway, is not bound to exercise more than ordinary care to protect the public from danger, unless the acts of the dog have, with the owner's knowledge, caused injury, or have been of such a vicious character, as to be liable to cause injury. *Shaw v. Craft* (1888) 37 Fed. 317. And see the reported case (*MELICKER v. SEDLACEK*, ante, 259). Yet, if the dog is of such a vicious character, and the owner knows it, he may be held responsible. *Cameron v. Bryan* (1893) 89 Iowa, 214, 56 N. W. 434, 1 Am. Neg. Cas. 103.

If a person has a dog in his possession for a considerable length of time, and such dog has during all that time been in the habit of rushing into the highway in front of the owner's residence, and of barking at, chasing, worrying, or attacking passing teams in a ferocious manner, a question is presented to the jury to find whether the owner was aware of such habits, or, if not, whether he was negligent in not knowing them. The facts may be such that they may well find that he ought to have known them, and so from such facts imply notice to him. The length of time such vicious habit is shown to have existed has an important bearing upon the question whether notice or knowledge of such habit may be inferred as imputed to the owner. *Knowles v. Mulder* (1889) 74 Mich. 202, 16 Am. St. Rep. 627, 41 N. W. 896.

Permitting a dog to run at large without a muzzle, contrary to law, is not the proximate cause of injury to a pedestrian who is tripped and injured by its running against him. *Forsythe v. Kluckhorn* (1911) 150 Iowa, 126, 33 L.R.A. (N.S.) 163, 129 N. W. 739.

And in *Millins v. Garratt* (1906) *Times*, March 6, cited in 2 *English & Empire Dig.* p. 233, where one, while cycling in a public street, was thrown down by coming into contact with a blind dog, it was held to be no evidence of negligence that the owner of the dog let it run in the street.

But in *Jones v. Owen* (1871) 24 L. T. N. S. (Eng.) 587, it was held that an owner of greyhounds, who coupled them together with a rope and permitted them to run upon the highway

without being led or otherwise restrained, was properly found guilty of negligence, rendering him liable for injuries to a pedestrian who was run into by them and thrown by the rope. It was pointed out that the court was not confronted with the question merely of allowing dogs on the highway without restraint, but of coupling them together and failing to lead or guide them.

And in *Ingham on Animals*, p. 379, *Brogan v. Worton*, 78 S. C. L. Rev. 162, is set out as holding that, where the defendant, seeing a cat running past in a public street, called to a dog beside him to seize it, and the dog accordingly gave chase and while doing so knocked down and injured a child, the former acted negligently and without due care for passers-by, and was liable in damages. Although it does not appear from the case, as set out, that defendant was the owner of the dog, yet such fact is of little importance, since if a nonowner could be held responsible in damages for his affirmative act in setting a dog in motion to the injury of another, a fortiori, the owner would be liable if he committed the same act.

One who is injured as the result of his horse running away because it was frightened by a dog that barked and bit at him is not precluded from recovering damages for the injuries because of the fact that he was driving a skittish horse in an unsafe carriage. *Chickering v. Lord* (1893) 67 N. H. 555, 32 Atl. 773.

And it is no defense to an action for damages resulting from a dog barking at and frightening a horse that the owner of the horse was traveling on Sunday, and not on an errand of necessity or charity. *Schmid v. Humphrey* (1878) 48 Iowa, 652, 30 Am. Rep. 414.

A married woman cannot be charged with harboring a dog as owner, under proof showing no more than that the dog belonged to her husband, but that she permitted it to remain on the home premises, the legal title to which was in her, so as to make her liable for injuries sustained by reason of the dog chasing and barking at a horse,

causing it to run away. *Burch v. Lowary* (1906) 131 Iowa, 719, 117 Am. St. Rep. 443, 109 N. W. 282.

But it has been held that a woman who owns and controls the premises is liable for injuries to one driving upon the highway, due to being kicked by his horse when attacked by a dog, although the dog was owned by her son, who lived with and worked for her. *Jenkinson v. Coggins* (1900) 123 Mich. 7, 81 N. W. 974.

In *Denison v. Lincoln* (1881) 131 Mass. 236, an action for injuries caused by the shying of a horse, alleged to have been caused by the actions of a dog, the court said that it would not say that there was error in refusal of the instruction that "if the dog did not leave his master's premises, and did not go within 15 feet of the plaintiff's horse, and did not bark or make any noise, the dog cannot be said to have attacked the plaintiff or her horse," since the whole evidence was not reported, and it could not be said that there might not have existed in the acts of the dog certain characteristics which made those acts amount to a demonstration of attack, which would naturally cause a horse to shy, though the dog did not leave his master's premises, nor go within 15 feet of the horse, or bark, or make any noise.

Evidence of special habits of animals.

In *Johnstone v. Tuttle* (1907) 196 Mass. 112, 81 N. E. 886, where it was claimed that a horse started in consequence of a dog running under the wagon, it was held error to exclude evidence that the horse had formed the habit of starting without any disturbing cause.

Under statute.

Under a statute making the owner of a dog liable for injury inflicted by him on one traveling on the highway, the owner of a dog is liable for injuries received by one from being thrown out of his wagon on the street, upon his horse becoming unmanageable because bitten by the dog. *Malafronte v. Miloni* (1913) 35 R. I. 225, 86 Atl. 146.

So, too, under a statute making the owner or keeper of a dog liable if the

dog assault, or bite, or otherwise injure any person traveling on the highway, the keeper of a dog was held liable for injuries to one driving upon the highway, from being kicked by his horse when attacked by the dog. *Jenkinson v. Coggins* (Mich.) *supra*.

And in *Tasker v. Arey* (1916) 96 Atl. 737, 114 Me. 551, one whose dog jumped in front of an automobile which was being driven along a public highway, striking the wheel and causing it to be overturned, was held to be liable for the resulting damages, under a statute which provides that, "when a dog does damage to a person or his property, his owner or keeper, and also the parent, guardian, master, or mistress of any minor who owns such dog, forfeits to the person injured the amount of the damage done, providing the said damage was not occasioned through the fault of the person injured."

— statute permitting double damages.

Under a statute permitting recovery of double the amount of damages sustained as a result of injuries caused by a dog, one may recover double the damages sustained as a result of a dog jumping at and barking at his horse, causing it to become frightened and unmanageable. *Sherman v. Favur* (1861) 1 Allen (Mass.) 191; *White v. Lang* (1880) 128 Mass. 598, 35 Am. Rep. 402; *Denison v. Lincoln* (1881) 131 Mass. 236; *Boulesler v. Parsons* (1894) 161 Mass. 182, 36 N. E. 790, 1 Am. Neg. Cas. 132.

So, too, in *Williams v. Brennan* (1912) 213 Mass. 28, 99 N. E. 516, an action under a statute for double damages for injuries alleged to have been due to acts of a dog, the facts were that a large dog ran toward an automobile, barking as he ran, and when he reached the automobile snapped at the right fore tire, but missed it, and his body struck the left fore wheel, causing the automobile to skid so that it, still in contact with the dog, came directly in front of a horse attached to an ice wagon. The dog did not touch the horse, but when the automobile came in front of it the horse reared and descended upon the top of the automobile, causing the injuries

sued for. It was contended that, on that evidence, the jury was not warranted in finding that the dog was the sole direct and proximate cause of the injury, but the court, without any discussion, held that *Denison v. Lincoln* (1881) 131 Mass. 236, was decisive against such contention.

And the fact that the traveler was unlawfully traveling on Sunday, and not from necessity or charity, does not defeat his right to recover under the statute. *White v. Lang* (1880) 128 Mass. 598, 35 Am. Rep. 402.

And the fact that the horse attacked was being led behind a wagon is not such evidence of negligence as will preclude a recovery under the statute. *Boulester v. Parsons* (1894) 161 Mass. 182, 36 N. E. 790, 1 Am. Neg. Cas. 132.

And the fact that the shying of a horse which was frightened by a dog contributed to the injury will not prevent a recovery under the statute, where the act of the dog was the sole and proximate cause of the shying, and the shying was not the result of any vicious habit of the horse. *Denison v. Lincoln* (Mass.) *supra*.

In an action under the statute for injuries occasioned by a dog, alleged to have resulted from the act of the dog in rushing into the highway and frightening a horse, evidence tending to show that the dog had made other attempts upon other passing teams in a like manner, offered with a view to showing that the dog had made the attack in question, is competent. *Broderick v. Higginson* (1897) 169 Mass. 482, 61 Am. St. Rep. 296, 48 N. E. 269.

—statute eliminating scienter.

Generally, as to statute eliminating scienter as a condition of liability for injury by a dog or other animal, see annotation, 1 A.L.R. 1113.

Recognizing that proof of scienter was required at common law, it was held in *Malafronte v. Miloni* (1913) 35 R. I. 225, 86 Atl. 146, that the pur-
11 A.L.R.—18.

pose of the statute unqualifiedly rendering the owner of a dog liable for injuries caused by it was to dispense with the necessity of proof of scienter. And to same effect, see *Meracle v. Down* (1885) 64 Wis. 323, 25 N. W. 412.

And under a statute which allowed double damages for injuries by a dog, and which expressly dispensed with proof that the owner of the dog knew that it was mischievous or vicious, it was held in *Newton v. Gordon* (1888) 72 Mich. 642, 40 N. W. 921, an action for injuries due to a horse being frightened by a dog, that it was unnecessary to allege that the dog was in fact mischievous or vicious. The court stated that "the only reason for the averment at common law was that it was necessary to show knowledge of such fact in the defendant before plaintiff could recover. The reason of the rule requiring the averment to be made having been entirely abrogated by statute, the rule itself must be allowed to go with it; otherwise, a senseless form would be perpetuated, and which, as often as taken advantage of, would prove destructive of substantial rights."

But under a statute imposing liability on the "owner" of a dog, without regard to his knowledge of the dog's vicious or mischievous nature, it is only in a case where the declaration alleges defendant to be the owner of the dog that the allegation of knowledge and proof thereof is dispensed with, and so, where the declaration follows common-law precedents and alleges that defendant kept a dog, knowing that it was vicious, the scienter must be alleged and proved in order to hold the owner liable for damages resulting from such dog's running out and frightening a team traveling on the highway, causing it to run away. *Wormley v. Gregg* (1872) 65 Ill. 251, 1 Am. Neg. Cas. 90.

J. H. B.

HELEN M. RODGERS, Appt.,

v.

MARTHA M. RODGERS et al., Exrs., etc., of John C. Rodgers, Deceased,
Respts.*New York Court of Appeals—June 11, 1920.*

(229 N. Y. 255, 128 N. E. 117.)

Contract — for resumption of marital relations — validity.

1. An agreement by a man and his father to pay his wife, who has brought an action against him for divorce, a specified sum if she will discontinue the action and resume marital relations with her husband, is not against public policy.

[See note on this question beginning on page 277.]

Joint debtors — right to sue one alone.

2. A father who contracts jointly with his son to pay a sum to the latter's wife, in case she will dismiss a divorce proceeding and resume marital

relations with the son, cannot complain that the action to enforce payment is brought against him alone.

[See 6 R. C. L. 880; 20 R. C. L. 678.]

APPEAL by plaintiff from an order of the Appellate Division of the Supreme Court, First Department, affirming a judgment of the Special Term, Part IV., for New York County (Newburger, J.), sustaining a demurrer to and dismissing the complaint in an action brought to recover an amount alleged to be due plaintiff under an agreement with her husband and his father, in consideration of the dismissal by her of a divorce proceeding and resumption of marital relations with her husband. *Reversed.*

The facts are stated in the opinion of the court.

Mr. Joseph F. Murray, with Mr. Harry A. Redmond, for appellant:

The agreement imposed a joint and several liability upon the defendants' testator, and the estate of the husband was not a necessary party defendant.

2 Jarman, Wills, 6th ed. p. 1791; Pearce v. Edmeades, 3 Younge & C. Exch. 252, 160 Eng. Reprint, 695, 3 Jur. 245, 8 L. J. Exch. in Eq. 61; Doe ex dem. Patrick v. Royle, 13 Q. B. 100, 116 Eng. Reprint, 1201; Theberath v. Celluloid Mfg. Co. 5 Bann. & Ard. 577, 3 Fed. 143; Morrison v. American Surety Co. 224 Pa. 41, 73 Atl. 10; Besore v. Potter, 12 Serg. & R. 154; Geddis v. Hawk, 10 Serg. & R. 33; Hanley v. Medford, 56 Or. 171, 108 Pac. 188; Consolidated Canal Co. v. Peters, 5 Ariz. 80, 46 Pac. 74; Jacobs v. Davis, 34 Md. 204; Commercial Nat. Bank v. Gorham, 11 R. I. 162; Kortwellyeszsy v. Manhattan Cooperage Co. 162 App. Div. 285, 147 N. Y. Supp. 586.

Even though there was a joint liability only imposed by the contract,

the estate of plaintiff's husband was not a necessary party defendant.

Getty v. Binsee, 49 N. Y. 385, 10 Am. Rep. 379; Potts v. Dounce, 173 N. Y. 335, 66 N. E. 4; Third Nat. Bank v. Graham, 174 App. Div. 503, 161 N. Y. Supp. 159.

It was not necessary to allege non-payment by the plaintiff's husband during his lifetime, and the insolvency of his estate.

Lerche v. Brasher, 104 N. Y. 157, 10 N. E. 58; Re Rowell, 45 App. Div. 323, 61 N. Y. Supp. 382; Hicks-Alixanian v. Walton, 14 App. Div. 199, 43 N. Y. Supp. 541; Bremer v. Ring, 146 App. Div. 724, 131 N. Y. Supp. 487; Re Neil, 35 Misc. 254, 71 N. Y. Supp. 840; National Surety Co. v. Seach, 171 App. Div. 414, 157 N. Y. Supp. 422.

The agreement in suit is entirely valid, and in no wise contravenes or is opposed to public policy.

Sommer v. Sommer, 87 App. Div. 434, 84 N. Y. Supp. 444; Winter v. Winter, 191 N. Y. 462, 16 L.R.A. (N.S.) 710, 84 N. E. 382; Poillon v. Poillon,

49 App. Div. 341, 63 N. Y. Supp. 301; Whitney v. Whitney, 4 App. Div. 597, 36 N. Y. Supp. 891, 39 N. Y. Supp. 1136; Holmes v. Hubbard, 60 N. Y. 183; Bock v. Perkins, 139 U. S. 639, 35 L. ed. 318, 11 Sup. Ct. Rep. 677; Dady v. O'Rourke, 172 N. Y. 452, 65 N. E. 273; Beardsley v. Hotchkiss, 96 N. Y. 213; Fullerton v. Chatham Nat. Bank, 17 Misc. 532, 40 N. Y. Supp. 874; Timerson v. Timerson, 2 How. Pr. N. S. 526; Pitts v. Pitts, 52 N. Y. 593; Johnson v. Johnson, 14 Wend. 637; Burr v. Burr, 10 Paige, 20, affirmed in 7 Hill, 207; Davies v. Davies, 55 Barb. 130; Hammerstein v. Equitable Trust Co. 156 App. Div. 644, 141 N. Y. Supp. 1065; Curtis v. Leavitt, 15 N. Y. 9; Re Kings County Elev. R. Co. 105 N. Y. 97, 59 Am. Rep. 478, 13 N. E. 18; Chemung Canal Bank v. Payne, 164 N. Y. 252, 58 N. E. 101; People v. Van Rensselaer, 9 N. Y. 291; Stringer v. Barker, 110 App. Div. 37, 96 N. Y. Supp. 1052; Horner v. Wood, 23 N. Y. 354; New York v. Sands, 105 N. Y. 210, 11 N. E. 820; Recknagel v. Steinway, 105 App. Div. 561, 94 N. Y. Supp. 119; Barnes v. Klug, 129 App. Div. 192, 113 N. Y. Supp. 325; Wilson v. Hinman, 182 N. Y. 408, 2 L.R.A.(N.S.) 232, 108 Am. St. Rep. 820, 75 N. E. 236; Mack v. Mack, 87 Neb. 819, 31 L.R.A.(N.S.) 441, 128 N. W. 527; Goldstein v. Goldstein, 35 Misc. 251, 71 N. Y. Supp. 807; Wright v. Wright, 114 Iowa, 748, 55 L.R.A. 261, 87 N. W. 709; Merrill v. Peaslee, 146 Mass. 460, 4 Am. St. Rep. 334, 16 N. E. 271.

There is ample valid consideration shown in the agreement in suit to sustain this action against the defendant.

Best v. Thiel, 79 N. Y. 15; Torry v. Black, 58 N. Y. 185; Home Ins. Co. v. Watson, 59 N. Y. 390; Dubois v. Hermance, 56 N. Y. 673; Baird v. Baird, 145 N. Y. 659, 28 L.R.A. 375, 40 N. E. 222; Antisdel v. Williamson, 37 App. Div. 167, 55 N. Y. Supp. 1028; Quackenbush v. Mapes, 123 App. Div. 242, 107 N. Y. Supp. 1047; 5 Lawson, Rights & Rem. § 2244; Todd v. Weber, 95 N. Y. 181, 47 Am. Rep. 20; Hamer v. Sidway, 124 N. Y. 538, 12 L.R.A. 463, 21 Am. St. Rep. 693, 27 N. E. 256; Marie v. Garrison, 83 N. Y. 14; Mack v. Mack, 87 Neb. 819, 31 L.R.A.(N.S.) 441, 128 N. W. 527; Miller v. McKenzie, 95 N. Y. 580, 47 Am. Rep. 85; White v. Baxter, 71 N. Y. 254; Cox v. Stokes, 156 N. Y. 491, 51 N. E. 316; Burr v. Beers, 24 N. Y. 178, 80 Am. Dec. 327; Mechanics' & F. Bank v. Wixson, 42 N. Y. 438; Traders' Nat. Bank v. Parker,

130 N. Y. 415, 29 N. E. 1094; Dolcher v. Fry, 37 Barb. 152; Van Order v. Van Order, 8 Hun, 315.

Messrs. Thomas F. Conway and Thomas E. O'Brien, for respondents:

Failure of the plaintiff to allege in the complaint that her husband, prior to his death, on the 6th day of February, 1917, had omitted or failed to make the payments provided for in the contract, and that his estate is insolvent, is fatal to the cause of action attempted to be alleged.

Pittsburgh-Westmoreland Coal Co. v. Kerr, 220 N. Y. 137, 115 N. E. 465.

The agreement is void as being against public policy.

Winter v. Winter, 191 N. Y. 462, 16 L.R.A.(N.S.) 710, 84 N. E. 382; Poillon v. Poillon, 49 App. Div. 341, 63 N. Y. Supp. 301; Whitney v. Whitney, 4 App. Div. 597, 36 N. Y. Supp. 891, 39 N. Y. Supp. 1136; Kesler's Estate, 143 Pa. 386, 13 L.R.A. 581, 24 Am. St. Rep. 557, 22 Atl. 892; Copeland v. Boaz, 9 Baxt. 223, 40 Am. Rep. 89; Merrill v. Peaslee, 146 Mass. 460, 4 Am. St. Rep. 334, 16 N. E. 271; Ridgely v. Keene, 134 App. Div. 647, 119 N. Y. Supp. 451; Foley v. Speir, 100 N. Y. 552, 3 N. E. 477.

The contract is also void for lack of consideration.

Re Callister, 153 N. Y. 294, 60 Am. St. Rep. 620, 47 N. E. 268; Blaechinska v. Howard Mission & Home, 130 N. Y. 497, 15 L.R.A. 215, 29 N. E. 755; Van Order v. Van Order, 8 Hun, 315; Kramer v. Kramer, 181 N. Y. 477, 74 N. E. 474; 21 Cyc. 1148.

The estate of the husband, through its legally appointed representative, is a necessary party defendant.

Knowles v. Cuddeback, 19 Hun, 590; Barry v. Ransom, 12 N. Y. 462; Hubbard v. Gurney, 64 N. Y. 458; Easterly v. Barber, 66 N. Y. 433; Wells v. Miller, 66 N. Y. 255; Barson v. Mulligan, 191 N. Y. 306, 16 L.R.A.(N.S.) 151, 84 N. E. 75; O'Conner v. Gifford, 117 N. Y. 275, 22 N. E. 1036; Baskin v. Andrews, 53 Hun, 95, 6 N. Y. Supp. 441; Richardson v. Draper, 87 N. Y. 337; Potts v. Dounce, 173 N. Y. 335, 66 N. E. 4.

Pound, J., delivered the opinion of the court:

This action was begun against John C. Rodgers, who died after the decision of the appellate division was made, and has been continued against the executors of his will.

The question is whether the complaint states facts sufficient to constitute a cause of action, and whether there is a defect of parties defendant. The material allegations are that plaintiff was the wife of James M. Rodgers; that she had brought an action against him in the state of New York for an absolute divorce, which was pending on April 7, 1909; that she discontinued her action and resumed her relations with her husband in consideration of the agreement of her husband and John C. Rodgers, his father, entered into with her on that date, providing, among other things, that "the party of the second part [plaintiff], so long as she shall live and shall either live with the party of the first part [her husband] or separate from him, and irrespective of whether she shall bring an action against him for a separation or for an absolute divorce, shall be paid on the first of each and every month the sum of \$300, dating from April 1, 1909; and it is understood and agreed that such payments shall not be affected by the death of either of the parties of the first part or third part [defendant], but shall continue so long as the party of the second part shall live."

She further alleges that she fully performed all the conditions of such agreement on her part, and continued to live with her husband as his wife until his death on February 6, 1917; that defendant has failed to pay the moneys provided to be paid her by him since the 7th day of April, 1909, excepting \$1,900 thereof, and that there is now due and owing from him the sum of \$29,600, with interest "no part of which has been paid."

We think that the complaint is sufficient. The agreement set forth therein is not, on its face, against public policy. It is for the resumption of marital relations between husband and wife, separated for cause. In the absence of proof,

Contract—
for resumption
of marital
relations—
validity.

it may not be presumed that the wife's grievance was unsubstantial. It rests on a valuable consideration. The wife condoned the alleged adultery of the husband. That was a detriment to her. She surrendered a right. The husband got rid both of the action and the cause of action for divorce. He might have been successful in his defense, but it was a substantial benefit to him to have the case ended and his wife again under his roof. The performance of marital duty should not be made the subject of bargain and sale, but it does not appear that reconciliation was plaintiff's duty in this case. Rather it was her right to refuse to condone an offense against the marriage relation, and to insist on a divorce, with separate support and maintenance. The husband was not hiring a discontented wife, separated from him without good cause, to return to him. She was to be paid to give up her right to live apart from him. She did not return until she was assured of proper treatment as a wife, and the court will not say to her that she sold her forgiveness, and that "conjugal consortium is without the range of pecuniary consideration." To apply such a rule to cases like this would be to discourage the reunion, which the law should favor, of couples unhappily parted. We are dealing with the contract that was executed by plaintiff, and not with unexecuted possibilities based on subsequent separation of husband and wife. *Adams v. Adams*, 91 N. Y. 381, 43 Am. Rep. 675. The wife, when she returned to her husband, was entitled by law to her support. It cannot be presumed from the allegations of the complaint that such support was the equivalent of the allowance provided for her by the agreement of the parties.

It is urged that plaintiff's remedy is primarily against the husband, and that it would be inequitable to impose full liability on the father, in the absence of allegations that the husband's estate is insolvent. The

agreement, upon its face, imposes at least a joint obligation upon the husband and the husband's father. Whatever the real purpose of the parties, their expressed intent does not remotely suggest that the father was a mere surety for his son. The court has no concern at this time in the adjustment of differences which may never arise between the representatives of the two estates, nor with the raw equities of the case, nor with the burdensomeness of the contract sued upon. The agreement, by its terms, is not affected by the death of either husband or husband's father, and binds the legal representatives of both. The defendant was bound to discharge the obligation which he assumed, and the plaintiff was not

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alone.

bound to join the representatives of the husband's estate as parties defendant. *Potts v. Dounce*, 173 N. Y. 335, 66 N. E. 4.

The complaint alleges that no part of the amount alleged to be due to the plaintiff has been paid, except the sum of \$1,900. The allegation of nonpayment is sufficient. Its fair purport is that nothing has been paid by either of the obligees either during the lifetime of the husband or thereafter.

The judgments appealed from should be reversed, and the demurrer overruled, with costs in all courts, and defendants should have leave to answer within twenty days on payment of costs.

Hiscock, Ch. J., and Chase, Collin, Cardozo, Crane, and Andrews, JJ., concur.

ANNOTATION.

Validity and enforceability of agreement designed to prevent divorce, or avoid or end separation.

I. Introductory, 277.

II. Agreement between spouses:

- a. Dismissal of divorce, annulment, or separation suit, 278.
- b. Forbearance to institute divorce suit, 282.
- c. Termination or avoidance of separation, 283.
- d. Validity as to creditors, 286.
- e. Third person as beneficiary, 287.

III. Agreement between spouse and third person, 287.

I. Introductory.

The test of public policy has generally been applied in determining the validity and enforceability of an agreement entered into for the purpose of preventing a divorce, or avoiding or ending a separation of spouses. Almost all of the decisions recognize the interest of the public in such an agreement, since it affects the stability of the marriage relation. There are, however, divergent views as to the effect of an agreement of this kind on the domestic relation. In most juris-

dictions, an agreement of that character is held not only to be unobjectionable in this respect, but to promote the stability of the relation, as it purports to do. On the other hand, several courts have considered such an agreement as mischievous, because it offers an inducement for domestic discord to persons who are willing to occupy this vantage ground for the purpose of obtaining pecuniary or other concessions. A few courts, moreover, have urged that the effect is to degrade the marriage relation by making it a subject of barter and sale. In one state, the validity of a contract of this nature appears to be determined by a consideration of the terms of the particular contract, with a view to ascertaining whether its enforcement will strengthen or weaken the marriage tie. See *Bowden v. Bowden* (1917) 175 Cal. 711, L.R.A.1918A, 380, 167 Pac. 154, and *Pereira v. Pereira* (1909) 156 Cal. 1, 23 L.R.A. (N.S.) 880, 134 Am. St. Rep. 107, 103 Pac. 488.

*II. Agreement between spouses.**a. Dismissal of divorce, annulment, or separation suit.*

It is well settled that a husband and wife, or a husband and a trustee for the wife in jurisdictions which do not permit a husband and wife to contract directly, may enter into a valid and enforceable contract which provides for the dismissal of a divorce, annulment, or separation suit, pending between the spouses, and the payment of a consideration therefor.

California.—See *Bowden v. Bowden* (1917) 167 Cal. 154, L.R.A.1918A, 380, 167 Pac. 154; *Pereira v. Pereira* (1909) 156 Cal. 1, 23 L.R.A.(N.S.) 880, 134 Am. St. Rep. 107, 103 Pac. 488.

Illinois.—*Phillips v. Meyers* (1876) 82 Ill. 67, 25 Am. Rep. 295.

Kentucky. — *Parsons v. Parsons* (1901) 23 Ky. L. Rep. 223, 62 S. W. 719; *Moayon v. Moayon* (1903) 114 Ky. 855, 60 L.R.A. 415, 102 Am. St. Rep. 303, 72 S. W. 33; *Woodruff v. Woodruff* (1906) 121 Ky. 784, 90 S. W. 266, 91 S. W. 265.

Massachusetts. — *Crosby v. Clem* (1911) 209 Mass. 193, 95 N. E. 297.

Michigan.—*Reithmaier v. Beckwith* (1876) 35 Mich. 110; *Rozell v. Redding* (1886) 59 Mich. 331, 26 N. W. 498.

New Jersey.—*Barbour v. Barbour* (1892) 49 N. J. Eq. 429, 24 Atl. 227, reversed on other grounds in (1893) 51 N. J. Eq. 267, 29 Atl. 148.

New York. — *Adams v. Adams* (1883) 91 N. Y. 381, 43 Am. Rep. 675, affirming (1881) 24 Hun, 401; *Pettit v. Pettit* (1887) 107 N. Y. 677, 14 N. E. 500; *Sommer v. Sommer* (1903) 87 App. Div. 434, 84 N. Y. Supp. 444; *Smith v. Smith* (1885) 35 Hun, 378; *Goldstein v. Goldstein* (1901) 35 Misc. 251, 71 N. Y. Supp. 807; *France v. France* (1902) 38 Misc. 459, 77 N. Y. Supp. 1015, affirmed in (1903) 79 App. Div. 291, 79 N. Y. Supp. 579. Compare *Rogers v. Rogers* (1834) 4 Paige, 516, 27 Am. Dec. 84; *Van Order v. Van Order* (1876) 8 Hun, 315; *Armstrong v. Armstrong* (1886) 1 N. Y. S. R. 529.

Pennsylvania. — *Reamey v. Bayley* (1887) 7 Sadler, 239, 11 Atl. 438.

Rhode Island. — *Darcey v. Darcey*

(1909) 29 R. I. 384, 23 L.R.A.(N.S.) 886, 71 Atl. 595.

England.—*Jodrell v. Jodrell* (1815) 9 Beav. 45, 50 Eng. Reprint, 259, 15 L. J. Ch. N. S. 17, 9 Jur. 1022; *Wilson v. Wilson* (1845) 14 Sim. 405, 60 Eng. Reprint, 415, 14 L. J. Ch. N. S. 204, 9 Jur. 148, affirmed in (1846) 1 H. L. Cas. 538, 9 Eng. Reprint, 870, 12 Jur. 467; *Hart v. Hart* (1881) L. R. 18 Ch. Div. 670, 50 L. J. Ch. N. S. 697, 45 L. T. N. S. 13, 30 W. Rep. 8; *Upton v. Henderson* (1912) 106 L. T. N. S. 839, 56 Sol. Jo. 481, 28 Times L. R. 398.

Thus, in *Moayon v. Moayon* (1903) 114 Ky. 855, 60 L.R.A. 415, 102 Am. St. Rep. 303, 72 S. W. 33, the court upheld the validity of a contract entered into during the pendency of a divorce suit, by a husband and wife and a trustee for the latter, whereby it was agreed that the spouses should be reconciled and live together, and the husband should make a conveyance of one third of his property, real and personal, to a trustee for the benefit of his wife and children. It was contended that there was no valid consideration for the husband's agreement, since the wife agreed only to do what she was already under obligation to do. The court denied the validity of the contention, since the wife had a valid cause for divorce or separation, and was, therefore, not under obligation to live with the husband.

Furthermore, in *Barbour v. Barbour* (N. J.) supra, it was held, that a wife was entitled to specific performance of an oral contract by her husband to convey certain land to her, where she had, as consideration therefor, agreed to discontinue a suit for divorce against him, and resume marital relations, and had fully executed her agreements.

Likewise, in *Darcey v. Darcey* (R. I.) supra, it was decided that a wife was entitled to specific performance of a contract whereby, in consideration of her agreement to discontinue a divorce proceeding against her husband, and live with him as his wife, he agreed to convey one half of certain property to her, and make a further conveyance of the other half in-

terest in the property if he should again consort with the corespondent in the divorce suit.

In *Rozell v. Redding* (1886) 59 Mich. 331, 26 N. W. 498, the court held that an agreement by a wife to discontinue a suit for divorce against her husband, to resume marital relations with him, and to pay him a sum of money was, in equity, a valid consideration for a conveyance of realty by him to her.

And in *Jodrell v. Jodrell* (Eng.) *supra*, the court sustained the validity of a trust deed which was given by a husband to trustees, in consideration of the dismissal of a divorce suit by his wife, and which provided for the payment, out of the income from the estate conveyed, of £4,000 annually, for the use of the wife in maintaining a household establishment.

Likewise, in *Upton v. Henderson* (Eng.) *supra*, the court upheld the validity of a trust deed which was given as part of a larger contract, which provided for the dismissal of a divorce suit brought by a husband against his wife.

In *Adams v. Adams* (1883) 91 N. Y. 381, 43 Am. Rep. 675, affirming (1881) 24 Hun, 401, it appeared that, while a divorce suit was pending between a husband and wife, he executed a note to her father for her benefit, in consideration of her agreement to discontinue the suit. It was held that the note was supported by a valid consideration, and enforceable. "Agreements to separate," said the court, "have been regarded as against public policy, but it would be strangely inconsistent if the same policy should condemn agreements to restore marital relations, after a temporary separation had taken place. While the law favors the settlement of controversies between all other persons, it would be a curious policy which should forbid husband and wife to compromise their differences, or preclude either from forgiving a wrong committed by the other." That decision overruled *Van Order v. Van Order* (1876) 8 Hun (N. Y.) 315, an action brought on a contract entered into by a husband and wife, whereby she agreed to dismiss a

suit for divorce on the ground of adultery, condone the offense, and give to him the custody of their child, and he agreed to pay her \$600 in annual payments of \$50 each. It appeared that, after the making of this contract, he procured a divorce on the ground of her adultery, and refused to make any further payments. The court held that the agreement of the husband to pay the wife money, in consideration of the condonation of adultery, was opposed to public policy and void.

In *Phillips v. Meyers* (1876) 82 Ill. 67, 25 Am. Rep. 295, it appeared that a wife who was living apart from her husband, and had instituted a suit against him for divorce on account of drunkenness and cruel treatment, agreed to dismiss the suit and live with him, in consideration of a note executed by the husband for her benefit, and payable whenever he should become intoxicated, or should mistreat her. The court held that the note was valid and enforceable.

In *France v. France* (1902) 38 Misc. 459, 77 N. Y. Supp. 1015, affirmed in (1903) 79 App. Div. 291, 79 N. Y. Supp. 579, it appeared that a bond was given by a husband to his wife to carry out an agreement to pay her a sum weekly in consideration of her agreement to discontinue a divorce proceeding, to make no defense to an action for divorce brought by the husband in another state, and to release all claim to his property. The bond was held to be enforceable, under a statute authorizing a husband and wife to make any contracts with each other which do not provide for the dissolution of marriage, or the relief of the husband from his obligation to support his wife.

In *Reamey v. Bayley* (1887) 7 Sadler (Pa.) 239, 11 Atl. 438, it appeared that a wife had filed a petition for divorce, and that the husband, the wife, and a trustee for her, entered into an agreement whereby it was provided, among other things, that the divorce suit should be discontinued, that the husband's behavior toward his wife should be kindly and faithful, and that, in case he behaved otherwise, a bond

and mortgage should become due and payable to the trustee for the use of the wife. It was held that on his maltreatment of the wife, the husband's bond could be enforced by the trustee.

In *Reithmaier v. Beckwith* (1876) 35 Mich. 110, the court held to be enforceable an agreement of a husband that a certain sum of money should be paid to his wife out of his estate within thirty days after his death, in consideration of her discontinuing a divorce action which she had instituted against him.

Similarly, in *Smith v. Smith* (1885) 35 Hun (N. Y.) 378, the court upheld the validity of a contract by a husband to pay the costs of a divorce suit and the fee of his wife's attorney, in consideration of her resuming marital relations with him.

In *Crosby v. Clem* (1911) 209 Mass. 193, 95 N. E. 297, it appeared that, during the pendency of a divorce suit brought by a wife, the parties entered into a contract to the effect that the wife should dismiss the action, and that the husband should give her \$500, execute a note to a trustee for her benefit in repayment of a sum of money which she had advanced as the purchase price of a stock of goods bought by the husband, and secure the note by a mortgage on the stock. The note and mortgage were duly executed, assigned by the trustee to the wife, and by her to a third person without consideration. In an action to enjoin the foreclosure of the mortgage, no decision was rendered as to the validity of the wife's agreement to dismiss her divorce suit as a consideration, since the court held that the contract was severable and that the previous payment by the wife on the stock of goods bought by the husband furnished a legal consideration to support the note and mortgage.

A contract for the dismissal of a divorce action pending between a husband and wife is valid and enforceable, though it provides for their separation. *Parsons v. Parsons* (1901) 23 Ky. L. Rep. 223, 62 S. W. 719; *Woodruff v. Woodruff* (1906) 121 Ky. 784, 90 S. W. 266, 91 S. W. 265; *Pettit v.*

Pettit (1887) 107 N. Y. 677, 14 N. E. 500, overruling *Rogers v. Rogers* (1834) 4 Paige (N. Y.) 516, 27 Am. Dec. 84, and *Armstrong v. Armstrong* (1886) 1 N. Y. S. R. 529; *Hart v. Hart* (1881) L. R. 18 Ch. Div. (Eng.) 670, 50 L. J. Ch. N. S. 697, 45 L. T. N. S. 13, 30 Week. Rep. 8. See also *Bowden v. Bowden* (1917) 167 Cal. 154, L.R.A. 1918A, 380, 167 Pac. 154. Compare *Pereira v. Pereira* (1909) 156 Cal. 1, 23 L.R.A.(N.S.) 880, 134 Am. St. Rep. 107, 103 Pac. 488.

In *Woodruff v. Woodruff* (1906) 121 Ky. 784, 90 S. W. 266, it appeared that, while a divorce suit was pending between the parties, a husband and wife made a contract in settlement of the suit, wherein it was stipulated that, in case the wife thereafter should separate from her husband for any good and satisfactory cause, he should pay to her a certain sum monthly for the support of herself and the minor children, and that she should relinquish her contingent right of dower in his estate. On a subsequent estrangement and separation of the parties, the wife brought an action to enforce the contract. It was urged that the contract was unenforceable, on the ground that it tended to produce a separation of the parties, and was, therefore, contrary to public policy. The court, however, upheld the contract, saying: "Such a contract, does not tend to breed dissension between husband and wife, or to produce a separation between them. At the time the contract was made, the husband desired the wife to discontinue her pending action and return to his home. She was unwilling to waive the rights she had then acquired, without some security. To induce her to waive them, he made the contract. It was based on an adequate consideration."

Likewise, in *Hart v. Hart* (1881) L. R. 18 Ch. Div. (Eng.) 670, it was held that a husband and wife, during the pendency of a divorce suit between them, could enter into a valid contract for its discontinuance, though the contract provided that they should live apart. The court said: "It is perfectly well settled that husband and wife, being at arm's length in a divorce

suit, are perfectly competent to enter into a binding agreement, and whatever may be said about other considerations, I for my part regard the main consideration of such an agreement to be the compromise of a litigation, the putting an end to an action which, whenever it arises, is a scandalous and shocking thing, which husband and wife, whatever their grievances may be, may each of them think is a very proper thing to put an end to, by making considerable sacrifices on one side and on the other. I cannot conceive any point of law and common sense of higher consideration than that."

A contract between a husband and wife has been held valid which provided for the dismissal of a divorce action by the wife against the husband, for their living apart, for the relinquishment of all rights in one another's estate, and for the division of certain property between them. *Parsons v. Parsons* (1901) 23 Ky. L. Rep. 223, 62 S. W. 719.

In *Bowden v. Bowden* (1917) 167 Cal. 154, L.R.A.1918A, 380, 167 Pac. 154, an action was brought for the recovery of money on a contract which provided that, in consideration of the dismissal by a wife of a divorce action which was then pending, the husband should pay a certain sum to her if he should, at any time in the future, cruelly treat, abandon, desert, or cease to live with her. The only defense to the suit insisted on by the husband was that the contract was opposed to the policy of the law. The court, however, upheld the validity of the contract, distinguishing *Pereira v. Pereira* (Cal.) supra, on the ground that, in that case, the contract passed on by the court, although it purported to be made in consideration of the dismissal of a divorce proceeding, had the effect of encouraging the dissolution of the marriage tie. In the earlier case, the lower court, in determining the property rights of the parties to a divorce proceeding, refused to enforce a contract entered into by them when a previous divorce suit was pending. By the terms of this contract, the wife agreed to waive her cause for divorce,

and the husband agreed that if he should give the wife a new cause of action for divorce, and she should establish the same in a subsequent divorce or maintenance suit, he should pay her \$10,000 in full satisfaction of all her claims in such action. The refusal of the trial court to enforce this contract was sustained by the supreme court, on the ground that the amount agreed on in case a divorce should be given was not commensurate with the wealth of the husband, and that, therefore, if he should be tempted to commit anew the offenses against his wife, the contract would serve only to encourage him to inflict the injury.

On demurrer, an agreement between a husband and wife has been held to be unenforceable, whereby they agreed to the discontinuance of a divorce suit brought by the wife against her husband on the ground of adultery, to a release by the wife of her inchoate dower in all of her husband's real estate, to the payment by the husband of the costs of the divorce suit, and additional payments to the wife of \$2,100 annually. See *Armstrong v. Armstrong* (1886) 1 N. Y. S. R. 529, wherein *Adams v. Adams* (1883) 91 N. Y. 381, 43 Am. Rep. 675, was distinguished, on the ground that the contract passed on in that case had the effect of bringing the parties together, and that the effect of the contract in the case before the courts was to separate them. However, *Armstrong v. Armstrong* (N. Y.) supra, was overruled by *Pettit v. Pettit* (1887) 107 N. Y. 677, 14 N. E. 500, which upheld the validity of a contract providing for the dismissal of an action brought by a wife for divorce, on the ground of cruel and inhuman treatment, for a division of the husband's property between husband and wife, and for their living apart. In answer to the objection that the contract provided for the separation of husband and wife, the court said: "It is claimed to be against public policy, because by its terms the wife agrees to live separate and apart from her husband. In the pending action for divorce, the plaintiff would have been entitled, if successful, to a decree of separation and

a suitable allowance from the estate of her husband, for her support and maintenance. It is difficult to see how it could be in accord with public policy to award such relief, and yet against public policy for the husband to concede it in advance of the decree, and as a compromise of the existing litigation."

A contract is not objectionable because it provides for the dismissal of an action to annul a marriage. See *Wilson v. Wilson* (1845) 14 Sim. 405, 60 Eng. Reprint 415, affirmed in (1846) 1 H. L. Cas. 538, 9 Eng. Reprint, 870, 12 Jur. 467, wherein it was held that a wife was entitled to specific performance of a contract by her husband that he would allow her to live separate from him, and that he would convey to trustees certain real and personal property for her use for life, in consideration of her suspending an action to annul their marriage on the ground of impotency. As to the validity of the consideration, the court said: "The effect of these articles is to put an end to the suit, which suit would have the effect, *prima facie*, of dissolving the contract made in *facie ecclesiae*. The putting of an end to the suit is in affirmation of what the parties have solemnly and advisedly done; it takes away all discussion about their status, and it leaves the status of the parties just in the very position in which the law would determine it to be, but for the disputes between the parties themselves; and it appears to me, therefore, that the articles of separation, so far as they tend to put an end to the suit, must be taken to be according to public policy, because they affirm the status."

Similarly, a contract is not rendered void or unenforceable by the fact that it provides for the dismissal of an action for judicial separation. *Sommer v. Sommer* (1903) 87 App. Div. 434, 84 N. Y. Supp. 444; *Goldstein v. Goldstein* (1901) 35 Misc. 251, 71 N. Y. Supp. 807. In the former case, the court decided that an agreement by a wife to dismiss an action for separation was a valid consideration for a contract by the husband that the wife should become vested with her dower

interest in certain property, and be entitled to collect one third of the rent of the property, whenever the husband should cease to live with or support her. In *Goldstein v. Goldstein* (N. Y.) *supra*, an action in equity to enforce an agreement of a husband to execute a will in favor of his wife, it was held that her agreement to abandon proceedings to procure a separation from him constituted a valid consideration for his agreement with respect to the will, that the will, when made, was an executed contract, and that a subsequent will constituted a fraud on her which entitled her to relief in a court of equity. The court decided that it was immaterial whether the wife actually had a valid cause for separation, since it was evident that the husband desired to effect a compromise.

b. Forbearance to institute divorce suit.

A contract of a husband or wife to pay a consideration for the forbearance of the other spouse to institute an action for divorce has been held to be enforceable. *Polson v. Stewart* (1897) 167 Mass. 211, 36 L.R.A. 771, 57 Am. St. Rep. 452, 45 N. E. 737. See also *Newsome v. Newsome* (1871) L. R. 2 Prob. & Div. (Eng.) 306, 40 L. J. Prob. N. S. 71, 25 L. T. N. S. 204, 19 Week. Rep. 1039. Compare *Fisher v. Koontz* (1899) 110 Iowa, 498, 80 N. W. 551, 81 N. W. 702; *Merrill v. Peaslee* (1888) 146 Mass. 460, 4 Am. St. Rep. 334, 16 N. E. 271.

In the case last cited, it appeared that a husband executed a note to a trustee for the benefit of his wife, in consideration of his wife's agreement to return to him, and not institute proceedings for divorce and alimony. The court held that the note was without a valid consideration, and unenforceable, on the ground that it was contrary to public policy to uphold an agreement to resume marital relations for a pecuniary consideration, after a justifiable separation. *Holmes, J.*, in a dissenting opinion, contended that it was not unlawful to make a lawful act, which the wife could perform or not, as she chose, a consideration for a contract, merely because the effect was

to mingle a worldly consideration with other motives which the wife may have had for renewing cohabitation. The actual decision in this case is not very clear. The consideration of the note, as stated in the dissenting opinion, was that the wife would not proceed against her husband for a divorce or alimony, and would return and live with him as his wife; but Allen, J., in stating the opinion of the court, made the following reservation: "Had the consideration of the note been an agreement not to prosecute proceedings for a divorce, a different question would have been presented, upon which we express no opinion." The decision has been explained in a later Massachusetts case as not impugning the validity of a forbearance to bring a well-founded suit for divorce, as a consideration for a contract. See *Polson v. Stewart* (Mass.) *supra*, wherein a bill was brought for specific performance of a covenant executed by a husband to convey certain lands to his wife, in consideration of her forbearance to bring an action against him for divorce, and a demurrer to the bill was overruled. Although the case was decided in conformity with the law of North Carolina, the domicile of the parties to the covenant, it was intimated that this consideration for a contract was valid under the Massachusetts law, as well as under that of North Carolina.

In *Newsome v. Newsome* (1871) L. R. 2 Prob. & Div. (Eng.) 306, 40 L. J. Prob. N. S. 71, 25 L. T. N. S. 204, 19 Week. Rep. 1039, the court recognized the validity of a contract of a husband and wife, providing that she should forbear to prosecute a well-founded cause of action for divorce on certain conditions, but held that the contract did not bar an action brought against the husband for divorce, since he had broken a condition to the effect that the agreement should be binding only so long as he remained faithful to her.

On the other hand, it has been doubted whether an agreement is binding which is in consideration of a promise by a wife, who is living with her husband, to waive her right to maintain an action for divorce and to

continue to live with him. See *Fisher v. Koontz* (1899) 110 Iowa, 498, 81 N. W. 702. It appeared, in that case, that an antenuptial contract had been made whereby the wife was to acquire no interest in her husband's property. After his death, the widow brought an action to have her distributive share of his property set apart for her, on the ground that the antenuptial contract was annulled by a later oral agreement. The court, admitting the validity of an oral agreement relating to realty, where the consideration has passed, held that the agreement of the wife to forego her right to maintain a divorce suit, and to continue to live with her husband, could not be presumed to have been made as a consideration for pecuniary or property rights. The following reason was given: "Their adjustment of differences must be conclusively presumed to have sprung from mutual affection, the interests of home and children, and their well-being in society, and not to have been induced by greed of worldly gain. . . . The sacredness of the relation demands that conjugal consortium be kept without the domain of bargain or sale."

c. Termination or avoidance of separation.

A contract between husband and wife, made when the spouses are separated for legal cause, and providing for the payment of a consideration for their reunion, is, by the weight of authority, enforceable by either spouse.

Connecticut. — *Kennedy v. Howell* (1850) 20 Conn. 349.

Iowa. — Compare *Miller v. Miller* (1889) 78 Iowa, 177, 16 Am. St. Rep. 431, 35 N. W. 464, 42 N. W. 641.

Kentucky. — *Hite v. Hite* (1910) 136 Ky. 529, 124 S. W. 815.

Massachusetts. — *Terkelsen v. Peterson* (1914) 216 Mass. 531, 104 N. E. 351.

Michigan. — *Duffy v. White* (1897) 115 Mich. 264, 73 N. W. 363.

Oklahoma. — *Howell v. Howell* (1914) 42 Okla. 286, 141 Pac. 412.

Pennsylvania. — *Fisher v. Filbert* (1847) 6 Pa. 61.

Tennessee. — Compare *Copeland v.*

Boaz (1877) 9 Baxt. 223, 40 Am. Rep. 89.

Texas.—Compare *Roberts v. Frisby* (1873) 38 Tex. 219; and *McKay v. McKay* (1916) — Tex. Civ. App. —, 189 S. W. 520.

West Virginia.—Compare *Bolyard v. Bolyard* (1917) 79 W. Va. 554, L.R.A. 1917D, 440, 91 S. E. 529.

England. — *Harrison v. Harrison* [1910] 1 K. B. 35, 79 L. J. K. B. N. S. 133, 101 L. T. N. S. 638, 26 Times L. R. 29; *Vandergucht v. De Blaquiére* (1839) 5 Myl. & C. 229, 41 Eng. Reprint, 358, 3 Jur. 1116.

Thus, in *Howell v. Howell* (Okla.) *supra*, a decree was entered in a divorce suit, upholding a prior settlement of property rights under an agreement which provided that the wife should return to her husband, and that he should settle on her a substantial part of his property. In the contract, the wife expressed an intention to live with her husband as long as he abstained from using alcoholic beverages. To its validity the objection was made that it tended to produce a separation of the spouses. The court, however, held to the contrary, saying: "As we view it, the contract was in contemplation of, and for the very purpose of, effecting a reunion, rather than of providing or looking forward to another separation; in fact, it had this result, and for three years thereafter they lived together. Having this view of the contract, it is not open to the objection urged."

Similarly, in *Vandergucht v. De Blaquiére* (Eng.) *supra*, the court sustained the validity of a contract which provided that spouses, who were living apart, should reunite, but that if the wife should again accuse her husband of infidelity, there should be a separation, and a conveyance by him to her of certain property.

In *Duffy v. White* (Mich.) *supra*, it appeared that, while a husband and wife were living apart because of the infidelity of the latter, the husband agreed to resume marital relations, in consideration of her executing a deed to certain property to a third person, who, it was understood, would convey

the property to the husband. The latter was to hold the property in trust, for the purposes stated in a trust agreement which was executed at the same time as the deed. In an action to set aside the deed, it was held that the agreement of the husband to return to his wife, after legal cause for separation, constituted a valid consideration for the conveyance.

In *Harrison v. Harrison* (Eng.) *supra*, it appeared that, while a wife was living apart from her husband under an order of court granting her that right, she agreed to return to and live with him if he would execute a deed providing, in effect, that he would pay her £150 in case he should again be convicted of an assault, or be adjudged by the justices to have threatened her, and that on payment of such sum she would not demand or take any weekly sum which might thereafter be awarded her by the justices. Thereafter, he was again adjudged by the justices to have assaulted his wife, and required to pay her a certain sum weekly under a separation order. In an action to recover on his covenant to pay her £150, it was held that this covenant was valid and enforceable. In answer to the objection that the covenant provided for the separation of the parties, and was therefore against public policy, the court said: "Here the parties were living apart at the time the agreement was made, and its object was mainly to enable them to live together again, though it also provided for the maintenance of the wife in the event of their subsequently being again separated by an order of justices. If such a separation is not against the policy of the law, I cannot see how the agreement can be so, merely because it is made in contemplation of such a separation."

Likewise, in *Hite v. Hite* (Ky.) *supra*, a contract was upheld which was entered into by a husband and wife while living apart on account of the husband's misconduct, and which provided for their living together, and for the payment of certain sums of money by the husband to his wife, to be materially increased in case it should be

necessary and proper for the wife again to separate from her husband.

Similarly, in *Fisher v. Filbert* (1847) 6 Pa. 61, the court held to be enforceable a bond which was given by a husband in favor of his wife, in consideration of her returning to him and dismissing an action against him for assault.

But in *Bolyard v. Bolyard* (1917) 79 W. Va. 554, L.R.A.1917D, 440, 91 S. E. 529, it was held that a bond of a husband to return to his wife and support her and his children was not enforceable, on account of a rule that a husband and wife, in West Virginia, cannot enter into a binding contract.

In *Terkelsen v. Peterson* (1914) 216 Mass. 581, 104 N. E. 351, it appeared that while a wife was living apart from her husband an agreement was made by them, providing, among other things, that they should resume their marital relations during the good behavior of each spouse, and that the husband should provide for the comfortable maintenance and support of his wife, in case of another separation due to his wrong. An action was brought by the wife on this contract, after a subsequent separation due to the husband's intoxication and cruelty. The court held that the contract was enforceable, on the ground that its purpose was primarily to unite the family, and that it was not illegal to stipulate for the support of the wife in case of another separation for valid cause. It was pointed out that the grounds of the separation which occurred were a valid cause for divorce, and that, even though the contract may have contemplated other grounds for separation, those which were valid should not be held inseparable from the others.

In *Kennedy v. Howell* (1850) 20 Conn. 349, it was held that a note under seal was not unenforceable because given by the maker to his wife, in consideration of her agreement to return and live with him, although it was admitted that the wife's agreement did not impose any new obligation on her, and would have been void, even if it had done so, under the rule as to a contract of a feme covert.

In one frequently cited case, however, it was held that a note executed by a husband to a trustee for the benefit of his wife, to induce her to return to him, was void, since such an undertaking was considered against public policy and promotive of separation of husband and wife. *Copeland v. Boaz* (1877) 6 Baxt. (Tenn.) 223, 40 Am. Rep. 89.

An agreement to pay a consideration to end a separation has, however, been held to be invalid, where the spouses, at the time of the contract, were separated without legal cause. Thus, in *McKay v. McKay* (1916) — Tex. Civ. App. —, 189 S. W. 520, wherein it appeared that a contract was made, ratifying a conveyance of land by a husband to his wife, and that a part of the consideration therefor was an agreement of the wife again to live with her husband, from whom she had been separated without legal cause, the court held that the contract was void, since a part of the consideration was an agreement of the wife to do merely what she was already under a legal obligation to do. See to the same effect, *Roberts v. Frisby* (1873) 38 Tex. 219, wherein the court said: "I do not know how far a husband would be morally bound by a post-nuptial contract in which he hires his wife to live with him; but the legal obligation cannot be recognized in this court."

It appears that one spouse cannot enforce against the other a contract to prevent separation, made at a time when the husband and wife are living together. *Miller v. Miller* (1889) 78 Iowa, 177, 16 Am. St. Rep. 431, 35 N. W. 464, 42 N. W. 641. In that case it appeared that an agreement was entered into by a husband and wife while living together, whereby each party agreed to refrain from scolding, fault-finding, and anger, the wife to keep the home in a comfortable condition, and the husband to pay to the wife, so long as she observed her agreements, a certain sum monthly. An action for breach of the contract was brought by the wife, who alleged in her petition facts, existing at the time of the making of the agreement, which

at least entitled her to live separately from her husband. The husband demurred. The court held that the contract was not enforceable, since the wife did not allege that she had observed her agreements, and that, even if she had made such allegation, the issue raised by a denial thereof would have required judicial inquiry of matters such as instances of anger, fault-finding, or scolding on the part of the wife, which could not be contested in court without a violation of the privacy of the home, and a consequent subversion of domestic happiness and welfare.

d. Validity as to creditors.

With respect to the validity, as against creditors, of a transfer of property under a reconciliation contract between husband and wife, there appears to be a difference of judicial opinion. Two cases have upheld, as against the rights of creditors, the validity of a contract between a husband and wife, which provided for a conveyance of property from one spouse to the other, in consideration of a dismissal of a divorce suit, or of an agreement for resuming cohabitation after a separation. Thus, in *Hobbs v. Hull* (1788) 1 Cox, Ch. Cas. 445, 29 Eng. Reprint, 1242, it was held that, as against creditors of the husband, a settlement on the wife was valid, which provided that she should live separate from him, and which was made in consideration of her forbearance to bring an action against him for divorce.

Similarly, in *Casto v. Fry* (1890) 33 W. Va. 449, 10 S. E. 799, it was held that, in an action to set aside a conveyance of real estate by a husband to his wife and have it applied in satisfaction of the husband's liability on an official bond, an agreement by the wife to abandon a prospective suit for divorce against him and pay certain of his debts constituted a valid consideration for the conveyance, and that the conveyance was valid as against creditors who were unknown to the wife at the time the deed was delivered to her.

On the other hand, there is author-

ity for holding to be void, as against creditors, a contract of conveyance by one spouse to the other, in consideration of an agreement to dismiss a divorce action. *Oppenheimer v. Collins* (1902) 115 Wis. 283, 60 L.R.A. 406, 91 N. W. 690. See also *Morgan v. Potter* (1879) 17 Hun (N. Y.) 403; and *Friedman v. Bierman* (1887) 43 Hun (N. Y.) 387. In *Oppenheimer v. Collins* (Wis.) supra, it appeared that at a time when there were certain judgments outstanding and unsatisfied against a husband, he made an assignment to his wife of all of his interest in his father's estate, in consideration of the dismissal of an action of divorce which she had instituted against him. After a renewal of cohabitation for a few months, a new action for divorce was commenced by her, and a decree was entered without provision for alimony, as she relied on her rights under the previous assignment. In an action to have the interest in his father's estate applied in satisfaction of the judgments against the husband, it was held that the assignment of this interest to the wife was void. The decision was based on the grounds that it was contrary to public policy, and illegal, for a husband and wife to bargain as to the continuance or severance of the marriage relation, and that the rights of creditors in the property of a husband could not be protected if such bargaining was recognized as a valid consideration for a transfer of property rights.

In *Morgan v. Potter* (N. Y.) supra, the court held to be void, as against creditors, a conveyance of property by a husband to his wife, in pursuance of a contract which provided that she should dismiss a suit which she had begun against him for a limited divorce, and that the parties should live apart. The decision was based mainly on the ground that the contract provided that the parties should live apart, and was, therefore, opposed to public policy. The court, however, stated that even if the consideration was valid, the equities in the case, as against creditors, would be no stronger than if the husband had made the conveyance for the support of his wife

and child while the parties were living amicably together. See to the same effect, *Friedman v. Bierman* (N. Y.) *supra*. The authority of the foregoing New York cases, however, is impaired by the fact that they were decided before it was settled in that state, by *Pettit v. Pettit* (1887) 107 N. Y. 677, 14 N. E. 500, that a contract to dismiss a divorce suit is valid as between the parties thereto, though it provides for the separation of the parties.

e. Third person as beneficiary.

It has been held that a contract between a husband and his wife for the purpose of reuniting them after a separation is enforceable by a third person, to whom, by the contract, the consideration is to be paid. *Burkholder's Appeal* (1884) 105 Pa. 31. In that case it was held that an agreement by a wife to forego a valid ground for separation from her husband constituted an adequate consideration to support a contract of the husband, in favor of a son of the wife by a former marriage. It appeared that the contract was under seal, but the effect of the seal was held not to exclude evidence of lack of consideration appearing in the instrument itself.

However, it was held in *Sterling v. Sterling* (1852) 12 Ga. 201, that a son, against the objection of his mother, was not entitled to the specific performance of a contract of his father and mother, whereby the mother agreed to dismiss a divorce proceeding against her husband, and the father agreed to convey by deed of trust certain land, for the benefit of his wife for life, and on her death to vest absolutely in their children or personal representatives. The decision was not based on the invalidity of the contract, but on the grounds that the son acquired no vested right on which he was entitled to recover, and that the contract was revocable by the parties thereto.

III. Agreement between spouse and third person.

It has been held that a contract of a third person, other than a paramour

of one of the spouses, to pay a consideration to a spouse for the abandonment of a divorce suit or an agreement to live together after a separation, is valid. *Mack v. Mack* (1910) 87 Neb. 819, 31 L.R.A.(N.S.) 441, 128 N. W. 527; *Bolyard v. Bolyard* (1917) 79 W. Va. 554, L.R.A.1917D, 440, 91 S. E. 529. See also *Kiepert v. Nugent* (1913) 153 Wis. 127, 140 N. W. 1123; *Gipps v. Hume* (1861) 7 Jur. N. S. 1301, 2 Johns. & H. 517, 70 Eng. Reprint, 1163, 31 L. J. Ch. N. S. 37, 5 L. T. N. S. 307, 10 Week. Rep. 38. And see the reported case (*RODGERS v. RODGERS*, ante, 274).

Thus, in *Mack v. Mack* (Neb.) *supra*, it was held that a wife could recover on a contract by a son of her husband, to the effect that the son would support her for life if she would return to her husband and care for him while he lived. It appeared that at the time of the contract the wife had a legal cause for separation from her husband. As to the validity of the consideration for the son's contract, the court said: "The argument that there was no consideration must fail, if, as a matter of fact, the wife was living separate from her husband for reasons sufficient to entitle her to a divorce. In that event, by returning to him, she waived her right to a divorce, and rendered him services she was not obliged under these circumstances to perform. Neither can we assent to the proposition that because the stepson made the promise there was no consideration therefor. The consideration for a promise need not move to the promisor in order to constitute a valid contract, but a detriment suffered by the promisee in reliance upon the promise is sufficient."

In the reported case (*RODGERS v. RODGERS*), an action was brought by a widow against the father of her former husband on a contract entered into by the father and the husband to pay the wife certain sums monthly so long as she lived, in consideration of her resuming marital relations with her husband. Although it also appears that the contract was made to prevent the prosecution of a divorce action on the ground of the husband's

adultery, it is held that the contract was valid, and that the wife was entitled to a recovery for its breach by the father after her husband's death.

In *Bolyard v. Bolyard* (1917) 79 W. Va. 554, L.R.A.1917D, 440, 91 S. E. 529, an action was brought by a wife living apart from her husband, against him, and his father as surety, on an obligation which bound the husband to resume housekeeping with his wife, to support her and his children, and not to desert or abandon them. The court held that the bond was valid and enforceable against the father, though not against the husband, on account of a rule of law in West Virginia which forbids contracts between a husband and wife. The court said: "Though inaptly and somewhat inaccurately expressed, in some instances, the purpose of the bond was to bind the husband to performance of his marital duty. This purpose cannot be regarded as being, in any sense, inconsistent with public policy. On the contrary, public policy and social order require the performance of the things he bound himself to do. They were just such things as the law itself required of him, but it did not afford remedies adequate to enforcement of full performance thereof. It was the purpose of the bond measurably to supply this defect in the law."

The rule, however, appears to be

otherwise when the contracting party is a paramour of one of the spouses. In such a case it has been held that public policy forbids the enforcement of a contract for the dismissal of a divorce suit. • *Gipps v. Hume* (1861) 7 Jur. N. S. 1301, 2 Johns. & H. 517, 70 Eng. Reprint, 1163, 31 L. J. Ch. N. S. 37, 5 L. T. N. S. 307, 10 Week. Rep. 38. In that case an action was brought against the obligor of a bond, who had been made a corespondent in a divorce suit and had executed the bond for the payment of a sum of money to the plaintiff in the divorce action in consideration of his dismissing it. The court held that the bond was void, since the agreement was contrary to public policy and the divorce and matrimonial acts, in that it took the damages which might have been recovered from the corespondent out of the control of the court, so that they could not, in the discretion of the court, be applied for the support of the wife or for the benefit of the children of the husband and wife.

In *Kiepert v. Nugent* (1913) 153 Wis. 127, 140 N. W. 1123, the court upheld a contract by a husband made in favor of a third person, in consideration of his effecting a reconciliation between the promisor and his wife, who, at the time of the contract, was separated from him. W. S. R.

VINCENT KERENS, Appt.,

v.

ST. LOUIS UNION TRUST COMPANY, Exr., etc., of Richard C. Kerens,
Deceased, et al., Respts:

Missouri Supreme Court (In Banc)—June 19, 1920.

(— Mo. —, 223 S. W. 645.)

Trust — power of trust company to determine sobriety.

1. A trust company with express power to act as trustee under wills has implied power to determine when a beneficiary has complied with the terms of a trust requiring him to abstain from intoxicating liquors for five years to receive the property, notwithstanding different committees might differ as to whether or not the condition had been complied with.

[See note on this question beginning on page 300.]

Will — construction — meaning of words.

2. Generally a testator's meaning is to be determined from the will alone.

— **evidence to construe ambiguous words.**

3. If the language of a will is susceptible of two constructions, evidence of testator's feeling toward a legatee may be admitted to enable the court to put itself, so far as may be, in the testator's place.

— **spendthrift trust — right of legatee.**

4. The annuity is all to which a legatee is entitled until compliance with the condition under a will placing property in the hands of a trustee to pay a monthly annuity to testator's son for life, but providing that if the son refrains from intoxicants for a period of five years the corpus of the fund shall be paid to him.

Condition — definition.

5. A condition precedent is one which must be fulfilled before the estate or interest can vest.

[See 10 R. C. L. 664.]

Will — enforcement of condition precedent.

6. A condition precedent in a will will be enforced if it was plainly the intention of the testator to create an estate of that character.

— **trust company as executor — public policy.**

7. Permitting a trust company to act as executor and trustee under a will is not against public policy.

[See 11 R. C. L. 50.]

Statute — construction — purpose.

8. A statute should always be construed so as to effectuate the purpose of its enactment.

[See 25 R. C. L. 960, 999.]

(Graves, J., dissents in part.)

APPEAL by plaintiff from a judgment of the Circuit Court of the City of St. Louis (Jones, J.) in favor of defendants in a suit brought to construe the will of Richard C. Kerens, deceased, and the statute conferring power upon trust companies to execute testamentary trusts. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Boyle & Priest, Frank Y. Gladney, and Stanchfield & Levy, for appellant:

The court will resolve every doubt against the construction of the will contended for by the Trust Company and the remaindermen, for the Trust Company has completely identified its interest with the conflicting and partisan interest of the remaindermen, and is seeking a construction that will favor the remaindermen's interest, identified with its own.

Smith v. Jordan, 77 Conn. 469, 59 Atl. 507; Gordon v. Green, 118 Mass. 260; Bryant v. McIntosh, 3 Cal. App. 95, 84 Pac. 440; Marcom v. Wyatt, 117 N. C. 129, 23 S. E. 169; Arrington v. Arrington, 116 N. C. 170, 21 S. E. 181; Murray v. Lizotte, 31 R. I. 527, 77 Atl. 231.

Where indefiniteness and uncertainties appear on the very face of the will, the rule is absolute, that oral evidence cannot be availed of to remove or explain it away.

Goode v. Goode, 22 Mo. 524, 66 Am. Dec. 630; Davis v. Davis, 8 Mo. 56; Gregory v. Cowgill, 19 Mo. 415; Bradley v. Bradley, 24 Mo. 315; Nichols v. 11 A.L.R.—19.

Boswell, 103 Mo. 157, 15 S. W. 343; Mersman v. Mersman, 136 Mo. 256, 37 S. W. 909; Meiners v. Meiners, 179 Mo. 625, 78 S. W. 795; Robards v. Brown, 167 Mo. 457, 67 S. W. 245; King v. Ackerman, 2 Black, 418, 17 L. ed. 298; Chater v. Carter, 238 U. S. 584, 59 L. ed. 1470, 35 Sup. Ct. Rep. 859.

The interposition of a trust and a trustee does not change the rule of, or postpone, the vesting of the interest.

Cornwell v. Orton, 126 Mo. 365, 27 S. W. 536; Patrick v. Blair, 119 Mo. 113, 24 S. W. 767; Simmons v. Cabanne, 177 Mo. 352, 76 S. W. 618; Deacon v. St. Louis Union Trust Co. 271 Mo. 669, 197 S. W. 261; Walter v. Dickman, 274 Mo. 185, 202 S. W. 538; Croxall v. Shererd, 5 Wall. 281, 18 L. ed. 577; 1 Perry, Trusts, 6th ed. § 357.

The words, "give, devise, and bequeath," are clear, positive in meaning, and free from inference or doubt.

Gannon v. Albright, 183 Mo. 248, 67 L.R.A. 97, 105 Am. St. Rep. 471, 81 S. W. 1162.

The devise is to be construed just as if, after the name of the beneficiary,

there followed the words "and his heirs and assigns."

Roth v. Rauschenbusch, 173 Mo. 588, 61 L.R.A. 455, 73 S. W. 664.

The law favors the heir, and he cannot be disinherited upon conjecture.

Wright v. Denn, 10 Wheat. 228, 6 L. ed. 309; *McCaffrey v. Manogue*, 196 U. S. 569, 49 L. ed. 602, 25 Sup. Ct. Rep. 319.

Where an estate is given in one part of an instrument in clear and decisive terms, such estate cannot be taken away or cut down by raising a doubt upon the extent, or meaning, or application of a subsequent clause, or by inference therefrom, nor by any subsequent words that are not as clear and decisive as the words of the clause giving the estate.

Nichols v. Boswell, 103 Mo. 158, 15 S. W. 343; *Sevier v. Woodson*, 205 Mo. 214, 120 Am. St. Rep. 728, 104 S. W. 1; *Jackson v. Littell*, 213 Mo. 599, 127 Am. St. Rep. 620, 112 S. W. 53; *Settle v. Shafer*, 229 Mo. 569, 129 S. W. 897; *Middleton v. Dudding*, — Mo. —, 183 S. W. 444; *McArthur v. Scott*, 113 U. S. 381, 28 L. ed. 1027, 5 Sup. Ct. Rep. 652.

That the subsequent inferential or doubtful part takes the form of a trust makes no difference in the application of the rule.

Cornet v. Cornet, 248 Mo. 221, 154 S. W. 121; *Howard v. Howard*, — Mo. —, 184 S. W. 993.

Subsequent parts of the will in question serve to confirm the vesting effect of the words "give, devise, and bequeath."

O'Hare v. Johnston, 273 Ill. 458, 113 N. E. 127; *Jones v. Jones*, 223 Mo. 442, 25 L.R.A. (N.S.) 424, 123 S. W. 29; *Taylor v. Mason*, 9 Wheat. 325, 351, 6 L. ed. 101, 108; *King v. Ackerman*, 2 Black, 415, 17 L. ed. 298; *Collier, Will*, 40 Mo. 320; *Simmons v. Cabanne*, 177 Mo. 347, 76 S. W. 618.

Wherever it is possible, a will will be so construed as not to create a condition, particularly a condition precedent.

Deacon v. St. Louis Union Trust Co. 271 Mo. 669, 197 S. W. 261; *Brian v. Tylor*, 129 Md. 150, 98 Atl. 532.

The condition here is subsequent.

Burnham v. Burnham, 79 Wis. 557, 43 N. W. 661; *Alexander v. Alexander*, 156 Mo. 413, 57 S. W. 110; *Simmons v. Cabanne*, 177 Mo. 336, 76 S. W. 618; *Jones v. Jones*, 223 Mo. 445, 25 L.R.A. (N.S.) 424, 123 S. W. 29; *Finlay v.*

King, 3 Pet. 346, 7 L. ed. 701; *Taylor v. Mason*, 9 Wheat. 325, 350, 6 L. ed. 101, 108.

The conduct clause, if construed as an attempt to set up and fix a definite standard of conduct, is void and incapable of enforcement because it is so indefinite and uncertain that the court cannot know from the words of the will what was the true intent of the testator.

Methodist Episcopal Church, South v. May, 201 Mo. 370, 99 S. W. 1093; *Reed v. Reed*, 39 Mo. App. 477; *Schmucker v. Reel*, 61 Mo. 600; *Hadley v. Forsee*, 203 Mo. 428, 14 L.R.A. (N.S.) 49, 101 S. W. 59; *Jones v. Jones*, 223 Mo. 449, 25 L.R.A. (N.S.) 424, 123 S. W. 29.

The power of the Trust Company to determine "sobriety and good behavior" and "free will and desire" must be found in the statute.

State ex rel. Crow v. Lincoln Trust Co. 144 Mo. 562, 46 S. W. 593.

The meaning of the statute, whatever it may be determined to be, was fixed by the legislature when the enactment was made.

Harwood v. Tracy, 118 Mo. 631, 24 S. W. 214; *General Assembly v. McElhinney*, 61 Mo. 543.

In construing the statute the court will heed the general object and purpose of the legislature, all the provisions of the statute to get at the true meaning of any portion, and general words shall be accommodated to the intent, whether general or specific.

Ross v. Kansas City, St. J. & C. B. R. Co. 111 Mo. 26, 19 S. W. 541; *Pembroke v. Huston*, 180 Mo. 636, 79 S. W. 470; *Riddick v. Walsh*, 15 Mo. 536; *Macke v. Byrd*, 181 Mo. 690, 52 Am. St. Rep. 649, 33 S. W. 448; *State ex rel. School Dist. v. Harter*, 188 Mo. 529, 87 S. W. 941; *State ex rel. Major v. Ryan*, 232 Mo. 92, 133 S. W. 8; *State ex rel. Balch v. Fry*, 186 Mo. 203, 85 S. W. 328; *Pennington v. Coxe*, 2 Cranch, 52, 2 L. ed. 204.

The statutory provisions as to the powers of a trust company must be strictly construed.

State ex rel. Crow v. Lincoln Trust Co. 144 Mo. 587, 46 S. W. 593; *Gause v. Commonwealth Trust Co.* 196 N. Y. 155, 24 L.R.A. (N.S.) 967, 89 N. E. 476.

The statute imports at least three distinct characteristics of trust companies, and one explicit definition of and limitation upon the kinds of trusts that they can assume and execute,

which, taken together, are decisive of the issue here involved.

Chicago Title & T. Co. v. Zinzer, 264 Ill. 31, 105 N. E. 718, Ann. Cas. 1915D, 931; People v. Binghamton Trust Co. 139 N. Y. 192, 34 N. E. 898; Reyburn v. Bakewell, 88 Mo. App. 647; Murphree v. Hanson, 197 Ala. 246, 72 So. 437; Bodely v. Taylor, 5 Cranch, 225, 3 L. ed. 85; State ex rel. South Missouri Pine Lumber Co. v. Dearing, 180 Mo. 64, 79 S. W. 454; Arnett v. Williams, 226 Mo. 118, 125 S. W. 1154; Safe Deposit & T. Co. v. Sutro, 75 Md. 365, 23 Atl. 732; Hazel v. Hagan, 47 Mo. 281; Bales v. Perry, 51 Mo. 451; Donaldson v. Allen, 182 Mo. 626, 81 S. W. 1151; Security Co. v. Snow, 70 Conn. 288, 66 Am. St. Rep. 107, 39 Atl. 153; Dillingham v. Martin, 61 N. J. Eq. 276, 49 Atl. 143; Whitaker v. McDowell, 82 Conn. 195, 72 Atl. 938, 16 Ann. Cas. 324.

The intention of the testator, if inconsistent with the law, must give way.

Brown v. Rogers, 125 Mo. 398, 28 S. W. 630; Harbison v. Swan, 58 Mo. 154; Peugnet v. Berthold, 183 Mo. 64, 81 S. W. 874.

The court will not bend the settled principles of law to accommodate the attempt of the testator.

Cornwell v. Wulff, 148 Mo. 559, 45 L.R.A. 53, 50 S. W. 439; Briant v. Garrison, 150 Mo. 670, 52 S. W. 361.

The trust provision of the will being invalid, and this invalidity not affecting the essential plan and scheme of the testator, viz., to distribute the residuary estate among the three legatees named in equal parts or portions, that portion of the will remains as though the will did not contain the trust provisions.

Sevier v. Woodson, 205 Mo. 216, 120 Am. St. Rep. 728, 104 S. W. 1.

Messrs. Bryan, Williams, & Cave for respondents.

Walker, Ch. J., delivered the opinion of the court:

This is a suit to construe the will of Richard C. Kerens and the statute conferring power upon trust companies to execute trusts of this character.

The testator was a resident of the city of St. Louis and executed the will April 10, 1916, and died in the following September. In said will the testator named as executor and trustee the St. Louis Union Trust

Company. The suit is brought by Vincent Kerens, a son of the testator, against the trust company as trustee and the legatees and devisees other than the plaintiff. The trial court sustained the trust created by the will, and the plaintiff has appealed. We are concerned only with such portions of paragraph 12 of said will having reference to the matter at issue.

The introductory section to said paragraph 12 is as follows:

"All the rest, residue, and remainder of my estate, real, personal, or mixed, of every description and wheresoever situate, of which I may die seised or possessed, or to which I may be entitled at the time of my death, together with all lapsed legacies and any and all property becoming a part of my residuary estate under the provisions of this my last will, the whole being referred to as my 'residuary estate,' shall be divided by my executor into three equal parts or portions, one of which I hereby give, devise, and bequeath unto my daughter, Madeline Kerens Kenna; another of which I give, devise, and bequeath unto my daughter, Gladys Kerens Colket; and the remaining one third to the said St. Louis Union Trust Company, as trustee for my son, Vincent Kerens, to have and to hold the same, for the uses and purposes upon the terms and conditions and with the powers and duties hereinafter set forth."

Subdivision (a) of said paragraph 12 provides for the management by the trustee of the estate.

Subdivision (b) defines more fully the powers of the trustee.

Subdivisions (c), (d), and (e) are in the following language:

"(c) During the lifetime of my said son Vincent, or, if said trust shall not be sooner terminated by the trustee pursuant to the power hereinafter conferred upon it, during the life of said trust, said trustee shall pay to him out of the net income accruing from said estate the sum of five hundred dollars (\$500) on the first of each calendar

month succeeding the time of my death, and the remaining undistributed income it shall reinvest and hold as part of the corpus or principal of said trust estate subject to all the provisions of this 12th clause of my will. If, at any time during the lifetime of my said son, he shall of his own free will and desire have passed five consecutive years of continued sobriety and good behavior, and shall establish such fact by proof to the satisfaction of said trustee, then the latter, namely, said trustee, shall declare said trust to be at an end, and thereafter convey, transfer, and pay over to my said son Vincent all the trust property and estate then held or possessed by it as such trustee, and said trust shall thereupon be terminated.

"If at any time or times, on account of serious illness or other unforeseen emergency, my said son shall, in the opinion of said trustee, imperatively require the expenditure upon him or for his benefit of part of the accumulated and undistributed income or of the principal, said trustee is hereby authorized to appropriate and expend for such purpose such an amount as it may think necessary under the circumstances; provided, however, that whereas during my lifetime I became guarantor of the payment to my daughter-in-law, Jane H. Kerens, during her lifetime, or until her remarriage after his death, of the sum of four hundred and fifty dollars (\$450) per month by her husband, my said son Vincent, I direct that if my said son shall fail to make to his said wife any of said monthly payments, or any part thereof, during the existence of this trust, said trustee shall pay out of said net income, before making the payment of five hundred dollars (\$500) per month to my said son, all said monthly stipends to his said wife which at the time may be due and unpaid, his right to receive his monthly stipend of five hundred dollars (\$500) out of said net income being subject to the prior payment of overdue instalments to his

said wife as aforesaid; and provided further, that if my said daughter-in-law shall prove against my estate or otherwise establish as a charge against the same her claim under her said agreement, of which I am guarantor as aforesaid, the principal of the fund hereinabove devised and bequeathed in trust for my said son shall be charged with the satisfaction of such claim until provision shall have been made for its payment or its release so that my estate generally shall not be charged with the payment of the same or any part thereof. And said trustee is hereby authorized, if such a contingency should arise, to use such part of said trust estate as may be necessary to procure the release or satisfaction of said claim of my said daughter-in-law.

"(d) It is my will, and I direct, that neither the income from said trust estate, hereby provided for said beneficiary, nor the principal fund, shall be liable for his debts, present or future, and shall not be subject to the right on the part of any creditor to seize or reach the same under any writ or by any proceeding at law or in equity. And said beneficiary shall not have any power to give, grant, sell, convey, mortgage, pledge, or otherwise dispose of, encumber, or anticipate the income, or any instalment thereof, or any share in the principal thereof, it being my will that no right of disposition of any such property shall vest in said beneficiary until the same shall have been actually transferred or paid over to him.

"(e) At the death of my said son, if said trust shall not have been terminated as authorized in paragraph (c) hereof, all the trust property and estate in the hands of said trustee shall be distributed and turned over to my two daughters, Madeline Kerens Kenna and Gladys Kerens Colket, and to the descendants of either or both of them who shall have then died leaving any descendant or descendants surviving, in equal shares per stirpes."

Relevant testimony necessary to

an understanding of the facts and the determination of the cause will be set forth in the opinion as occasion requires.

The assignment of errors is as follows:

(1) The court erred in admitting testimony explanatory of the meaning of the will, and in permitting the respondents to vary its meaning by extrinsic evidence.

(2) The court erred in not holding that the will vested in the appellant the equitable title to one third of the residuary estate.

(3) The court erred in holding that the conditions named were definite, certain, and capable of enforcement.

(4) The court erred in refusing to hold that the conditions were subsequent, and so vague and indefinite as to be incapable of administration.

(5) The court erred in refusing to hold that the trustee had no power under the will, or by law, to determine the conditions attempted to be imposed, and no authority to withhold the estate from appellant until he shall comply with, if he shall fail to comply with, the conditions of the will as by it interpreted.

(6) The court erred in refusing to hold that under the will and the law the appellant is entitled to immediate possession of said equitable estate, and that the remaindermen are entitled to no interest therein.

These in their order.

I. Oral Testimony.—As a general proposition a testator's meaning is to be determined by his will alone, and from this we must ascertain his intent; but, if it is found that the language is susceptible of two constructions, evidence of the testator's feelings towards plaintiff may be admitted which will enable the court to put itself, so far as may be, in the testator's place, that the words used may be read in the light of his environment at the time the will was executed. Tisdale v. Prather, 210 Mo. loc. cit. 408, 109

S. W. 41; Whitelaw v. Rodney, 212 Mo. loc. cit. 548, 111 S. W. 560; Tebow v. Dougherty, 205 Mo. loc. cit. 320, 103 S. W. 985; Methodist Episcopal Church, South v. May, 201 Mo. loc. cit. 369, 99 S. W. 1093.

If the terms employed are therefore unambiguous, they will define themselves, and the admission of outside facts will be unnecessary. Otherwise, such evidence is admissible as will more clearly disclose the situation of the parties. For example, the admission of extrinsic evidence was deemed necessary to determine the estate created, whether it was a fee or a spendthrift trust (Cornet v. Cornet, 248 Mo. loc. cit. 216, 154 S. W. 121); or to designate with certainty the beneficiary (Schneider v. Kloepple, 270 Mo. 389, 193 S. W. loc. cit. 836); or to determine whether the testator intended to create a condition precedent or subsequent (Meiners v. Meiners, 179 Mo. loc. cit. 625, 78 S. W. 795); or whether an absolute legacy or one in trust was intended (Webb v. Hayden, 166 Mo. loc. cit. 46, 65 S. W. 760); or to render clear ambiguous expressions, determine the ties connecting the testator with the legatees, or the affection existing between them, and the motives which may reasonably be supposed to have influenced the testator in the disposition of his property (McMahan v. Hubbard, 217 Mo. 624, 118 S. W. 481; Smith v. Bell, 6 Pet. loc. cit. 68, 8 L. ed. 322). The admission of oral testimony, as thus authorized, does no violence to the rule that a testator's intentions are to be determined from the will itself; the purpose of the admission being that the court may be enabled, as near as possible, to put itself in the place of the testator at the time he made the bequests, and thus view his acts as of the time when and under the circumstances then existing.

The statute (Rev. Stat. 1909, § 583) which enjoins courts to have a due regard to the directions of wills and the true intent and meaning of testators is aided, not militated against, by the admission of testi-

mony of the character here under review. If doubt exists from the terms of a will as to the testator's purpose, in what other manner than by the admission of extrinsic testimony can that purpose or his true intent and meaning be ascertained, and the directions of the will intelligently interpreted? We are therefore of the opinion that there was no error in the admission of the extrinsic testimony herein. In thus ruling we do not minimize the force of the old English maxim that the testator's intention is to be regarded as the pole star in directing the court in the construction of a will. *Gulliver ex dem. Jeffereys v. Poyntz*, 3 Wils. 141, 95 Eng. Reprint, 978. Added radiance is given to the luminary thus defined by the admission of the oral testimony, and the court's course more clearly indicated.

II. The Will Construed.—An interpretation of the will according to its terms, aided by such extrinsic testimony as may be necessary to enable us to view it from the vantage of the testator, necessitates a determination of the question whether the condition under which the trust was created is to be construed as precedent or subsequent. The will was made after repeated fruitless efforts on the part of the testator to reclaim the plaintiff from his weakness for drink and the demoralizing effects of drunkenness. This form of dissipation, with the consequent dependent condition of the plaintiff upon the bounty of his father, had persisted during the young manhood of the plaintiff, who was still within the thirties at the time of the former's death. We are concerned with this phase of the case only so far as it may aid in construction. While the terms of the will are sufficiently definite to determine the testator's intention in the creation of the trust, the motive which moved this intention and the purpose thereby sought to be effected cannot but be illuminated by evidence of the plaintiff's delinquency, and the testator's knowledge of same, extending over a period of

years. Armed with this knowledge, uncertain on account of frequent disappointments, yet hoping that in the fullness of time the plaintiff might reform, the testator created the trust, named the trustee, directed that it be placed in possession of the portion of his estate designated, and defined its powers. His purpose was to place the principal of same beyond the prodigal and elastic grasp of the plaintiff, who, up to that time, had never been capable of maintaining himself; and to provide with the income arising therefrom a certain support for the plaintiff during his life. With that flickering spark of hope which oftentimes fitfully glows in a parent's heart long after it has become dead cold ashes elsewhere, the testator further provided that if plaintiff should at any time, of his own free will and desire, have passed five consecutive years of continued sobriety and good behavior, and should establish such fact to the satisfaction of the trustee, then the trust should terminate and the estate be turned over to him.

The conclusions deducible from the terms of this trust are the right of the trustee to the custody of the body of the estate, its continued possession of same with power, as directed, of disposing of the income therefrom subject to the termination of the trust. Without these powers the trust would be incapable of execution and the purpose of the testator would be utterly defeated. A trust incapable of execution under its own terms is futile. This cannot be so classified. The power it confers is ample for the purpose contemplated. Active in its nature, it panoplies the trustee, under subdivisions (a) and (b) of the will—which we have not heretofore set out at length,—with power to hold and manage the interest devised during the existence of the trust, to pay taxes and other charges against the property and all legal and proper expenses incident to its care and protection, and such other expenses as may be connected with the execution of the trust; to invest cash

forming part of the principal, lend same upon approved security, or expend it in the purchase of personal or real property; and to sell any part or parts of said estate in such manner, at such times and places, and for such consideration as it may approve; to lease or rent any part of the real property belonging to said trust estate on such terms or conditions as it may approve; to borrow money and secure its payment by mortgages or pledges of the personal or real property of said estate, whenever and as often as in the opinion of the trustee said actions will be conducive to the interests of the estate; to make and carry out any agreement with any person or persons for a sale, division, or distribution of any property said trustee may hold or own in common with such other person or persons; and in the execution of any of the powers enumerated to make and execute deeds, leases, mortgages, conveyances, or other instruments deemed by said trustee necessary and appropriate to such end or ends.

The foregoing provisions declaratory of the status and powers of the trustee, together with other pertinent portions of the will, when given their plain ordinary meaning are of controlling importance in determining the testator's intention. *Deacon v. St. Louis Union Trust Co.* 271 Mo. 669, 197 S. W. 261.

In the presence of the powers thus conferred, which are as comprehensive and absolute as can be expressed in words, considering the nature of the subject and the purpose contemplated, there is nothing left in the estate to which the plaintiff can, under existing conditions, make a claim, except the specified legacy of \$500 per month. That this is the definitive limit of his claim upon the estate is evident from subdivision (d) supra, of the will, which, supplementing the provision in regard to the allowance to the plaintiff provided for in subdivision (c) supra, directs that neither the income from the trust estate nor

the principal shall be liable for plaintiff's debts, present or future, nor subject to the right of any of plaintiff's creditors; nor shall he have the power to give, grant, sell, convey, mortgage, pledge, or otherwise dispose of, encumber, or anticipate the income, or any instalment thereof, or any share of the principal, it being, as the testator further provides, his will that no right of disposition of any such property shall vest in plaintiff until the same shall have been actually transferred or paid over to him. By which last clause is meant that he shall, as is evident from not only the purport but the tenor of the trust, have complied with the condition explicitly prescribed by the testator.

From the foregoing provisions these deductions follow: That there was created a trust estate; that the title to same was invested in the trustee; that this title carried with it the right in the trustee to the possession of the property and its care, control, and domination, subject only to the limitations of the trust; that this title was to be divested only upon two grounds, one, the conduct of the plaintiff, and the other, his death.

The investiture of the title thus being complete and absolute for the purpose prescribed, nothing was left upon which an interest of the plaintiff therein could be based, his allowance being clearly in the nature of a gift or a donation. The certainty of payment and continuance of duration of this gift did not in any wise change its nature. In order, therefore, for the plaintiff to acquire an interest in the estate, it was necessary for him to comply with the terms of the trust, such compliance being a condition precedent to the establishment of his right. Absent such compliance, and no estate could vest in him. To rule otherwise would be to ignore the elementary meaning of a condition precedent, which the texts tell us is one which **Condition—definition.** must be fulfilled before the estate or interest can vest.

—spend-thrift
—trust—
right of legatee.

In reaching this conclusion we are not unmindful of the well-settled rule frequently recognized in this jurisdiction, from the Collier Will Case (40 Mo. 322) to that of Deacon v. St. Louis Trust Co. *supra*, that wherever it is possible, with a proper regard for the evident purpose of the trust, such a construction will be given a will as to obviate the creation of an estate subject to a condition, particularly a condition precedent. But where, as in the instant case, it is

Will—enforcement of condition precedent.

ter, no other alternative is left but to so declare.

This will differs in no wise, except in the particular terms employed, from many others which have received judicial interpretation; and, while it is true, as was said in *Gulliver ex dem. Jeffereys v. Poyntz*, *supra*, that "unless a case be cited directly in point, and agree in every circumstance, it will have little or no weight with the court," the rulings upon what constitutes a condition precedent in cases of this character are sufficiently similar in their controlling facts to justify their citation as precedents.

In *Jarboe v. Hey*, 122 Mo. 341, 26 S. W. 968, the reformation of a profligate son was made a condition of his taking an interest in his father's estate; such reformation, as in the case at bar, to be determined by the trustee. In construing the will we held that this constituted a condition precedent, a compliance with which was prerequisite to the vesting of the estate. This ruling has never been questioned, but, on the contrary, wherever the tenor of a devise is of like import, it has been approved. *McPike v. McPike*, — Mo. —, 181 S. W. 7.

In *Markham v. Hufford*, 123 Mich. 505, 48 L.R.A. 580, 81 Am. St. Rep. 222, 82 N. W. 222, the condition of a legacy was that it was to be paid to the legatee, if, at the expiration of two years from date of the demise of the testatrix, the legatee shall in

the judgment of the executors be deemed a reformed man. The court, in construing the will, held that it was the evident intention of the testatrix that the legatee should not have the legacy unless within two years after her death he should change his course of conduct; and she selected persons in whom she had confidence to determine the question at the proper time. It was left to their judgment, and the inference is they knew the legatee's faults. Unless at that time the executors should determine that he was a reformed man, the provision would be inoperative. It was unnecessary for the testatrix to make a record of the legatee's faults. It is a valid condition to require the reform of bad habits,—citing *Dustan v. Dustan*, 1 Paige, 509; *Webster v. Morris*, 66 Wis. 366, 57 Am. Rep. 278, 28 N. W. 353. The court further held that a condition which involves anything in the nature of a consideration is, in general, a condition precedent. In reaching this conclusion, the concise definition of a conditional legacy from 2 Williams on Executors, 7th Am. ed. 558, was quoted, to the effect that it is one the existence of which "depends upon the happening or not happening of some uncertain event, by which it is either to take place or be defeated. No precise form of words is necessary in order to create a condition in a will, but whenever it clearly appears that it was the testator's intent to make a condition, that intent shall be carried into effect."

Of a like tenor, and, if possible, more particularly applicable to the case at bar, is the ruling of the Supreme Court of the United States in *Finlay v. King*, 3 Pet. 346, 7 L. ed. 701, in which the court said: "It . . . is certainly well settled . . . that there are no technical appropriate words which always determine whether a devise be on a condition precedent or subsequent. The same words have been determined differently, and the question is always a question of intention. If the language of the particular clause, or

of the whole will, shows that the act on which the estate depends must be performed before the estate can vest, the condition is, of course, precedent, and unless it be performed, the devisee can take nothing. If, on the contrary, the act does not necessarily precede the vesting of the estate, but may accompany or follow it, if this is to be collected from the whole will, the condition is subsequent."

In addition, the curious will find in *Markham v. Hufford*, *supra*, a compilation of rulings of courts of last resort as to what constitutes under the different facts stated a condition precedent. It is not deemed necessary to burden this opinion with their particular citation.

In *Webster v. Morris*, 66 Wis. 366, 57 Am. Rep. 278, 28 N. W. 353, the testator made a bequest to a grandson, the income of which was to be used for his support until a certain age, when the principal sum was to be paid to him, "provided he has in the meantime learned some useful trade, business, or profession and is of good moral character;" and the executors were to determine whether he had complied with this proviso. It was held that this condition was not indefinite, uncertain, or contrary to good morals or public policy, and was valid. This on the theory that every person has a legal right to dispose of his own property as he sees fit. The court, in holding the condition to be valid and its performance necessary before the principal sum could be paid to the grandson, cited a large number of cases, English and American, in support of its conclusion.

In *Brennan v. Brennan*, 185 Mass. 560, 102 Am. St. Rep. 363, 71 N. E. 80, a testatrix devised and bequeathed all of the residue of her estate to one of several heirs at law, "to him and his heirs forever, provided that he shall take care of me and look after me while I live." The person named as devisee had no knowledge of this provision of the will until after the death of the testatrix, and had not performed the

requirements of the clause. Held, that the devise was not a fee simple, but one upon a condition precedent to be performed during the lifetime of the testatrix, and that the devisee's lack of knowledge of the will until after the death of the testatrix was immaterial as affecting the nature of the devise.

In *Abend v. Endowment Fund Commission*, 174 Ill. 96, 50 N. E. 1052, the testator had an insane son. In his will the testator created a trust fund, and provided that the trustees should use the income and such portion of the principal as, in the discretion of the trustees, might be deemed necessary for the maintenance of the son. The will contained this further proviso: "And in case my said son James shall recover from his unfortunate condition and become of sound mind, I direct that the above-named sum, so increased or diminished, as the case may be, shall be by the above-named trustees paid over to the said James, and in case my said son, James H., shall never recover the use of his reason, then I direct that the said trustees shall, at his death, pay over the above-named sum, so increased or diminished, to the commissioners of the endowment fund of McKendree College."

The son died insane, and a controversy arose between the trustees and the commissioners of the college as to the right to the fund. The court held that under the will the son took no estate, but a mere interest in the income, and that no estate vested in the absence of the happening of the condition precedent, to wit, his return to sanity.

Respondent's brief contains references to many other cases of like effect to the foregoing. Their citation here can serve no purpose except to unduly lengthen this opinion. The hallmark of interpretation in all of them, as repeatedly stated, is the intention of the testator as determined from the language of the particular will. Applying this test here, we find the words employed susceptible of no other reasonable con-

struction than that the testator intended to create a condition, a compliance with which was an essential prerequisite to the vesting of an estate in the plaintiff. A review of analogous cases has but tended to strengthen this conclusion.

III. Power of the Trustee.—It is contended that the trustee, being a corporation, has no power to execute this trust. For the measure of its corporate powers we must look to the act of its creation, found in article 3, Laws 1915, pp. 160-195. We make special reference to such portions of said act as have a material relevance to the matter in controversy, as follows: In subd. 4, § 127, p. 166, of same, it is provided that a trust company may take, accept, and hold by devise or bequest any real or personal property in trust, and execute and perform any and all such legal and lawful trusts in regard to same, upon the terms, conditions, limitations, and restrictions declared, imposed, established, or agreed upon in and by such devise or bequest; and under subd. 9 of said § 127 it is provided that such company may act as executor and trustee under the last will of the estate of any deceased person; and under the initial paragraph of § 129, p. 168, of said act, upon a trust company having been nominated as executor of the last will of a deceased person, letters testamentary are required to be granted to it; and under subd. 3 of said § 129 it is provided that a trust company may be appointed and empowered to act as a trustee, or in any other fiduciary capacity, in the manner now provided by law for the appointment of individuals to any such office. A résumé of these powers, as defined by statute, may aid in a readier comprehension of their nature and extent. Under them a trust company may hold devised property in trust, and execute such trust in conformity with the declared intentions of the trustor or testator; act as executor and trustee; have letters testamentary granted to it; and, generally, act as trustee or in any other fiduciary ca-

capacity, in the manner now provided by law for the appointment of individuals to any such office.

The authority thus conferred is explicit; it is in harmony with the purpose for which the trust company was created; it contravenes no law, organic or statutory; and is not against public policy. ^{—trust company as executor—public policy.} The trust created is well within these powers, and hence the established rule of construction to which we gave affirmative recognition in *State ex rel. Crow v. Lincoln Trust Co.* 144 Mo. 562, 46 S. W. 593, in regard to the limit of the exercise of corporate powers, is not violated. The only question remaining for determination is whether in the performance of the trust the company has such an implied power, arising by necessary implication from that expressly granted, as will enable it to exercise the judgment of a natural person in determining, if occasion arises, whether the plaintiff has complied with the conditions which will entitle him to the estate.

The incertitude of an officer of the trust company in declining to reply definitely to an inquiry of counsel for plaintiff as to the quantum of proof that would be required to entitle the plaintiff to the estate, coupled with that officer's unnecessary conclusion that one committee on estates of the trust company might find differently from another, constitutes no reason, by analogy or otherwise, to sustain the conclusion that the implied power does not arise by necessary implication out of that expressed. ^{Trust—power of trust company to determine sobriety.} Such an argument may properly be directed against the wisdom of naming a corporate trustee in a case of this character, rather than a natural person, but it can serve in no wise to define the limits of the trustee's implied powers, which, under our statute, are the same in an artificial as in a natural person, in that powers implied must be determined by a reasonable deduction from those expressed, construed

with a view to the performance of the purpose of the trust. Laws 1915, pp. 165 et seq.; Chambers v. St. Louis, 29 Mo. loc. cit. 577; Thomp. Corp. § 2374; Clark & M. Priv. Corp. § 1490.

If, therefore, it appears that the exercise of the implied power is essential to effect the clearly defined purpose of the testator—in this case, the determination of the character of plaintiff's conduct—then it should be held that such implied power arises by necessary implication out of that expressed. In the absence of such a construction, the intention of the testator would, in this case, be defeated, and the purpose of the trust as a consequence destroyed. It is contended that the right to determine the condition in question can only be exercised by a natural person; in other words, that the judgment necessary to the proper performance of a trust of this character cannot be satisfactorily exercised by a corporation. This, it will be found, is a distinction more artificial and imaginary than real. An examination of the authorities justifies the conclusion heretofore reached, and as having been sustained by our statute, that a corporation with legal capacity to hold property may take and hold it in trust, when authorized by law, in the same manner and to the same extent as a private person. *White v. Rice*, 112 Mich. loc. cit. 408, 70 N. W. 1024; *Union Bank & T. Co. v. Wright*, — Tenn. —, 52 L.R.A. 469, 58 S. W. 755; *Minnesota Loan & T. Co. v. Beebe*, 40 Minn. 7, 2 L.R.A. 418, 41 N. W. 232. From this it follows that when the law has clothed a corporation with power to exercise the functions of a trustee, including the possession, care, custody, and disposition of property, and has prescribed the condition upon which the trust shall terminate, it cannot be said with any degree of reason that it is not possessed of the conse-

quent power, within the terms of the trust, to determine whether the prescribed condition has been performed and the trust terminated.

A statute should always be construed so as to effectuate the purpose of its enactment. To accomplish this end, the meaning of words may, with a proper regard for the object to be attained, be restricted and at other times extended. Neither course is necessary in the case at bar. The provisions of the statute are plain and unequivocal, and they confer ample power upon the trust company to execute the trust; and the definite terms of the latter leave no doubt as to the purpose contemplated by the testator, and the extent of the power he intended to confer on the trustee.

Statute—
construction—
purpose.

Under this state of facts, it cannot be otherwise reasonably concluded than that, in addition to the express power conferred on the trustee, it is clothed by necessary implication with such added power as will enable it to intelligently determine, upon the submission of proof by the plaintiff, whether his conduct has been such as to authorize the turning over of the estate to him and thus terminate the trust. We examined with some degree of care the cases cited and discussed by counsel for the plaintiff, in opposition to the conclusions we have reached herein, but do not find, upon a comparison of the facts in such cases with those at bar, any sufficient reasons to hold otherwise than we have indicated. From all of which it follows that the judgment of the trial court should be affirmed, and it is so ordered.

All concur, except Graves, J., who dissents from paragraph 3 and result.

Woodson, J., absent.

Petition for rehearing denied July 12, 1920.

ANNOTATION.

Power of corporation to execute a trust involving a determination regarding the personal conduct or needs of beneficiaries.

The ancient rule that corporations could not take and hold either real or personal estate in trust for the use of another, based as it was upon the theory that, since an artificial body such as a corporation cannot have a conscience, no trust or confidence should be intrusted to it, is no longer adhered to, the generally accepted rule now being that a corporation may execute any trust which is not repugnant to or inconsistent with the purposes for which the corporation was created. For a general discussion of these rules and theories, see Thompson on Corporations, 2d ed. vol. 3, § 2374, and Perry on Trusts & Trustees, 6th ed. vol. 1, §§ 42 and 43.

The general acceptance of this modern rule undoubtedly accounts for the fact that, although the instances are almost innumerable in which corporations have been appointed trustees and have executed trusts involving a determination requiring the exercise of discretion or judgment necessary to the proper execution of the trust, but very few cases have involved the specific question under consideration in this annotation. In fact, out of a large number of cases examined, the reported case (*KERENS v. ST. LOUIS UNION TRUST CO.* ante, 288) is the only one which has specifically passed upon the contention that a condition in a trust which necessarily involves a determination as to the personal conduct or needs of a beneficiary renders the trust one that can be exercised only by a

natural person, or, in other words, that the judgment necessary to the proper performance of such a trust cannot be satisfactorily exercised by a corporation. And it will be observed that the court in this case refuted such a contention, and held that when a corporation can be regarded as clothed with power to exercise the functions of a trustee, including the holding of property for the use of another, it has implied power to determine whether conditions imposed upon the beneficiary by the trust have been performed; such, for instance, as whether the beneficiary in the instant case had reformed, and had lived such a life as warranted termination of the trust under a provision in the trust to the effect that, if the beneficiary established to the satisfaction of the trustee that he had passed five consecutive years of continued sobriety and good behavior, the trustee should terminate the trust by turning over the trust estate to such beneficiary absolutely. In *Roberts v. Corson* (1919) — N. H. —, 5 A.L.R. 1172, 107 Atl. 625, it was expressly held, but without discussion, that a corporation might be made the trustee of a fund "to be used by it as it shall determine best in each case for the benefit of its members who may be in want or distress," provided the administration of the trust was not inconsistent with the purpose for which the corporation was established.

G. J. C.

ELIASBERG BROTHERS MERCANTILE COMPANY, Appt.,

v.

W. C. GRIMES.

Alabama Supreme Court — April 24, 1920.

(— Ala. —, 86 So. 56.)

Tax — income as property — constitutional limitation.

1. Income is property within the meaning of a constitutional provision

limiting the tax rate to a certain percentage of the value of the taxable property within the state.

[See note on this question beginning on page 313.]

Definition — property.

2. The term "property" in its strict legal sense is applicable to the exclusive right of the owner with respect to the use, control, and disposition of something which is capable of ownership, but in its more general and popular sense it is applicable to the thing itself.

[See 22 R. C. L. 37.]

Constitutional law — giving effect to part of unconstitutional law.

3. A statute imposing an income tax which is unconstitutional because the rate exceeds the constitutional limit cannot be given effect even in the amount within such limit, if the incomes were not taxed alike by the statute, and certain exemptions were allowed therein, and it is impossible to tell what adjustment the legislature would have made under a limited rate.

— equal protection — denial of tax exemptions to nonresident.

4. Denying income tax exemptions to nonresidents which are allowed to residents denies them the equal protection of the laws as guaranteed by the Federal Constitution.

[See 6 R. C. L. 426, 427.]

Tax — income — general clause in tax law.

5. Incomes are not included in a clause in a revenue act, following statements of specific items of property to be taxed, "all other property real, personal, and mixed."

Statute — construction — ejusdem generis.

6. A provision in a revenue law, "all other property real, personal, and mixed," following a statement of specific items of property to be taxed, will be construed to include only such other things as are ejusdem generis.

[See 25 R. C. L. 996.]

(Anderson, Ch. J., and McClellan, J., dissent.)

APPEAL by defendant from a decree of the Circuit Court for Dallas County (Miller, J.) in favor of plaintiff in a suit to enjoin certification to the state tax officials of the salary earned by him as an employee of defendant. *Affirmed.*

Statement by Somerville, J.:

The bill alleges that Grimes is a married man, with a wife as his only dependent; that he is employed by Eliasberg Bros. Mercantile Company at a stated salary; and that they are about to make returns to the state tax officials of the income or salary received by Grimes so that the same may be subjected to the income tax as provided by the Revenue Act of 1915. The bill declares the said act to be void and of no effect in so far as the income tax features are concerned, alleging the ground therefor, which fully appears from the opinion.

Messrs. Keith & Wilkinson, J. Q. Smith, Attorney General, Lawrence E. Brown and Henry P. White, Assistant Attorneys General, for appellant.

Messrs. Hugh Mallory, R. B. Evins, Ray Rushton, J. J. Mayfield, and H. F. Crenshaw, for appellee:

Income is property. It is the money, or its equivalent, which one receives for services rendered, or as the fruit of an investment.

Maguire v. Tax Comr. 230 Mass. 503, 120 N. E. 162; Boyd v. Selma, 96 Ala. 148, 16 L.R.A. 729, 11 So. 393; Western U. Teleg. Co. v. State Bd. of Assessment, 80 Ala. 278, 60 Am. Rep. 99; Board of Revenue v. Montgomery Gaslight Co. 64 Ala. 277; Birmingham v. Klein, 89 Ala. 464, 8 L.R.A. 369, 7 So. 386; Phoenix Carpet Co. v. State, 118 Ala. 150, 72 Am. St. Rep. 143, 22 So. 627; State v. Birmingham Southern R. Co. 182 Ala. 483, 62 So. 77, Ann. Cas. 1915D, 436; Lott v. Ross, 38 Ala. 156; State v. Board of Revenue, 73 Ala. 65; Opinion of Justices, 220 Mass. 613, 108 N. E. 570; Suter v. Jordan Marsh Co. 225 Mass. 34, 113 N. E. 580; Kennard v. Manchester, 68 N. H. 61, 36 Atl. 553; Pollock v. Farmers' Loan & T. Co. 157 U. S. 427, 39 L. ed. 759, 15 Sup. Ct. Rep. 673.

The tax is void as to nonresidents.

Travis v. Yale & T. Mfg. Co. 252 U. S. 60, 64 L. ed. 460, 40 Sup. Ct. Rep. 228.

The entire income tax division is void.

Phoenix Carpet Co. v. State, 118 Ala. 143, 72 Am. St. Rep. 143, 22 So. 627; 21 Am. & Eng. Enc. Law, 2d ed. 804; Quartlebaum v. State, 79 Ala. 1; Travis v. Yale & T. Mfg. Co. supra; South & North Ala. R. Co. v. Morris, 65 Ala. 193; Skagit County v. Stiles, 10 Wash. 388, 39 Pac. 116; State ex rel. McNeal v. Dombaugh, 20 Ohio St. 167; State ex rel. Crumpton v. Montgomery, 177 Ala. 212, 59 So. 294; State v. Roden, 15 Ala. App. 385, 73 So. 662.

A tax on incomes or profits is not a privilege, occupation, or license tax.

Lott v. Ross, 38 Ala. 156; Board of Revenue v. Montgomery Gaslight Co. 64 Ala. 269; State v. Board of Revenue, 73 Ala. 65; Western U. Teleg. Co. v. State Bd. of Assessment, 80 Ala. 278, 60 Am. Rep. 99; Phoenix Carpet Co. v. State, 118 Ala. 143, 72 Am. St. Rep. 143, 22 So. 627.

Somerville, J., delivered the opinion of the court:

The question of decisive importance presented by this appeal is whether or not the graduated tax of from 2 to 4 per centum imposed upon incomes by the Revenue Act of 1919 (Gen. Acts 1919, pp. 374-395) is in violation of § 214 of the Constitution of Alabama, which declares: "The legislature shall not have the power to levy in any one year, a greater rate of taxation than sixty-five one-hundredths of one per centum on the value of the taxable property within this state."

The solution of the major question obviously depends upon two constituent inquiries: (1) Is income "property" in the ordinary legal sense of the word? And (2) if so, is it embraced within the meaning of the word "property" as used in this constitutional limitation?

In his very recent work on Federal Income and Profits Taxes, p. 223, Mr. Holmes, quoting the language of the supreme court of Massachusetts in Tax Comr. v. Putnam (Trefry v. Putnam) 227 Mass. 522, L.R.A.1917F, 806, 116

N. E. 904, says: "In its ordinary and popular meaning, 'income' is the amount of actual wealth which comes to a person during a given period of time. At any single moment a person scarcely can be said to have income. The word in most, if not all, connections, involves time as an essential element in its measurement or definition. It thus is differentiated from capital or investment, which commonly means the amount of wealth which a person has on a fixed date. Income may be derived from capital invested or in use, from labor, from the exercise of skill, ingenuity, or sound judgment, or from a combination of any or all of these factors. One of the most recent of its definitions is 'the gain derived from capital, from labor, or from both combined' (Stratton's Independence v. Howbert, 231 U. S. 399, 58 L. ed. 285, 34 Sup. Ct. Rep. 136; Doyle v. Mitchell Bros. Co. 247 U. S. 179, 62 L. ed. 1054, 38 Sup. Ct. Rep. 467)."

It is clear, therefore, that while "income" is a complex conception of elements and units which may be, and usually are, acquired and used or disposed of at different times, its elements and units are in the most literal sense *wealth and property*—none the less so because their possession is transient and their identity easily and quickly lost. But instability of possession and identity cannot destroy their character as "property," merely because they render impracticable their assessment in the ordinary way as property owned or possessed at the beginning of the tax year. This was clearly pointed out by Judge Stone in Board of Revenue v. Montgomery Gaslight Co. 64 Ala. 269, 275: "Property, real or personal, owned on the 1st day of January, is required to be given in by the owner for assessment and taxation that year. It is assessed to the *then* owner. The rule as to salaries, gains, incomes, is different. The tax on these is given in, assessed, and paid the year after they accrue. This for the obvious reason that

(— Ala. —, 86 So. 56.)

they cannot be known till then. . . . In this way it may and does often happen that taxes apparently double are paid in one year, and rightfully paid, on the *same property*; once, for the year preceding the assessment, as a *gain or profit*, and a second time as being the owner of it on the first day of the year in which it is assessed" [italics supplied].

In its strictest legal sense the term "property" is applicable to the exclusive right of the owner with respect to the use, control, and disposition of something which is capable of ownership. But in its more general and popular

**Definition—
property.**

sense it is applicable to the thing itself. 6 Words & Phrases, pp. 5693-5699. In this sense "property" includes everything which goes to make up one's wealth or estate. *Carlton v. Carlton*, 72 Me. 115, 116, 39 Am. Rep. 307. In *Greene v. Knox*, 175 N. Y. 432, 67 N. E. 910, it was held that the salary of an office is property within the protection of constitutional provisions; and a teacher's salary was so held in *Hibbard v. State*, 65 Ohio St. 574, 58 L.R.A. 654, 64 N. E. 109.

In the Opinion of Justices, 220 Mass. 613, 624, 108 N. E. 574, it was said: "A tax upon the income of property is in reality a tax upon the property itself. Income derived from property is also property. Property by income produces its kind; that is, it produces property and not something different."

In *Boyd v. Selma*, 96 Ala. 144, 148, 16 L.R.A. 729, 11 So. 394, this court said: "In its general or ordinary significance, the term 'personal property' embraces all objects and rights which are capable of ownership, except freehold estates in land, and incorporeal hereditaments issuing thereout or exercisable within the same."

In § 2, Code 1852, the words "personal property" are defined as including "money, goods, chattels, things in action, and evidences of debt, deeds, and conveyances."

This definition, substantially unchanged, is retained in all subsequent Codes, including that of 1907.

To summarize: Money or any other thing of value, acquired as gain or profit from capital or labor, is property; in the aggregate, these acquisitions constitute income; and, in accordance with the axiom that the whole includes all of its parts, income includes property and nothing but property, and therefore is itself property. This conclusion is so clear that we cannot regard it as debatable, and we have discussed the question at such length chiefly out of deference to the learned counsel for the state, who have undertaken to refute it upon reason and upon cited authority. If there is anywhere a lingering doubt upon this question, it will be instantly dispelled by reading the opinions in *Ludlow-Saylor Wire Co. v. Wollbrinck*, 275 Mo. 339, 205 S. W. 202, and in *State v. Pinder*, 7 Boyce (Del.) 416, 108 Atl. 43, where it is fully discussed, both upon principle and authority. As pointed out by counsel, the supreme court of Georgia, in the case of *Waring v. Savannah*, 60 Ga. 93, has declared that income is not property until it is invested, or placed in a bank, or locked up at home; and this conclusion is based upon the theory that "property is a tree; income is the fruit; labor is a tree; income, the fruit; capital, the tree; income, the fruit; . . . but so long as it is fruit merely, and plucked to eat, and consumed in the eating, it is no tree, and will produce itself no fruit."

With all due respect to the court which approved such reasoning—and we note that Judge Bleckley concurred dubitante—we are unable to appreciate its relevancy or its value. Investing, or depositing, or locking up what is received as income changes not its character, but merely its use; and the notion that a tree is property, while its fruit is not, cannot be sustained upon any principle of logic or common sense. The opinion refers to the earlier

case of *Savannah v. Hartridge*, 8 Ga. 23, as holding that income is not property, but an examination of that case shows that it merely held that a legislative grant of power to the city of Savannah, to raise money "by tax and assessment upon all real and personal estate within the corporate limits of the city," did not include the power to lay a tax on occupations or incomes which had never been taxed by the state. That decision was clearly correct. In both of the Georgia cases referred to above, it must be noted also that the tax under consideration was an excise tax on receipts from a business or occupation, and there is a palpable confusion of thought and of terms. Practically all courts and text-writers are agreed that an excise tax, being a tax on business or occupation, however measured, is not a tax on property. Our own court, in particular, has always carefully distinguished these two subjects of taxation, as we shall hereafter show.

We come now to a consideration of the second question, viz., does the term "property," as used in § 214 of the Constitution, include incomes, as defined and taxed by the Revenue Act of 1919, so as to subject their taxation to the limitation therein prescribed?

The general principles which should govern courts in interpreting and construing constitutional provisions have been often stated, and need not be now repeated. For present purposes it will suffice to recall what was said in *Western U. Teleg. Co. v. State Bd. of Assessment*, 80 Ala. 273, 275, 60 Am. Rep. 99, as pertinent to the present inquiry: "Having been taught by experience that no legislative power is more liable to oppressive use than the taxing power, and having suffered evils by resting it too broadly on discretion, the people have shown, in the history of the successive constitutions, a progressive policy to restrain the power of the legislative department in this respect, and to remedy existing; and guard against apprehended, evils, by

imposing limitations consistent with the public needs and the public safety. The just expositor, in interpreting the constitutional mandates and inhibitions, will consult the changes that have been made from time to time, the causes which produced them, and the mischief intended to be remedied. The words used should be allowed such operation and force as will reasonably accomplish the purposes proposed, but without extension beyond their legitimate meaning, and so as to avoid embarrassing or disabling proper governmental administration."

It is, of course, to be conceded that though "property" is a generic term, which is often used to describe all things that are capable of exclusive ownership, it is variously used also, in a more or less restricted sense, to include only one or more of the kinds or forms or species of the genus. We are here concerned with its meaning only as it relates to the subject of taxation.

In *Lott v. Ross*, 38 Ala. 156, 160, decided in 1861, it was said: "Where the words 'taxable property' occur in an independent act, it would seem that they should be understood in the sense of things taxed which are susceptible of ownership or possession, unless there is something in the context which affixes to them a different meaning, or unless the plain object of the law will be defeated if they are not held to cover subjects of taxation which are not property in the ordinary sense."

This definition was quoted with approval in *Western U. Teleg. Co. v. State Bd. of Assessment*, 80 Ala. 273, 278, 60 Am. Rep. 99, and has, we believe, never been questioned. The decision in the *Lott Case* was that a legislative grant of power to Mobile county to levy a specified tax on the "taxable property" within the county did not authorize the imposition of a tax on the gross amount of sales of merchandise, for the reason that such a tax "is not a tax upon the goods themselves, or the fruits of the sale, but upon the

(— Ala. —, 86 So. 56.)

business or act of selling." And it was further said that "this is not, then, a *property or income* tax, but an *occupation or privilege* tax" [italics supplied]. It is clear from this language that this court, sixty years ago, conceived of a tax on income as a property tax, and carefully distinguished it from an excise tax on occupation or business.

A chronological review of the several limitations upon the taxing power of the state, as adopted in successive constitutions, will be found in Western U. Teleg. Co. v. State Bd. of Assessment, 80 Ala. 273, 60 Am. Rep. 99, and in Capital City Water Co. v. Board of Revenue, 117 Ala. 303, 23 So. 970. The first limitation, which included personal property, is found in the Constitution of 1868, art. 14, § 1, providing that "all taxes, levied on property in this state, shall be assessed in exact proportion to the value of such property." This identical clause was adopted in the Constitution of 1875, art. 11, § 1, along with the new provision (art. 11, § 4) that "the general assembly shall not have the power to levy, in any one year, a greater rate of taxation than $\frac{1}{4}$ of 1 per centum on the value of the taxable property within this state." In that Constitution also was incorporated the provision (§ 6, art. 11) that "the property of private corporations, associations, and individuals of this state shall forever be taxed at the same rate." This clause was a substantial repetition of § 4, art. 13, of the Constitution of 1868. These several limitations on the taxing power were carried into the Constitution of 1901 in totidem verbis. As each of them uses the word "property" as the subject of taxation, obviously in the same sense, a judicial interpretation of that word in any of them will be equally applicable to all.

The taxation of incomes for revenue is not a new policy in this state. The first tax on annual gains, profits, or incomes and salaries, was levied by the Revenue Act of 1866 (Laws 1865-66, p. 1). In 1867, the

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same provision was adopted (Laws 1866-67, p. 259). In 1875 (Laws 1874-75, p. 1), the tax was limited to salaries; and, in 1876 (Laws 1875-76, p. 46), it was again levied on "all salaries, gains, incomes and profits for the preceding year." After discussing the application of this tax to corporations, the contention being made by the petitioning corporation that this revenue provision did not affect corporations, but only natural persons, Judge Stone said: "If this be true, then natural persons are taxed 'upon their annual gains, profits, or incomes,' and corporations, or artificial persons, are not. This would violate § 6, article 11, of the Constitution of 1875, which ordains that 'the property of private corporations, associations, and individuals of this state, shall forever be taxed at the same rate.'" Board of Revenue v. Montgomery Gaslight Co. 64 Ala. 269, 277.

In a later case, on a petition by the L. & N. Railroad Company to vacate certain assessments made upon its income under the Revenue Acts from 1874 to 1881, it was held that, for reasons not here pertinent, those acts were not intended to be, and could not be, applied to the income of railroads passing through several counties. The board of revenue insisted upon the application of § 6, art. 11, of the Constitution of 1875, and Judge Stone again said: "Under this clause of the Constitution it is contended that, inasmuch as the incomes of individuals—natural persons—are taxed, it is a constitutional duty to tax, at the same rate, the incomes of corporations. Such is undoubtedly the case, and the legislature, when they assert the power, cannot tax one class at a higher rate, and the other at a lower rate. Mobile v. Stone-wall Ins. Co. 53 Ala. 570. But . . . when the legislature, through a failure to levy, leave a *species of property* free of taxation, by providing no machinery which can be adapted to the assessment, the courts of the country are powerless to remedy the evil" [italics sup-

plied]. *State v. Board of Revenue*, 73 Ala. 65, 70.

Conceding that these statements of Judge Stone were dicta, in the strictest sense of that term, and therefore not perforce to be regarded as a settled definition of the word "property," as used in the same limitation when carried into the Constitution of 1901, they were nevertheless deliberate judicial interpretations, pertinent to the subject in hand, and appropriate as bases for the conclusions announced; and we are bound to presume that they reflected the seasoned opinion, not only of Judge Stone, but also of the other members of the court.

In a still later case, holding that a tax laid on the gross receipts of a telegraph company at the rate of 2 per centum was an occupation or privilege tax, and not a tax on property, and was therefore not in violation of the constitutional provision that "all taxes levied on property in this state shall be assessed in exact proportion to the value of such property," Judge Clopton, speaking for the court, discussed at length the meaning of "property" as used in that limitation, and carefully and pointedly distinguished between an income or property tax and a tax on occupation or privilege.

He said: "With a knowledge of the various subjects of taxation, of the well-defined distinction between property, when made liable to taxes, and other subjects of taxation, and that among such other subjects were occupations, privileges, business, and licenses, which, in the nature of things, are incapable of determinate value, valuation was adopted as the basis and measure of assessment. The limitations, by their terms, signify an intention that the provisions shall be only applicable to property, the value of which is capable of definite ascertainment by the officer whose duty it is to make the assessment, and that all other subjects of taxation should be excluded from their operation." And further: "In *Board of Revenue v. Montgomery*

Gaslight Co. 64 Ala. 269, and in *State v. Board of Revenue*, 73 Ala. 65, the tax was imposed on the net income, and not on the business. The money, held and owned by the company as the net result of the business, was the subject of taxation. *An income tax stands on different principles; its value is determinable; and the rules governing such tax are inapplicable to a tax on gross receipts*" [italics supplied]. *Western U. Teleg. Co. v. Board of Revenue*, 80 Ala. 278, 60 Am. Rep. 99.

The language which we have quoted from the opinions in the three cases, *supra*, exhibits, we think, a settled consensus of judicial understanding that the term "property," or "taxable property," includes all property capable of ownership, whose value can be accurately determined, and that incomes are such property. Those opinions were published in the official reports, and we must presume that they were known and understood by the profession and by the members of the constitutional convention of 1901.

It is supposed by counsel for the state that this repeatedly expressed conception of income as property, within the constitutional limitations on taxation, was dissipated, and currency given to a contrary view, in the case of *Capital City Water Co. v. Board of Revenue*, 117 Ala. 303, 23 So. 970. We have subjected the opinion in that case to the most rigid scrutiny, and fail to find in it any confirmation of this contention. It was the settled law of this state that a tax laid on the gross receipts of a business is an occupation tax, and not a property tax, within constitutional limitations. Subdivision 5, § 454, Code 1886, levied a tax on such receipts, "after deducting the expenses of carrying on such business." It was held that such a deduction did not change the character of the tax. Evidently the court was on doubtful ground, for two of its ablest members, Justices McClellan and Head, dissented. Justice

Haralson, the writer of the opinion, said: "This point, however, is urged upon the further contention that the tax imposed in this case is an *income tax*, susceptible of definite ascertainment as to its amount, and therefore it is *property*. [Then, following an analysis of the revenue provision:] Subdivision 5 of said § 454 must be construed, therefore, as a provision for an occupation or privilege tax, and not as a tax proper on property; and the clause in said subdivision,— 'after deducting the expenses of carrying on said business,'—as indicating no more than the method adopted by the legislature in ascertaining the extent to which the occupation or business has been enjoyed, and for which it ought to be taxed."

Reference had been previously made in the opinion to the former tax on salaries, gains, incomes, and profits, and it had been remarked that decisions construing them were correct, and not in conflict with the present ruling. Counsel for the taxpayer cited the three cases in 64, 73, and 80 Alabama Reports, and the last was cited as authority in the opinion. Justice Haralson evidently had read them, and had them freshly in his mind. So far from contradicting them, he approves them, and painstakingly shows that the tax he was dealing with was a different kind of tax, and governed by different principles.

It is true that the same justice remarked, incidentally, in the later case of Goldsmith v. Huntsville, 120 Ala. 182, 24 So. 509, that "a tax on gross amount of sales is not a tax on the goods themselves, or on the fruits of the sales, but upon the business of selling; is not a property tax, but an occupation or income tax." But the use of the term "income" in that connection, in view of the learned judge's sound discriminations in his previous opinion, can only be regarded as a casual inadvertence, perhaps a mere lapsus pennæ.

Another contention, vigorously pressed by counsel for the state, is

that a study of our Revenue Acts and Codes, from 1866 to 1886, inclusive, will show a legislative understanding and assertion that salaries, gains, incomes, and profits are not property, in view of repeated classifications placing them among the schedule of "other subjects of taxation," following the schedule enumerating the items of taxable property, and including "all other property, real or personal, not otherwise specified." And it is argued that such classifications must have been known to the Constitution makers, and must have qualified their understanding of the scope of the term "property" as the subject of tax limitations.

This is a matter worthy of consideration, and has been considered by this court in construing statutes, but never, so far as we are advised, in construing the constitutions which govern them. However, the force of the argument is dissipated here by the irregularity of the practice. In the Acts of 1866, where "gains, profits, or incomes" were first taxed, there is a general designation of "subjects" taxed, in which the item of corporate dividends, earned but not distributed (which are certainly taxable property), is placed among the occupations, and incomes, etc., are taxed in a separate and distinct section, apparently unrelated. This arrangement is followed in the Code of 1867, § 434 specifying the "subjects" in general, and § 435 dealing with incomes. The same arrangement is followed in the Act of 1868 (Laws 1868, p. 304). There was nothing in all of this to indicate that the Constitution makers of 1868 intended to impose the taxing limitations of that instrument only upon property which might be owned by a taxpayer at the usual date fixed for assessments, even though that was the usual basis for assessment. That was the only difference between the items of property going to make up a complete income and other items of property. The items of an income are assessed annually as in-

come, because it is impracticable to assess them in any other way, and not because they are, when acquired, different in kind or substance from money or other property owned on the day for making assessments. For this reason it is natural, and, indeed, inevitable, that incomes, as subjects of taxation, should be separately classified and treated; and it would be hardly significant if for administrative convenience, based upon practical but entirely superficial analogies, incomes should be placed in the schedule of occupation taxes.

The Act of 1875 schedules numerous items as "property," and places incomes in the schedule of "other subjects of taxation," along with occupations. The Act of 1876 places incomes in the schedule of "property," and places dividends, earned but not divided, in the schedule of "occupations"—an arrangement followed also in the Code of 1876. This act and its codification exhibit one fact of considerable significance. Closely following, as they did, the adoption of the Constitution of 1875, which for the first time in our history limited the rate of property taxation—specifically, to $\frac{3}{4}$ of 1 per centum—they reduced the previous rate of 1 per centum on incomes to the new constitutional limit of $\frac{3}{4}$, which it never again exceeded. This, it seems fair to assume, was a legislative recognition of the status of incomes as taxable property. The Act of 1883 (Acts 1882–83, p. 72) omits the item of incomes entirely, but places the item of dividends, earned but not divided, in the schedule of property.

The Act of 1885 (Acts 1884–85, p. 3) places incomes in the schedule of taxable "subjects," following the schedule of property, and this arrangement is followed in the Code of 1886, after which incomes do not again appear as a subject of taxation.

Such tergiversations do not suggest any fixed conception of incomes as a subject of taxation. Certainly the failure of the Consti-

tution makers of 1875, or 1901, to expressly mention incomes as a class of property to be protected by limitations, cannot be attributed to their recognition and adoption of a legislative conception of incomes as being occupations, and not property. The merely mechanical collocation of the subjects of taxation, if uniform, might be some aid in resolving a doubtful application of the revenue law, but it could hardly be accepted as a restriction upon the scope of a constitutional limitation which would otherwise, in ordinary meaning, bear no such restriction.

We do not consider it of any importance to inquire whether our Constitution makers entertained a definite conception of income as an aggregation of sums of money, which they specifically desired to protect in the aggregate. If they regarded money as property—and it is inconceivable that they could have regarded it otherwise—they must have entertained a general purpose to protect it from excessive or unequal taxation, by whatever name it might be called, and by whatever scheme it might be taxed. Money, when received as income, is visible, tangible, concrete, and that, in its last analysis, is what is taxed. It is of no consequence that items of money are added together, and the sum, reduced by the cost of its acquisition, is designated as income. That indicates merely the mode and extent of its taxation. Nor is it of any consequence that the money thus taxed has left the hands of its quondam owner, however speedily; for the state has the inherent power to tax property owned at any time during the tax year, though it has not always seen fit to do so.

A constitution, properly conceived, deals with basic principles and policies, and omits specific applications. Our constitutions limit the rate of taxation of property. The purpose in view, as observed by Judge Clopton in *Western U. Teleg. Co. v. State Bd. of Assessment*, 80 Ala. 278, 60 Am. Rep. 99, was "the protection of the property of the

citizen against forced contributions or legislative plunder." The candid and impartial student of the subject will find it difficult, if not impossible, to discover, in the face of an expressed solicitude for the protection of property—including money—owned at the beginning of a tax year, an indifference to the like protection of money received and owned at some previous time. The reason for protection in the one case is as compelling as it is in the other. The lack of protection in the one case leads to the same consequences that it leads to in the other. We think that the policy and the purpose of the Constitution, in harmony with its terms, equally embraces both.

We do not consider it necessary, in view of what we have already said, to discuss at length the development of income taxation under constitutional limitations, or without them, in other states, or to review in much detail the judicial decisions and the statements of text-writers on the subject. The only cases which oppose our view are *Waring v. Savannah*, 60 Ga. 93, and *Glasgow v. Rowse*, 43 Mo. 479. They were respectively decided forty and fifty years ago, and though their theory that incomes are not property has been followed by several of the earlier text-writers, their reasoning is faulty, and their fallacy stands condemned by modern judicial thought. The 43d Missouri Case has been recently reviewed at length in *Ludlow Co. v. Wollbrinck*, 275 Mo. 339, 205 S. W. 196, and although it was followed by a majority consisting of four of the seven justices, chiefly, as it would seem, upon the principle of stare decisis, a vigorous dissenting opinion was filed by Justice Faris, concurred in by two of his associates, which is, to our mind, an unanswerable indictment of the theory that income is not property within the meaning of constitutional safeguards. It is true that the cases of *Glasgow v. Rowse* and *Waring v. Savannah*, *supra*, have been cited as authority

by this court, but only to the proposition that "property," as designated in limitations on the taxing power, does not include occupations, privileges, and franchises. Citing a case upon one point is never to be regarded as an approval of the case as to other points not under consideration.

In *State v. Pinder*, 7 Boyce (Del.) 416, 108 Atl. 43, it was contended by the taxpayer that a constitutional provision limited the taxing power to "property," and that income, not being property, was not taxable at all. After reviewing the cases cited to sustain that contention, including the *Georgia* and *Missouri* cases, the court said, per Pennewill, Ch. J.: "In the absence of any authority on the subject, this court would unhesitatingly hold that income is property within the meaning of § 1, art. 8, of our Constitution, and therefore subject to taxation or exemption; shall we hold differently because the court, in a *Georgia* case decided in 1850, declared that income was not property within the meaning of the taxation laws of that state then before the court? We think the distinction drawn by the *Georgia* court was very technical, if not illogical, because, if income is property for other purposes, why should it not be for the purpose of taxation? It is the subject of larceny because it is property, and in these times is universally considered property."

In the noted case of *Pollock v. Farmers' Loan & T. Co.* 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912, *id.* 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673, the Supreme Court of the United States held, on rehearing, that a tax on the income derived from real or personal property is a direct tax on the property itself, which the Federal Constitution prohibited Congress from levying unless it was apportioned among the several states according to population. That case is not strictly in point, of course, for present purposes, but it is persuasive to show the advanced, and now gener-

ally accepted, modern view as to the nature of income and the theory of its taxation.

It is interesting to observe that in all of those states, excepting Georgia and Missouri, where a graduated or unequal tax has been laid on incomes, express authority is found therefor in their constitutions, side by side with the general provisions for uniformity or equality. We mention, among others, Kentucky, Massachusetts, Oklahoma, South Carolina, and Wisconsin, and refer to the following authorities: *Ketchum v. Louisville*, 97 Ky. 394, 28 L.R.A. 480, 30 S. W. 973; *Opinion of Justices*, 220 Mass. 613, 623, 108 N. E. 570; *Tax Comr. v. Putnam* (*Trefry v. Putnam*) 227 Mass. 522, L.R.A.1917F, 806, 116 N. E. 904; *Alderman v. Wells*, 85 S. C. 507, 27 L.R.A. (N.S.) 864, 67 S. E. 781, 21 Ann. Cas. 193; *State ex rel. Bolens v. Frear*, 148 Wis. 456, L.R.A.1915B, 569, 606, 134 N. W. 673, 135 N. W. 164, Ann. Cas. 1913A, 1147.

We attach no importance to the classification of taxable subjects as found in some of the textbooks, since they are obviously founded upon a failure to distinguish between an income tax and an occupation or privilege tax. Mr. Black, in his work on *Income and Other Federal Taxes*, §§ 35-38, says that an income tax is not levied upon property, or trade, or business, or the practice of a profession, but upon the acquisitions of the taxpayer arising from one or more of these sources; and he distinguishes income taxes from license, occupation, and excise taxes. It would seem, therefore, that he regards an income tax as strictly *sui generis*. He offers no reason for the dictum that the pecuniary acquisitions of a taxpayer are not property.

It is not suggested that the tax laid on incomes by our Revenue Act of 1919 is an occupation or a business or a privilege tax, or that it is anything but an income tax in the comprehensive sense in which it has been heretofore defined and consid-

ered. It must, therefore, be held to be a direct imposition upon "property" as such, as that term is used in § 214 of the Constitution of Alabama; and, being in excess of the maximum rate of $\frac{1}{100}$ of 1 per centum therein prescribed, it is plainly and beyond any reasonable doubt offensive to that limitation, and its provisions must, in accordance with our bounden duty in the premises, be pronounced null and void.

It is the view of the chief justice that the income provision, though void as to its levy in excess of $\frac{1}{100}$ of 1 per centum, may nevertheless be upheld as a valid levy *pro tanto*. In our desire to avoid the complete nullification of this important legislative provision, we have given serious and anxious consideration to that suggestion. We have, however, reached the conclusion that to declare it law in that amended form would be in effect nothing less than judicial legislation, and would be a dangerous departure from the settled rules that govern courts in respect to such legislation. The matter of its rate permeated every part and entered into every aspect of the levy. It is clear that the legislature did not intend to tax all incomes alike, and whether they would have allowed any exemptions at all, or in what amounts, under a flat-rate levy of $\frac{1}{100}$ of 1 per centum, and how they would have dealt with other features of the scheme, we cannot say, except as a matter of the sheerest conjecture. If the matter were not complicated by these considerations, it is possible that a way could be found, under the decision of *Wiley v. Parmer*, 14 Ala. 627, to save the levy *pro tanto*.

In that case the point decided was that a nonresident taxpayer could recover the excess paid by him over and above the amount paid by residents, under an act levying a specific tax of \$2 on slaves owned by nonresidents, while the slaves of

Tax-income as property—constitutional limitation.

Constitutional law—giving effect to part of unconstitutional law.

(— Ala. —, 86 So. 56.)

residents were taxed only one half of that amount. The suit was only for the excess, and it was not ruled that the levy was valid pro tanto, though the opinion might perhaps support such an implication.

But, even so, the difficulties we encounter here were wholly absent there. It is better that the state should endure the loss and delay which must follow our ruling than that courts should exercise their at least doubtful discretion in adjusting, mending, or reconstructing unconstitutional legislation. The theory of judicial amendment is exceedingly attractive to our minds, and in accordance with our natural inclinations, but it leads to quagmires of trouble into which we cannot safely enter.

It may be added, too, that if this court should sanction this judicial amendment, it would be immediately confronted with another constitutional difficulty, which it is conceded exists, viz., the denial of exemptions to nonresidents which are granted to residents, thus violating the Federal Constitution in respect

—equal protection—denial of tax exemptions to nonresident.

of the equal protection of the laws, as held by the United States Supreme

Court in the very recent case of *Travis v. Yale & T. Mfg. Co.* 252 U. S. 60, 64 L. ed. 460, 40 Sup. Ct. Rep. 228, and a new and doubtful separation of bad from good would be required.

Answering another contention that has been made, we do not think the view is tenable that the omnibus clause in the Revenue Act of 1919, subd. M, § 5, viz., "all other prop-

Tax-income—general clause in tax law.

erty, real, personal, and mixed," following, as it does, a

statement of specific items of property to be taxed in the ordinary way, and at the ordinary rate, can be construed as inclusive of incomes as property, so as to authorize their assessment under the general law. In the first place, the special treatment of incomes in separate sec-

tions negatives the idea of its inclusion in any general clause like that; and, in the second place, it is a familiar rule in the construction of such clauses that they are intended to include only such

Statute—construction—ejusdem generis.

other things as are ejusdem generis. *Martin v. State*, 156 Ala. 89, 47 So. 104. In accordance with this rule, it is held that express provision must be made by the legislature for the assessment of incomes. *Forman v. Board of Assessors*, 35 La. Ann. 825; 37 Cyc. 810, b.

It results that the petition to enjoin the enforcement of its provisions is grounded in equity, and the demurrer, for want of equity, was properly overruled.

The decree of the Circuit Court will be affirmed.

Sayre, Gardner, Thomas, and Brown, JJ., concur.

Thomas, J. concurring:

I concur in the opinion of the majority, but desire to add the following:

The history of the only amendment or change made in § 211 of the Constitution of 1901 sustains and confirms the decision in this case.

The report of the committee on taxation in the constitutional convention of 1901, in reporting this section, reported that the only amendment to the article of which section 211 formed a part was to add the provision that "no tax shall be assessed upon any debt for rent or hire of real or personal property, while owned by the landlord or hirer during the current year of such rental or hire, if such real or personal property be assessed at its full value."

This committee further reported that this assessment was intended to meet a then recent decision of this court. The style of the case was not given, but it is well known to the bench and bar of this state, and was the case of *L. D. Lusk v. State of Alabama*. It involved the question as to whether or not notes for the rent of land were taxable, if

the land itself was already taxed. This court held that they were, and that it was not double taxation, nor a tax on the land in excess of the constitutional limit. The correctness of that decision was doubted by many members of the legal profession, and one of the justices of this court dissented. The opinion of the court in that case was never officially reported, and not even reported in the Southern Reporter. The said committee of the constitutional convention, composed of some of the most learned lawyers in the state, disagreed as to the correctness of the decision, and in their report said the committee conceived such a tax upon the rent of land the "very worst form of double taxation," and that the amendment was intended to prevent such taxation in the future. That report was adopted by the constitutional convention without a dissenting vote.

While, of course, the Lusk Case may be different from this case, in that there the tax was levied upon choses in action or solvent credits, and here the tax is upon income as property, yet the fundamental constitutional questions as to double taxation and excessive rate of taxation are very similar. If that amendment to § 211 was intended to prevent the double and excessive taxation imposed upon Dr. Lusk, and did so prevent it, then, a fortiori, it prevented much of the income tax levied, or attempted to be levied, by the act in question.

The proposed income tax provisions of the statute before us unquestionably attempted to levy a tax upon the rents of land when and after the land is taxed; this is what the Constitution makers intended to prevent. If I may be pardoned for making the reference, the writer of this concurrence was of counsel for Dr. Lusk in that case, and he was then, and has ever since been, of the opinion that the opinion of this court in the Lusk Case was in error. There can be no doubt that the Constitution makers intended, by the

amendment quoted above, to cure that error, and prevent the repetition of similar taxes being thereafter levied. To my mind there is no doubt that if the tax sustained in the Lusk Case was prevented by the amendment of the Constitution, then the tax here levied against incomes which are received as rent from land is prevented. Calling one a tax upon solvent credits and the other an income tax can make no difference.

Anderson, Ch. J., dissenting:

While I agree, for reasons set forth in the opinion of Somerville, J., that the tax in question is controlled by § 214 of the Constitution of 1901, and cannot exceed $\frac{65}{100}$ of 1 per centum, I am of the opinion that the provision of the act under consideration is only void as to the excess, and is not invalid in its entirety, as was held by the trial court. The excess can be stricken without impairing the purpose or integrity of the provision, and without violating the legislative intent. The elimination of the rate in excess of constitutional limitation narrows rather than extends the operation of the provision. As the legislature levied 2 per centum and over in certain instances, it unquestionably intended to levy as much as .65 of 1 per centum. *Wiley v. Parmer*, 14 Ala. 627; *Ensley v. Cohn*, 149 Ala. 316, 42 So. 827; *Wilkinson v. Stiles*, 200 Ala. 279, 76 So. 45; *State v. Davis*, 130 Ala. 148, 89 Am. St. Rep. 23, 30 So. 344, and cases there cited. The case of *Wiley v. Parmer*, supra, involved a tax in excess of constitutional restrictions, and the taxpayer was relieved from only so much of said tax as exceeded the limit. This case has never been overruled, but has been several times cited. But, as an original proposition, I would not have felt warranted in striking down this solemn legislative provision in its entirety, as it is conceded to be lawful and valid, except in so far as the rate exceeds constitutional limitations as fixed by § 214.

The case of *Goodwin v. Birmingham*, 203 Ala. 274, 82 So. 524, cited and relied upon by counsel for appellee, is in no sense in conflict with this holding. That case involved an election for a twenty-five-year tax for school purposes, and the issuance of bonds covering said period, etc., whereas under the law the tax could not have been levied except for a period of ten years; and this court held, and properly so, that it could not say that the voters would have favored the tax levy, bond issue, etc., had they been given only ten instead of twenty-five years within which to make school improvements and meet the incurred obligations.

It appears from the opinion of the majority that the elimination of the excess might do violence to the legislative intent and result in a judicial amendment of the act. In reply to this suggestion, I merely quote the last legislative expression as found in § 424 of the act, and which is conclusive on the court as to the legislative intent, notwithstanding the question of separability is one for the court, and to my mind the elimination of the excess would leave a complete enactment at .65 of 1 per centum. Said section reads as follows: "If any section, clause, provision or portion of this act shall be held to be invalid or unconstitutional by any court of competent jurisdiction, such holding shall not affect any other section, clause, provision or portion of this act which is not in and of itself unconstitutional."

I therefore dissent from striking down the provision in its entirety.

McClellan, J., dissenting:

The majority of the court completely annul the income tax feature

of the Revenue Act of 1919. I dissent from that conclusion. My judgment is that the income tax feature is only partially inoperative, not wholly invalid. While I agree that a tax on money or property held in the possession of the taxpayer at the end of the income tax year is a property tax within the meaning of the limitation fixed in § 214 of the Constitution, I cannot agree that a tax levied on such part of the whole of the income that has been expended or exhausted by the earner during the tax year is or can be a tax on property within the purview of that section. Such expended or exhausted part of the income of the earner is not properly held or possessed by him in such manner as to be subject to a property tax. It cannot be seized, condemned, or confiscated, and is hence not "taxable property," within the deliberately pronounced definition of that term as set forth in *Western U. Teleg. Co. v. State Bd of Assessment*, 80 Ala. at 278, 60 Am. Rep. 99. It is my opinion that the income tax levied is inoperative only to the extent that it exceeds the rate fixed by § 214 of the Constitution when imposed on income actually held by the taxpayer at the end of the tax year.

But assuming that the majority opinion is correct in holding that the entire income of the earner is property within the limitation of § 214 of the Constitution, I concur with Chief Justice Anderson in the view expressed in the foregoing opinion, namely, that it is only invalid to the extent that the rate fixed is in excess of the limitation prescribed by the Constitution.

Petition for rehearing denied June 30, 1920.

ANNOTATION.

Income as "property" within constitutional limitations on taxation.

There is a decided conflict of authority among the few cases which have passed upon the question under consideration herein.

The court in the reported case (*ELIASBERG BROS. MERCANTILE CO. v. GRIMES*, ante, 300), it will be remembered, squarely takes the position that

income is property, within the meaning of the Alabama constitutional provision limiting the tax rate to a certain percentage of the value of the taxable property within the state. And that income is "property" within the meaning of a provision of the Delaware Constitution, providing for the taxation of such property as the legislature shall not exempt, see *State v. Pinder* (1919) 7 Boyce (Del.) 416, 108 Atl. 43, as set out and quoted in the GRIMES CASE.

But, as stated in the reported case (*ELIASBERG BROS. MERCANTILE CO. v. GRIMES*, ante, 300), there is authority to the effect that income is not "property" within the meaning of some constitutional limitations. To this effect was the decision in the cited and quoted case of *Waring v. Savannah* (1878) 60 Ga. 93, wherein it was held that income was not property within the meaning of a constitutional provision that taxes must be uniform on all species of property taxed, and therefore that it was not necessary to tax it at the same rate as other property. Again, in *Glasgow v. Rowse* (1869) 43 Mo. 479, it was expressly held that an income tax was not a tax on property within the meaning of a constitutional provision requiring taxation upon property to be in proportion to its value, so that an Income Tax Statute, imposing a different rate of tax on incomes of different classes of persons, was not invalid as violative of such a constitutional provision. And this decision was followed by the majority of the court in the recent Missouri case of *Ludlow-Saylor Wire Co. v. Wollbrinck* (1918) 275 Mo. 339, 205 S. W. 196, which involved the same identical question, but, as noted in the majority opinion in the reported case, there was a strong dissent, which was in its opinion "an unanswerable indictment of the theory that income is not property within the meaning of constitutional safeguards." For a further holding to the effect that a tax on income is not a tax on property within general constitutional limitations, see opinion of Peaslee, J., in Opinion of Justices (1915) 77 N. H. 611, 93 Atl. 311. Both *Waring v. Savannah* (Ga.) and *Glasgow v. Rowse* (Mo.) supra,

are expressly criticized in the reported case (*ELIASBERG BROS. MERCANTILE CO. v. GRIMES*, ante, 300), and the reasoning of the court in the *Glasgow Case* is referred to in *State v. Pinder* (Del.) supra, as "very technical, if not illogical."

And it seems clear that a constitutional provision that the legislature must provide for a uniform and equal rate of taxation, and prescribe regulations to secure a just valuation for taxation of all property, does not apply to income where the provision contains an express proviso to the effect that the legislature "may provide for a graduated tax on incomes." It was expressly so held in *Alderman v. Wells* (1910) 85 S. C. 507, 27 L.R.A.(N.S.) 864, 67 S. E. 781, 21 Ann. Cas. 193. Likewise, in *State ex rel. Bolens v. Frear* (1912) 148 Wis. 456, L.R.A. 1915B, 569, 134 N. W. 673, 135 N. W. 164, Ann. Cas. 1913A, 1147, error dismissed for want of jurisdiction in (1914) 231 U. S. 616, 58 L. ed. 400, 34 Sup. Ct. Rep. 272, it clearly appears that the court was of a similar opinion. At least, Winslow, Ch. J., in delivering the opinion of the court, said that when the Constitution provides that "the rule of taxation shall be uniform, and taxes shall be levied upon such property as the legislature shall provide," and was amended by the addition of the following words: "Taxes may also be imposed on incomes, . . . which taxes may be graduated, and progressive and reasonable exemptions may be provided," —both the legislature and the people clearly expressed "the idea that some form of general taxation in addition to, or in place of, property taxation, might well be adopted." And again, in *State ex rel. Atwood v. Johnson* (1919) — Wis. —, 7 A.L.R. 1617, 175 N. W. 589, the Wisconsin supreme court said: "Since the passage of the Income Tax Law, we have in this state two independent systems of taxation, namely, property tax and income tax, and, while the uniformity clause of the Constitution applies to property tax, it has no application to income tax," and then set out the provisions of the amendment quoted in connection with the next preceding case. G. J. C.

JOSEPHINE HAMMOND, Appt.,
v.
ADDIE MYERS et al.

Illinois Supreme Court — February 18, 1920.

(292 Ill. 270, 126 N. E. 537.)

Will — meaning of "nearest akin."

The words "nearest akin," in a will distributing real estate after a life estate, mean nearest blood relatives, so that brothers and sisters take in exclusion of nephews and nieces.

[See note on this question beginning on page 329.]

APPEAL by plaintiff from a decree of the Circuit Court for Edgar County (Marshall, J.) in favor of defendants on their cross appeal in a suit for the partition of certain real estate. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Walter S. Lamon and Joseph E. Dyas for appellant.

Messrs. J. K. Lauher and Paul B. Lauher for appellees.

Thompson, J., delivered the opinion of the court:

The question presented by this appeal is the construction to be given the words "nearest akin," in the following paragraph of the will of John Love, deceased: "I give, devise, and bequeath unto my son Robert Linton Love forty (40) acres of land, . . . to have and to hold the same during his natural life, for his support and maintenance during his natural life. After his death to revert to his nearest akin."

The will was executed December 6, 1886, the testator died February 19, 1888, and the will was admitted to probate March 9, 1888. February 9, 1918, Robert Linton Love, son of the testator and devisee under the will, died, leaving him surviving no widow, parent, or child, but leaving him surviving a sister, a brother, seven nieces, and five nephews. May 3, 1918, Josephine Hammond, surviving sister of Robert Linton Love, filed her bill seeking partition of the real estate described in the will, and making her brother and her nieces and nephews defendants. By her bill she claims to be the owner of an undivided half of said real estate as

tenant in common with her brother, and that the nieces and nephews of Robert Linton Love have no interest in the premises. The defendants answered the bill, admitting all its allegations except that with reference to the interests of the parties. Defendants filed a cross bill, setting forth the interests of the parties and the relation of the parties to Robert Linton Love, deceased, as follows: Charles M. Love, brother, Josephine Hammond, sister, and Addie Myers, only child of a deceased sister, each $\frac{6}{360}$ of the premises; Howard Wallace and Bessie Bonwell, children of a deceased son of a deceased sister, each $\frac{3}{360}$; Clyde Taylor, Emma Kester, Ella Richmond, and William H. Taylor, children of a deceased sister, each $\frac{1}{360}$; and Horace G. Phillips, Elizabeth Lemmons, Belle Connor, Anna Jones, and Charles J. Phillips, children of a deceased sister, each $\frac{1}{360}$. The cause was heard upon the bill, cross bill, and answers, and a decree entered finding that the interests of the parties in said real estate were correctly set forth in the cross bill, and ordering partition of said premises accordingly. From this decree appellant prayed and perfected her appeal.

The evidence shows that at the time this will was executed the living heirs of the testator were two

sons, four daughters, and five grandchildren, children of a deceased daughter, Margaret L. Phillips. Subsequent to the making of the will, and subsequent to the death of the testator, but prior to the death of Robert Linton Love, the life tenant, three daughters of the testator, Belle Myers, Harriet Taylor, and Elizabeth Wallace, died, leaving surviving them children, who, with the children of Margaret Phillips, claim to be entitled to an interest in the land here in question, as set forth in the cross bill. In 1886 the testator, John Love, had some personal property and 180 acres of land. He disposed of 40 acres of this land by will to take care of his son Robert Linton Love, who was not mentally capable of caring for himself. All of the remainder of his property passed intestate, and was sold by the administrator of his estate. The only land held in common by the parties to this suit is the 40 acres here in question.

As we have said, the only question presented here is whether the words "nearest akin," in the will, mean nearest blood relations, or include all those relations who would take under the Statute of Distributions. The terms "nearest of kin," "next of kin," and similar phrases used in wills, have been the subject of serious consideration by the courts of last resort of this and other countries. Redfield, in his work on Wills (vol. 2, 2d ed. p. 75), says: "Bequests to the next of kin of the testator or of some person named have received somewhat different constructions in the early cases, and different views have been maintained by different judges of great learning and ability. On the one hand, the terms were held to include those only who would take under the Statute of Distributions. Of this opinion were Mr. Justice Buller, Lord Kenyon, and Sir John Leach. And on the other hand were Lord Thurlow, Lord Eldon, Sir William Grant, and the decision of Sir T. Plumer in *Brandon v. Brandon*, 3 Swanst. 312, 36 Eng. Reprint, 876, 2 Wils. Ch. 14,

37 Eng. Reprint, 209, who all maintain that the terms 'next of kin' apply to those nearest in kindred to the propositus, and exclude all of more remote degree. The question came before the court in *Elmsley v. Young*, 2 Myl. & K. 82, 39 Eng. Reprint, 875, 3 L. J. Ch. N. S. 17, and at the rolls it was held that the words 'next of kin,' used simpliciter and without explanatory context, must be taken to mean next of kin according to the Statute of Distributions, but upon appeal before the lords commissioners the judgment upon this point was reversed, and the cases very extensively reviewed by their lordships. It was here held that the words 'next of kin' must be construed to mean, when used simpliciter, nearest of kin; and so a brother of the propositus will take the whole bequest, to the exclusion of the children of a deceased brother or sister. This subject was discussed at length before the House of Lords in *Withy v. Mangles*, 10 Clark & F. 215, 8 Eng. Reprint, 724, 10 L. J. Ch. N. S. 391, and the conclusion reached that *Elmsley v. Young* must be regarded as the settled law in regard to this point. . . . Lord Cottenham said the term 'next of kin,' under the Statute of Distributions, 'had been inaccurately used, since the statute carefully avoided using any such form of expression, without qualification, allowing the representation of those who had deceased of the nearest kindred, unless more remote than brothers' and sisters' children.' His lordship maintained that the term 'next of kin' had acquired no such popular import as to include those who would take under the Statute of Distributions in case of intestacy."

Thompson, in his work on Wills (§ 170), says: "The term 'next of kin' is limited in legal meaning, as in common use, to blood relations. . . . Under a gift to 'next of kin,' a brother or sister will take to the exclusion of the children of a deceased brother or sister. The term does not mean all those who would take under the Statute of Distributions. It sig-

nifies those who stand in the nearest relationship to the intestate according to the rules of the civil law for computing degrees of kinship."

Page, in his work on Wills (§ 521), says: "The words 'next of kin' do not, of themselves, impart succession ab intestato, and, taken alone, mean nothing more than nearest blood relations; and unless there is something more in the will indicating that the testator intended statutory next of kin, or that the property should be distributed as intestate property, the words must have their customary meaning. The words 'next of kin,' in a will, mean the nearest blood relations, and not all those who would take under the Statute of Distributions. Thus, 'next of kin' means a brother in preference to nephews, sons of a deceased brother."

See also 2 Jarman on Wills, 644.

The rule above stated is supported by the courts of last resort in this country. Swasey v. Jaques, 144 Mass. 135, 59 Am. Rep. 65, 10 N. E. 758; Leonard v. Haworth, 171 Mass. 496, 51 N. E. 7; Locke v. Locke, 45 N. J. Eq. 97, 16 Atl. 49; Galloway v. Babb, 77 N. H. 259, 90 Atl. 968; De Graffenreid v. Iowa Land & T. Co. 20 Okla. 687, 95 Pac. 624; Morse v. Lowe, 182 Mich. 607, 148 N. W. 970; Jones v. Parsons, 182 Iowa, 1377, 166 N. W. 707; Smith v. Egan, 258 Mo. 569, 167 S. W. 971, Ann. Cas. 1915D, 723.

While this court has never passed upon the precise question here presented, the courts which we have cited have given the question careful and able consideration, and we see no

reason why the rule established with such uniformity should not be adopted as the rule to be followed in this state. The meaning given the term "next of kin," in *Chicago & A. R. Co. v. Shannon*, 43 Ill. 338, furnishes no guide to a determination of the question now before us, for the reason that the phrase, as there used, was a technical legal phrase in a statute, and we held it to have been used by the legislature in its technical sense.

It follows therefore that the chancellor erred in ordering distribution among the legal heirs of the deceased in accordance with the Statute of Descent. The term "nearest akin" must be held to mean nearest blood relation. Will—meaning of "nearest akin."

Manifestly, a sister and a brother are nearer blood relations than a niece or a nephew, and therefore the prayer of the original bill should have been granted, and partition ordered between the appellant, Josephine Hammond, and the appellee, Charles M. Love.

The decree is reversed, and the cause is remanded to the Circuit Court of Edgar County for further proceedings consistent with the views herein expressed.

Petition for rehearing denied April 7, 1920.

NOTE.

The effect of the word "nearest," in testamentary gifts to "nearest heir," "nearest of kin," and the like, is the subject of the annotation following *KELLO v. KELLO*, post, 329.

ANDREW GODFREY et al., Plffs. in Err.,

v.

AMELIA EPPLE et al.

Ohio Supreme Court—December 9, 1919.

(100 Ohio St. 447, 126 N. E. 886.)

Will — nearest of kin — definition.

1. The phrase "nearest of kin," when employed in a last will and testa-

Headnote 1 by the COURT.

ment, in the absence of language in the will manifesting a different intention, is to be so construed as to embrace within its meaning such as would inherit under the Statutes of Descent and Distribution, and in the order and proportion therein provided.

[See note on this question beginning on page 329.]

— construction — presumption in favor of heir.

2. The presumption in favor of the heir at law in construing a will yields to the manifest intention of the testator, but only to this intention as gathered from express words of the will.

— division between groups — kin of husband and wife.

3. A bequest to be equally divided "between my and my wife's nearest kin, they sharing like and like," gives one half to each group, where the groups are unequal in numbers, the words "sharing like and like" applying only as between the members of the respective groups.

ERROR to the Court of Appeals for Meigs County to review a judgment in favor of defendants in a proceeding for the construction of parts of the will of Berthold Siemer, deceased. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. C. L. Cronebaugh, F. S. Monnett, and H. C. Fish for plaintiffs in error:

Messrs. Schorr & Wesselmann and Manning S. Webster, for defendants in error Meinshausen, et al.:

Testator, by the use of the designation "nearest kin," included his living sisters, as well as the representatives of his deceased brothers and sisters; the provision intended by him to be made in his will was a general family provision, in accord with the commonly accepted meaning of that term, and as it is used generally in all walks of life.

16 Am. & Eng. Enc. Laws, 700; Swasey v. Jaques, 144 Mass. 135, 59 Am. Rep. 65, 10 N. E. 758; Redmond v. Burroughs, 63 N. C. 242; Jones v. Oliver, 38 N. C. (3 Ired. Eq.) 369; Steel v. Kurtz, 28 Ohio St. 191, approved and followed in Schroth v. Noble, 91 Ohio St. 438, 110 N. E. 1067; Warren v. Englehart, 13 Neb. 283, 13 N. W. 401; Chicago & A. R. Co. v. Shannon, 43 Ill. 338; Merchants' Ins. Co. v. Hinman, 34 Barb. 410; Snedeker v. Snedeker, 47 App. Div. 471, 63 N. Y. Supp. 580; Esty v. Clark, 101 Mass. 36, 3 Am. Rep. 320; Blagge v. Balch, 162 U. S. 439, 40 L. ed. 1032, 16 Sup. Ct. Rep. 853; Geery v. Skelding, 62 Conn. 499, 27 Atl. 77; Conklin v. Davis, 63 Conn. 377, 28 Atl. 537; Slosson v. Lynch, 28 How. Pr. 417; Murdock v. Ward, 67 N. Y. 387; Wilkins v. Ordway, 59 N. H. 378, 47 Am. Rep. 215; Pinkham v. Blair, 57 N. H. 226; Varrell v. Wendell, 20 N. H. 481; Lusby

v. Cobb, 80 Miss. 715, 32 So. 6; May v. Lewis, 132 N. C. 115, 43 S. E. 550.

All those who are of the blood of the testator are clearly within purview of the saving provisions of § 10,581 of the General Code.

Woolley v. Paxson, 46 Ohio St. 307, 24 N. E. 599; Shumaker v. Pearson, 67 Ohio St. 330, 65 N. E. 1005; Schaefer v. Bernhardt, 76 Ohio St. 443, 81 N. E. 640, 10 Ann. Cas. 919; Mather v. Copeland, 5 Ohio N. P. 151; Porterfield v. Porterfield, 4 Ohio N. P. N. S. 654; Nutter v. Vickery, 64 Me. 490; Moses v. Allen, 81 Me. 268, 17 Atl. 66; Bray v. Pullen, 84 Me. 185, 24 Atl. 811; Howland v. Slade, 155 Mass. 415, 29 N. E. 631; Strong v. Smith, 84 Mich. 567, 48 N. W. 183; Minter's Appeal, 40 Pa. 111; Youngblood v. Youngblood, 11 Ohio C. C. N. S. 278.

Whilst item second of testator's will contemplates, under the circumstances therein set forth, a division of his estate into three equal parts, item third, far from contemplating such a division, provides expressly and unmistakably for an equal division (no matter how infinitely small the component parts of the division may be), leaving the number of those parts to be determined by the members composing the "nearest kin."

Doe ex dem. Kean v. Roe, 2 Harr. (Del.) 103, 29 Am. Dec. 336; McIntire v. McIntire, 192 U. S. 116, 48 L. ed. 371, 24 Sup. Ct. Rep. 196; Kling v. Schnellbecker, 107 Iowa, 636, 78 N. W. 673; Lee v. Lee, 39 Barb. 172; Purnell v. Culbertson, 12 Bush, 369; Myres v.

Myres, 23 How. Pr. 410; Jones v. Day, 102 Md. 99, 62 Atl. 364; Guesnard v. Guesnard, 173 Ala. 250, 55 So. 524; Lord v. Moore, 20 Conn. 122; Rogers v. Morrell, 82 S. C. 402, 129 Am. St. Rep. 899, 64 S. E. 143; Graves v. Graves, 55 Hun, 58, 8 N. Y. Supp. 284; Stearns v. Brandeberry, 29 Ohio C. A. 349.

Messrs. A. D. Russell and D. Curtis Reed, for other defendants in error:

Nichols, Ch. J., delivered the opinion of the court:

Items 2 and 3 of the last will of Berthold Siemer, late of Meigs county, Ohio, read as follows:

"Item 2d. In the event that my said wife should remarry, then I will and direct that my estate shall be divided in three equal shares, giving to my said wife one share and the other two shares shall go to my nearest kin.

"Item 3d. If my said wife does not remarry then after her death all estate then in existence shall be equally divided between my and my wife's nearest kin, they sharing like and like."

The testator died in February, 1915. His widow, Susanna Siemer, who did not remarry, died in June, 1917.

The case at bar involves a construction of the phrase "nearest kin," as employed in item 3. It also requires construction of the word "between," as associated with the clause, "they sharing like and like."

The testator had two brothers, both of whom were dead at the date of the execution of the will, and both of whom left lineal descendants.

He had five sisters, two of whom survived both him and his widow, and three of whom were dead at the time of the execution of the will, each, however, leaving lineal descendants.

The widow, Susanna Siemer, had two brothers and one sister. One brother and one sister departed this life before the execution of the will, leaving, however, lineal descendants who survived both testator and his widow. Her other brother survived both testator and herself.

Item 2 of the will is made a part

of the opinion, as it is thought it extends some assistance in arriving at the true intention of the testator, although the real devise of the property involved is covered by item 3.

The first question is: Does the phrase "nearest kin" exclude the children of the deceased brothers and sisters and restrict the devise to the two sisters, in the one instance, and the one brother, in the other, or should the doctrine of participation by representation prevail?

It is the claim of the surviving brother and sisters that the rule established in the case of Clayton v. Drake, 17 Ohio St. 367, if applied in the instant case, will limit the division of the estate to them.

The court in that case did give to the phrase "next of kin" a strictly technical definition, the effect of which was to defeat participation by representation. The court was, however, construing the term as found in the Statutes of Descent and Distribution, afterwards amended, and not as employed in a will.

If the facts in the case were precisely similar to the situation as developed in the case of Clayton v. Drake, *supra*, we would be disposed to be loath to disturb the doctrine there established, as a rule of property was there laid down; but since, as we have said before, the construction in the Drake Case is of the expression found in a statute, and not in a will, we do not regard the doctrine of the Drake Case as having that binding force and effect that would preclude a consideration anew of the law question involved in the case.

We are justified in this course of action, in the first place, by the doctrine established in the case of Steel v. Kurtz, 28 Ohio St. 191. Here "next of kin" was given a far broader meaning than ascribed to it in the Drake Case. A surviving husband was held to be the sole next of kin of a deceased wife (there being no children), to the exclusion of the brothers and sisters of the deceased. In the statute there under review it is provided that the damages recovered

should be distributed to the widow and "next of kin." There is no express provision in the act for the representatives of the next of kin nor for the surviving husband.

It is quite true that the act regulating the disposition of the fund recovered in an action for wrongful death, in force at the time of the decision in *Steel v. Kurtz*, did provide that the fund should be distributed to the widow and next of kin in the proportion provided by law in relation to the distribution of personal estates left by persons dying intestate. But it is obvious that this portion of the statute did not have the effect of enlarging the field of beneficiaries beyond those nominated in the law; its only effect being to determine the proportionate part each should receive. So we must conclude that it was only through a construction including a husband as the next of kin of a deceased wife that the surviving husband could participate in such fund.

It is the unquestioned doctrine of that case that the words "next of kin," wherever found in our Code, should comprehensively include all who are included in our Statutes of Descent and Distribution in the order and proportion therein provided. It is the unmistakable policy of Ohio, as evidenced by the entire General Code, that the representatives of next of kin should participate in the distribution of intestate property.

While it is true that in the Statutes of Distribution, for the sake of certainty, the general assembly has invariably added, after the phrase "next of kin," the words "or their legal representatives," yet, rather than deduce from this fact that there was a legislative acquiescence in the technical definition of "next of kin," it may be safely said that it was the firm intention of the general assembly to protect the representatives of deceased next of kin against all possibility of narrow judicial construction.

Under these circumstances, we are disposed to follow the broad construction of "next of kin" as em-

ployed in the *Kurtz* Case, *supra*, rather than the limited meaning given it in the *Drake* Case, *supra*. Both of these cases gave interpretation to the language as found in the statute. Construing the same or similar language found in a will, we are at liberty to depart from the narrower construction and call to our assistance some of the well-known rules of will construction.

We here meet with the expression "nearest of kin" rather than "next of kin," but we are not inclined to give any added force to the superlative "nearest." It is concededly difficult to distinguish between "next of kin," "nearest of kin," "nearest kindred," and associated expressions. Almost universally courts have declined to draw a shade of difference in their real meaning. In a primary sense, some authors say these expressions indicate the nearest degree of consanguinity.

This sense of the term would necessarily exclude a wife or husband from the category of "nearest of kin." If it were followed, it would mean that, if a married man by his last will should provide simply that his property should pass to his nearest of kin, his wife, should she elect to take under the will, would be barred from all participation in the estate; and yet it is indisputable that, if the married man in whose home domestic felicity reigned were asked as to his conception of the personnel of his nearest of kin, his certain reply would be, "My wife." The primary sense, it is therefore fair to say, is not by any means the universal, or even popular, sense of the term.

In many jurisdictions, especially in the English courts, it is held that in the construction of wills "next of kin" must be understood to mean nearest of kin, without regard to the Statutes of Distribution. It is possibly true that the weight of authority in America is in accord with the modern English rule. Notwithstanding this fact, we feel constrained to give to this expression, when found in a will, the same broad

meaning that was given it by the court in the Kurtz Case, *supra*, in construing a statute.

The construction given the expression by the courts of England operates to disinherit the heir at law, and is in derogation of the natural line of inheritance. There is a primary rule applicable to the construction of wills that the heir at law shall not be disinherited by conjecture, but only by express words, or necessary implication. It is said by as eminent an authority as Mr. James Schouler, ¶ 479 of the Students' edition of his treatise on Wills, that the policy of modern times is to extend the presumption in favor of the heir at law "to any one or all closely related who would, independently of a will, have taken the property in question under the appropriate Statutes of Descent and Distribution." The same author, in the same paragraph, says: "In case of doubt a construction of the will as to property which conforms most clearly to the general Statutes of Descent and Distribution should prevail."

The rule of presumption in favor of the heir at law must yield, it is true, to the manifest intention of the testator, but only, as we have just observed, if this intention be gathered from express words of the will. Had the testator provided, for instance, that, at the death of his widow, the property should descend to his surviving brothers and sisters, we would have met with an unequivocal disinheritance of the children of his dead brothers. Under such circumstances, the rule of presumption in favor of the statutory heir passes out. We do not feel inclined to favor a construction, unless it be a necessary one, against all principles of natural justice, and against the well-settled policy of inheritance as provided by our law.

We believe that the children of a testator's deceased brothers and sisters have just as much claim on

his bounty as his living brother and sister would have. Abstract justice would say so, the written law regards them with equal favor, and we are unwilling to ascribe to a testator, unless the plain language of his will would compel us, the harsh intention of doing that which the law says ought not be done, even though it permits it to be done.

If the terms and expression employed by a testator forbid interpretation by reason of their clarity, we are without power in the premises. However, the expression "nearest of kin" is not of that patent unambiguity that prohibits construction. While technically the term might exclude the children of a deceased brother or sister, yet we find eminent authority and modern precedent holding that its true meaning is comprehensive enough to include all who would take under the Statute of Descent and Distribution. Having the

—nearest of kin
—definition.

choice, therefore, of construction, we are disposed to adopt the interpretation that appears to us to be most consonant with the principles of natural justice, and which conforms to the well-settled legislative policy of the state, as well as the later judicial construction given the same phrase when found in our statutes.

The remaining question in controversy has reference to the division of the estate as between the testator's and his widow's nearest of kin. They are unequal in number. It is urged by the nearest of kin of the testator that the use of the expression "they sharing like and like" implies the meaning that all are to be placed in one class and each to receive his or her aliquot part, regardless of whether they be of the testator's or his widow's nearest of kin.

The claim of the widow's nearest of kin is that the true meaning and intention of the testator is to give one half to his own nearest of kin and the other half to his widow's;

nearest of kin. The court of appeals so construed the will, and we are in full accord with this construction. The expression "they sharing like and like," we believe, has reference to the proportionate share that each one of the two classes shall take, and does not operate to alter the plain meaning of the word "between." It has no broader meaning than would be ascribed to the term "equally." It simply divides the devisees into two groups or classes, and is not intended to provide that each individual devisee, without

—division between groups—
kin of husband
and wife.

reference to his classification, shall share alike with his fellow.

The judgment of the Court of Appeals is therefore affirmed in all things, and the cause is remanded to the Court of Common Pleas of Meigs County for further proceedings according to law.

Jones, Matthias, Johnson, Donahue, Wanamaker, and Robinson, JJ., concur.

NOTE.

The effect of the word "nearest" in testamentary gifts to "nearest of kin" or the like is treated in the annotation following *KELLO v. KELLO*, post, 329.

E. D. KELLO, Appt.,

v.

JOHN G. KELLO, JR., et al., Exrs., etc., of John G. Kello, Deceased, et al., Respts.

Virginia Supreme Court of Appeals—June 10, 1920.

(— Va. —, 103 S. E. 633.)

Will — meaning of "nearest heirs."

1. A provision in a will giving a residue to testator's nearest heirs does not mean nearest blood relatives, so as to vest title in a brother, to the exclusion of children of deceased brothers and sisters, where there is also a provision for a partition between all then living nearest heirs, and a special gift to the brother, but the words will be construed as synonymous with "next of kin," as provided by the Statute of Descent and Distribution.

[See note on this question beginning on page 329.]

— construction — effect to every word.

2. A will should be so interpreted as to give effect to every part and word thereof, provided some effect can

be given to each word not inconsistent with the general intent manifested by the entire instrument.

APPEAL by complainant from a decree of the Circuit Court for Southampton County, directing division of the estate of John G. Kello, deceased, in a suit for the construction of his will. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. John N. Sebrell, Jr., for appellant.

Messrs. James H. Corbitt and James T. Gillett, for infant respondents:

In construing wills, it is universally admitted that the intention of the testator must be sought after as the "polestar;" and, when found, must be followed as the "sovereign guide."

Wootton v. Redd, 12 Gratt. 196; Rhett v. Mason, 18 Gratt. 541; Hooe v. Hooe, 13 Gratt. 245; Hatcher v. Hatcher, 80 Va. 169.

The words "nearest heirs" in the will are not used simpliciter, but the other provisions of the will and the circumstances along with the words themselves show that the testator

meant by the words "nearest heirs" all those of his blood who would be entitled to share in case of intestacy.

9 R. C. L. p. 26; *Southgate v. Clinch*, 4 Jur. N. S. 428, 27 L. J. Ch. N. S. 655, 6 Week. Rep. 489; *Fuller v. Chamier*, L. R. 2 Eq. 682, 12 Jur. N. S. 642, 35 L. J. Ch. N. S. 772, 14 Week. Rep. 913; *Gwynne v. Muddock*, 14 Ves. Jr. 488, 33 Eng. Reprint, 608, 9 Revised Rep. 327; *Ryan v. Allen*, 120 Ill. 648, 12 N. E. 65; *Jones v. Jones*, 201 Pa. 548, 51 Atl. 362; *Stokes v. Van Wyck*, 83 Va. 724, 3 S. E. 387; *Slosson v. Lynch*, 28 How. Pr. 417; *Murdock v. Ward*, 67 N. Y. 387; *Pinkham v. Blair*, 57 N. H. 226; *Sander's Estate*, 126 Wis. 660, 105 N. W. 1064, 5 Ann. Cas. 508.

If the words "nearest heirs" had been used simpliciter, the words "nearest" would not vary the effect of the devise, and the heirs generally would take "equally" per capita.

Perdue v. Starkey, 117 Va. 806, 86 S. E. 158, Ann. Cas. 1916C, 409.

Saunders, J., delivered the opinion of the court:

This appeal brings before this court for construction the will of John G. Kello, a citizen of Southampton county. The will is herewith reproduced in full:

I, John G. Kello, of the county of Southampton and state of Virginia, being of sound and disposing mind, do hereby make, publish and declare this to be my last will and testament, hereby revoking all other wills by me at any time made:

First. I desire all my just debts to be paid if I should owe any at my death.

Second. I give to Alex Bradshaw and his sister Antonette Bradshaw the farm on which they have lived for a number of years and on which they now live, during their lives, and at their deaths to be sold and divided between my then living nearest heirs.

Third. I give to my brother, Everett D. Kello, \$1,000.

Fourth. I give to my niece Maggie P. Barrett \$1,000.

Fifth. I give to my niece Aleas Simmons \$1,000.

Sixth. I give to my niece Mary Mary O. Kello \$1,000.

Seventh. The balance of my estate

I desire to be divided equally between all of my then living nearest heirs.

Eighth. I give to my executors hereinafter mentioned full power to sell all of my real estate except that left in section two, of this will, to Alex and Antonette Bradshaw, for purposes of equal partition among all of then living nearest heirs.

Ninth. I do hereby nominate and appoint my nephew, John G. Kello, Jr., and Thomas S. Kello as my executors of this, my last will and testament.

In witness whereof I hereunto subscribe my name and affix my seal to this my last will and testament on this 30th day of March, 1916.

John G. Kello. [Seal.]

The testator, who was a bachelor about seventy years old, left surviving him heirs in three different degrees of kinship, as follows:

(1) A brother, E. D. Kello.

(2) Seven nephews and nieces, viz., John G. Kello, Jr., S. T. Kello (in the will T. S. Kello), J. R. Kello, Jr., Elise Simmons (in the will Aleas Simmons), Mattie O. Kello (in the will Mary O. Kello), Samuel H. Delk, and Maggie U. Barrett (in the will Maggie P. Barrett). John G. Kello, Jr., S. T. Kello, J. R. Kello, Jr., Mattie O. Kello, and Elise Simmons are the children of J. R. Kello, a brother of the testator; and Samuel H. Delk and Maggie U. Barrett are the children of Mrs. Delk, a sister. This brother and sister predeceased the testator.

(3) One great-niece, Mary O. Davis, and two great-nephews, John D. Delk and Thomas E. Delk. The latter two are the children of "Buggy" Delk, a dead son of Mrs. George Delk. Mary O. Davis is the daughter of Nettie Kello Davis, a deceased daughter of J. R. Kello.

The testator left an estate valued at about \$30,000. The executors construed the will to mean that the estate should be divided equally between the brother and the nephews and nieces, to the exclusion of the more remote kin, and were proceeding to settle the estate upon that

theory when they were interrupted in the execution of this purpose by a suit brought by Mary O. Davis, the great-niece, claiming an equal interest in the fund. For some unexplained reason this suit was dismissed. Thereupon, E. D. Kello, the brother, filed a bill claiming the entire residuum, on the ground that he was the nearest living kin of the testator at the death of the latter.

This bill was taken for confessed as to the adult defendants, no answer or appearance of any kind having been made by them. An answer was filed for the infants, Mary O. Davis, John D. Delk, and Thomas E. Delk, by a regularly appointed guardian ad litem. This answer challenged the contention that the will, properly construed, lodged the residuum in the brother, Everett D. Kello, and insisted that, according to the true intent of the testator, this residuum should be equally divided between all his heirs, living at the time of his death; to wit, the above-recited brother, nephews and nieces, and great-nieces and great-nephews.

In August, 1919, the circuit court of Southampton county entered a final decree in the above cause, directing the executors to divide the residuum into eleven equal parts, and give one part each to the brother of the testator, to the nephews and nieces, and to the great-nephews and great-nieces, as above described. To this decree, on the petition of E. D. Kello, the plaintiff in the suit in the circuit court, an appeal and supersedeas was allowed by one of the judges of this court.

In the very elaborate and able brief filed in behalf of the appellant, many authorities are cited, chiefly from the English courts. The precise question presented for determination in the instant case, namely, the construction of a devise to one's "nearest heirs," appears to be one of first impression in this state, and of comparatively rare occurrence in other jurisdictions. Many cases have been cited in which the testa-

tors have described the objects of their bounty as "my nearest surviving relations," or "my nearest and next of kin," or "my nearest of kin," or by like descriptive words; but, as the decisions in these cases do not hold that these phrases are synonymous with "nearest heirs," obviously these rulings are not very helpful, much less controlling. It is insisted on the part of the appellant that by the phrase "nearest heirs," the testator means to designate that class of persons which will bear to him the closest degree of kinship or blood relationship at his death, and that the word "nearest," if it is to be given any meaning whatever, must be construed to pass the estate to the kin of the testator in the order of their blood relationship, the remoter kin to be excluded in succession in favor of the nearer, until at last the nearest is reached.

It is very difficult to derive the intention of the testator from the words used in the will, nor is that difficulty lessened by an inspection of the meager accompanying facts. Frequently the task of elucidating the obscure language of a testator is removed by the revelations afforded by the facts and circumstances under which the will was made.

"In order the better to comprehend the scheme which the testator had in his mind for the disposition of his estate, the judicial expositor is permitted to place himself, figuratively speaking, in the very shoes of the person whose will he is called on to construe, and with the aid of such extrinsic evidence as is admissible for the purpose, possess himself of the condition of the testator and his family, and of such surrounding facts and circumstances as may be reasonably supposed to have influenced him in the disposition of his property. . . . With the lights thus afforded him, he is prepared as well as it is possible for him to be, . . . to declare, upon a careful examination and comparison of all parts of the will, what is the meaning of the words which the tes-

tator has seen fit to employ." Hatcher v. Hatcher, 80 Va. 171.

Apparently the testator, in the instant case, was on terms of equal affection with all of his relatives concerned in this controversy, and there is nothing to indicate that he had any reason to make exceptional preferences in the disposition of his estate, or to arrange a scheme of succession under which the brother would take first, to the exclusion of all others, and, secondarily, the nephews and nieces to the exclusion of the great-nephews and great-niece. These nephews, nieces, and others were not as close in blood to the testator as the brother, but they were the offspring of ancestors who bore the same degree of relationship to him, and, so far as the court knows, were regarded by him with the same affection as the surviving brother. While the brother is, apparently, a man of independent means, the pecuniary condition of the others is not revealed.

The paucity of the evidence relating to the circumstances attendant upon the making of the will in the case in judgment leaves us to seek the derivation of the testator's intent from the language of the will, without material extraneous aid. Some of this language indicates one intent; other language seems to point to a different intent. It is difficult to bring all of the language used into harmony, or to reach a conclusion entirely free from doubt. The rule of construction is familiar that a will should be so interpreted

as to give effect to every part and word thereof, provided some effect can be given to each word not inconsistent with the general intent manifested by the entire instrument. It is a sound rule that no word of a will should be rejected if it can have a possible meaning. But it is equally true that words often, and of necessity, are rejected by the judicial expositor in the determination of the real intent of the testator. The instrument must be considered as a whole, and his in-

tent must be sought in all of the words used, giving them in the first instance the meaning fixed by the accepted rules of construction. If that interpretation produces difficulties and creates conflicts between different portions of the instrument, leaving the intent of the testator obscured, then the expositor must determine whether the general intent derived from the entire will does not require the rejection of some word or words, or stamp them with a meaning different from the apparent or usual meaning. "It often happens that the same identical words require very different constructions in different cases, according to the context and the peculiar circumstances of each case." Rhett v. Mason, 18 Gratt. 560. Hence, having in mind the importance of the context in interpreting particular words and phrases, the learned judge delivering the opinion in this case concludes that but "little or no aid can be derived by a court on construing a will from prior decisions construing other wills."

The traces of the testator's intention must be sought in every portion of the will, and the whole carefully weighed together. The intent apparently indicated by the word or words used in one paragraph is often put in doubt by words used in other portions of the instrument, and equally entitled to be given effect. In such cases one or more of the conflicting words must yield to the general intent considered to be revealed by the entire instrument.

The appellant, in the instant case, insists that the words "nearest heirs" mean the nearest in blood to the testator living at the time of his death, and that, as he alone falls within that description, he is entitled to the entire residuum. If the words "nearest heirs" were synonymous with the words "nearest of kin," the contention would be irresistible. As it is, it is a persuasive one. But there is other language in the will indicating that the testator, when he used the words "nearest heirs," did not contemplate that his

estate should pass to a single brother under that designation, but rather that he had in mind a group of takers. It may well be asked, if the testator contemplated and intended that, at his death, the residuum should pass in its entirety to a single brother, why, in another portion of his will, he provided for a partition of this residuum between "all of his then living nearest heirs"? The testator made several special bequests, thereby showing that he was fully capable of distinctly providing for any individual cases that he particularly had in mind. One of these special bequests is to his brother, E. D. Kello. If, after making this special provision for his brother, the testator had had further in mind to give this brother the large residuum of his estate, if he was living when the will became effective, it seems likely that, in the seventh clause of that instrument, he would have specially designated him to receive it, following that designation by appropriate provisions for the passage of the residuum in the event that his brother predeceased him.

If the testator contemplated a situation in which his brother would take the entire residuum, then, as applied to that situation, the words "divided equally between" are not very apt words for a single taker, nor would such a taker be ordinarily referred to as "all of the living nearest heirs" of a testator.

Of course, in law, the word "heir" is interchangeable with the plural term "heirs," and conversely, when such a construction is justified by the context; but if the context indicates that the testator had "heirs," in its plural sense, definitely in contemplation as the first takers, and not an heir, then that intent must be made effective. The testator at three different places in his will uses the words "my then living heirs," associated with the words "divided," or "divided equally," or "for purposes of equal partition," thereby indicating that he had in mind a plurality of takers at all times, and

not a possible single taker in the first instance. If the testator, when he used the words "all my then living nearest heirs," meant to say that all of his kin living at the time of his death should be equal participants in the residuum of his estate, the associated words cited *supra* are apt and appropriate; but, if he had in mind a possible single taker, then those words are singularly infelicitous, and to bring them in harmony with the intent to give the residuum to the brother they must be given by construction an unusual meaning, or regarded as words of mere surplusage. The repetition in the will of the provision for dividing the estate between the nearest heirs, a naturally plural term, indicates that the uppermost thought in the mind of the testator was that his estate should pass at his death, not to a single taker, but to several.

Again, it may be asked why the testator did not use the words "my then living next of kin," or "my nearest surviving relations," instead of the words actually used, if he intended that his estate should pass to the nearest of his blood living at his death? "Heirs" is a highly technical word, while "kin" is not. The word "heirs" has been defined in Virginia as the "next of kin" who take under the Statute of Descents. The nearest in blood according to nature do not always share in the inheritance under the Statute of Descents. For instance, a father inherits the estate of a son to the exclusion of the mother, though she is equally near in blood to the son. Failing a living father, the estate of the son does not pass exclusively to the mother, but to the mother, brothers, and sisters. In the instant case, the testator left his estate to all of his "then living nearest heirs;" that is, it may be fairly said, to his next of kin who would take according to the statute, or to that group of kin who, for the purposes of inheritance, are his nearest heirs in the contemplation of the statute.

The Statute of Descents provides for the passage of estates. The per-

son or group of persons who take in any given case by the terms of the statute may be regarded in law as the nearest heirs, since they take to the exclusion of all others. At the death of John G. Kello, the next of kin to take his estate, and therefore the nearest inheritors according to the statute, were the group of blood relations recited *supra*. All of these parties, in case of intestacy, would have inherited by the force and effect and upon the terms of the statute. Using the word "heirs," the testator in all likelihood had in mind the Statute of Descents, and intended to indicate as takers of his estate the persons prescribed by that statute. If the words "my then living nearest heirs" are interpreted to mean next of kin as provided by statute, then no difficulty will arise with respect to the construction of the word "all" and the words "equal partition," or "division," or "equal division." These are apt words with reference to a plurality of takers.

It has been pointed out that there is nothing in the state of facts under which the will was made to indicate that the testator intended to provide in exceptional degree for any one of his kin. Hence, a construction of his will which would give the brother, a man of independent means, the entire residuum, in addition to his specific legacy of \$1,000, cannot be derived from those facts. It must be derived exclusively from the language of the will. The difficulties in the way of such a derivation have been indicated.

In one of the cases cited by the appellant, that of *Brandon v. Brandon*, 3 Swanst. 312, 36 Eng. Reprint, 876, the court construed the words "nearest and next of kin." After stating that the question for resolution was whether the property belonged to the persons who were next of kin according to the rule and measure established by the Statutes of Distribution, or to those who were next of kin in a more strict and natural sense, the court concluded that the words were perfectly exempt from ambiguity, and, as there was

nothing to show that the parties intended to refer to the statute, the nearest in blood should take. This decision was perfectly logical and proper. If the words "nearest heirs" were perfectly exempt from ambiguity, and there was nothing in the will in the instant case to indicate that the testator had in mind the Statute of Descents, the construction of this will would present no difficulties. But it has been pointed out that the word used in association with the word "nearest" is "heirs," a technical word, with a meaning expressly related to the statute. Hence, the difficulty of interpreting the word "heirs" to mean "kin," or "blood relations," and of reconciling that meaning with the natural meaning of other words used by the testator, relating to the disposition of the estate. All the cases cited, construing the words "next of kin," "nearest of kin," and equivalent expressions, appear to us to have been correctly decided by giving the words their ordinary grammatical sense, in the absence of a restraining context. But such a context, indicating a different intent, would cause the words "next of kin" to be otherwise construed.

In the case of *Gwynne v. Muddock*, 14 Ves. Jr. 490, 33 Eng. Reprint, 609, the court, construing the words "highest heir at law," held: "It would be contrary to the intention to divide them [i. e., the real and personal property devised], and it would be contrary to the words to give the whole to the next of kin. Therefore, the court has no alternative but to adhere to the words of the will, and permit the person who answers the description of heir at law to enjoy the whole."

This case would seem in point, as the next of kin were before the court as claimants. The court awarded the estate to the heirs at law apparently upon the theory that the persons who would take as heirs at law were necessarily the nearest heirs at law. Having in mind that the word "heirs" means the next of kin according to our Statute of Descents,

and therefore the persons upon whom the law would cast the estate in the event of intestacy, the words "nearest heirs," used by the testator, John G. Kello, are equivalent to the words "nearest heirs at law," which are the precise words construed by Sir William Grant in the case cited, *supra*.

The word "heirs," when unexplained and uncontrolled by the context, must be interpreted according to its strict technical import, in which sense it obviously designates the person or persons appointed by law to succeed to the real estate in case of intestacy. 2 Jarman, Wills, 5th ed. p. 61; Tillman v. Davis, 95 N. Y. 24, 47 Am. Rep. 1.

We have been at pains to point out that the context of this word in the will of John G. Kello, so far from controlling its meaning so as to make it the equivalent of "kin," indicates that the testator used it in its ordinary, well-understood technical sense. The general intent of the testator indicates equality of taking and the purpose to include all of his surviving relations who would take under the Statute of Descents as his beneficiaries. After a scrutiny of the will under consideration, with an earnest desire to place that construction upon the language of the testator which the general sense of the instrument requires, we are of opinion that the testator, by the use of the words "then living nearest heirs," intended that group or col-

lection of his kin
—meaning of
"nearest heirs." upon whom the law
would cast the inheritance in case of intestacy.

The conclusion reached, that the testator did not use the words "nearest heirs" to indicate that his relatives living at his death should

take his estate in the order of their blood relationship, but did use them with the intent to designate a collective group to include all of those relatives, is in harmony with the general intent disclosed by the entire instrument. In the group of relatives who would have taken the estate, in the event of intestacy, are individuals who are nearer in blood to the testator than others, and one who is nearest; but, as a group, they are his "nearest heirs." There is no nearer group, or other group in being which would take under the statute as heirs. With reference to this statutory taking, no individual member of this group can be said to be nearer in right, or nearest in right, since, as heirs, they would all take by force of the statute, and in the matter of quality, or right of taking, would all be on the same footing. Hence the conclusion that the entire group constitutes the "nearest heirs" of the testator, and that the testator, by his use of a technical word carrying a specific meaning related to the Statute of Descents, intended to designate that group as collective participants in his estate. This construction of the words "nearest heirs" brings the entire will into harmony. The word "all" is no longer an occasion of perplexity, and the provisions for equal partition become apt and appropriate, capable of easy application to the situation presented at the death of the testator, and of being carried out according to the usual acceptation and meaning of the words used.

In the opinion of the court, there is no error in the decree of the Circuit Court of Southampton County, and the same must be affirmed.

Sims, J., absent.

ANNOTATION.

Effect of word "nearest" in testamentary gift to "nearest heir" or the like.

- I. Generally, 329.
- II. Nearest blood or the like, 329.
- III. Nearest family, 330.

- IV. Nearest heir or the like, 330.
- V. Nearest kin or the like, 331.
- VI. Nearest relative or the like, 332.

I. Generally.

It has been said that "it is certainly difficult to distinguish between the expressions 'next of kin,' 'nearest of kin,' 'nearest kindred,' and 'nearest blood relations,' and primarily the words indicate the nearest degree of consanguinity, and they are perhaps more frequently used in this sense than in any other." *Swasey v. Jacques* (1887) 144 Mass. 135, 59 Am. Rep. 65, 10 N. E. 758.

There is some conflict in the cases as to the effect of the word "nearest" when prefixed to "heir" or a similar term in a testamentary gift. Some of the cases, like *KELLO v. KELLO* (reported herewith) ante, 322, and *GODFREY v. EPPLE* (reported herewith) ante, 317, hold that such a phrase includes all the heirs at law of the testator, while others, like *HAMMOND v. MYERS* (reported herewith) ante, 315, take the view that the word "nearest" confines the gift to heirs at law of the class standing nearest in blood to the testator, excluding all others. However, the variation in the phrases construed and the context in which they are used make it impossible to formulate a definite rule from the decisions.

*II. Nearest blood or the like.***Nearest of blood.**

It has been stated that the terms "nearest of blood" and "next of kin" are synonymous. *Cooper v. Denison* (1843) 13 Sim. 290, 60 Eng. Reprint, 113, 12 L. J. Ch. N. S. 404.

Nearest blood kin.

By virtue of the words "nearest blood kin," as used in a will, a sister of a testator takes in preference to nephews and nieces, children of the testator's deceased sister. *Davenport v. Hassel* (1852) 45 N. C. (Busbee, Eq.) 29.

Nearest blood relation.

The words "nearest blood relations," when used in a will, usually mean such persons as take under the statute regarding the distribution of estates of intestates; but a different meaning may be given them to effectuate the intention of the testator. Hence, it has been held that this expression in the will of one who had reason to believe that he had no relatives of his own blood except certain descendants of an illegitimate brother must be considered to have been used with reference to those descendants. *Sander's Estate* (1906) 126 Wis. 660, 105 N. W. 1064, 5 Ann. Cas. 508.

Nearest blood relative.

In *Miller v. Harding* (1914) 167 N. C. 53, 83 S. E. 25, it was held that the term "nearest blood relative" of a life tenant, as used in the devise of the remainder, was not synonymous with heirs, and that the gift to the life tenant was not, therefore, a fee under the rule in *Shelley's Case*, the court saying: "It is thus plain that the 'nearest blood relative' of Laura A. Green would not necessarily include all of her heirs, within the meaning of the rule in *Shelley's Case*. To illustrate: At her death she may leave a brother, and nephews and nieces, children of a deceased brother, in which case the surviving brother would be her 'nearest blood relative;' but her nephews and nieces would also be equally her heirs to that part of her land which their father, if living, would have inherited."

Nearest blood connection.

The will construed in *Jones v. Parsons* (1918) 182 Iowa, 1377, 166 N. W. 707, devised a remainder to the "nearest blood connection" of the life tenant. It was held that a sister of the life tenant took the remainder in preference to nephews and nieces, the

court saying: "Giving effect, therefore, to the terms used by the testator in his will, it must be said that the surviving sister is the 'nearest blood connection' of Mrs. Mitchell. The plaintiffs, being farther removed in blood connection, are excluded from the class by the terms descriptive thereof."

Nearest of kin by blood.

Under a devise to the daughters of the testator for life, and after their death to go to their "nearest of kin by blood," the daughters take an estate for life, with remainder to their children as purchasers. *Terrell v. Cunningham* (1881) 70 Ala. 100.

III. Nearest family.

It has been held that, in the case of a devise to one in tail, and, in default of issue of her body, empowering her to settle and dispose of the remainder as she saw fit, confiding in her not to alienate or transfer the property from the "nearest family," the term must be construed to mean heir, and hence an appointment by the devisee to her husband, with limitation over to his son, was void. *Griffiths v. Evan* (1842) 5 Beav. 241, 49 Eng. Reprint, 570, 11 L. J. Ch. N. S. 219.

IV. Nearest heir or the like.

Nearest heir.

With reference to the term "nearest heir," the court in *Ryan v. Allen* (1887) 120 Ill. 648, 12 N. E. 65, said: "When there are a number of persons falling within the designation of 'heirs,'—that is, having the right to take by inheritance from the ancestor,—although they may not take equally as to amount, the law furnishes no means of determining which one or more of the common class is or are 'nearest' in the quality or right of inheritance. The word 'nearest,' like 'next' or 'first,' prefixed to the term 'heirs' or 'heir,' without the use of other words of limitation on the devise to the heir, will not vary the effect of the devise. The nearest heirs are all those persons upon whom the law would cast the inheritance in the first instance, upon the death of the ancestor or intestate, and there can be no

other heirs. Those who are heirs are therefore necessarily nearest heirs, and, conversely, nearest heirs can be no other than heirs generally, and must include all those who stand in the same relation to the ancestor in respect of the right of inheritance."

In *Thomason v. Moses* (1842) 5 Beav. 77, 49 Eng. Reprint, 506, 6 Jur. 403, it appeared that a testator bequeathed personalty to his father for life, then to a brother for life, then to his next "nearest heir," passing over his heir at law, the son of his deceased eldest brother. It was held that, the will being void for uncertainty, the bequest passed to the next of kin of the testator.

In *KELLO v. KELLO* (reported herewith) ante, 322, it is held that a gift to be divided equally among the "nearest heirs" of the testator goes to all who are entitled to take as his heirs under the Statute of Descents, so that nephews and nieces take equally with brothers and sisters.

Nearest male heir.

In *Jones v. Jones* (1902) 201 Pa. 548, 51 Atl. 362, it appeared that an action was brought to determine the estate vesting by virtue of a will devising property to the sons of the testator "during their natural lives, and at their death to their or each of their nearest male heirs," with certain other limitations. It was held that the instrument created a life estate only in the sons. With respect to the meaning of the phrase "nearest male heirs," the court said: "The estate is ultimately devised to the 'nearest male heirs' of each son, after his death, without regard to the father who may beget them or to the mother who may bear them. The qualifying word 'nearest' would be unmeaning, used in connection with 'heirs,'—those to whom the inheritance passes, whether near or remote in blood,—if the term was employed by the testator in its technical sense, and it is evident that he did not so use it. By 'nearest male heirs' he meant the nearest male kindred of his sons at the death of each."

In *Lightfoot v. Maybery* [1914] A. C. (Eng.) 782, 7 B. R. C. 957, 83 L. J. Ch. N. S. 627, 111 L. T. N. S. 300, 58

Sol. Jo. 609, Ann. Cas. 1915A, 464, the court construed a testamentary gift over to the testator's "nearest male heir" as meaning the nearest male relative, as against a contention that the term "nearest" was surplusage, and that the phrase meant merely the testator's heir, being a male.

Nearest and lawful heir.

In *Reinders v. Koppelman* (1887) 94 Mo. 338, 7 S. W. 288, it appeared that a testator gave to his wife a life estate in certain property, and at her death the remainder, one half to his adopted daughter, and the other half to "the nearest and lawful heirs of mine and that of my said wife, share and share alike." After the testator's death the wife remarried and adopted as her heir the son of her second husband. It was held that the adopted son could not take under the will, but that the estate should go to the brothers and sisters of the wife, or their representatives, as being within the meaning of the phrase used.

"Nearest of kin by heirship," see *infra*, "Nearest kin or the like."

V. Nearest kin or the like.

Nearest of kin.

It has been said that the term "nearest of kin," when used in a will, imports those who stand in that relation to the testator at the time of his death. *Urquhart v. Urquhart* (1844) 13 Sim. 613, 60 Eng. Reprint, 239, 8 Jur. 161. And these words have likewise been construed to mean the nearest blood relations. *Keniston v. Mayhew* (1897) 169 Mass. 166, 47 N. E. 612; *Leonard v. Haworth* (1898) 171 Mass. 496, 51 N. E. 7.

In the absence of any controlling context, the persons entitled to take under the designation "nearest of kin" in a will are the nearest blood relations of the *propositus* at the time of his death, in an ascending and descending line. *Brabant v. Lalonde* (1895) 26 Ont. Rep. 379.

The term "nearest of kin" in a will signifies those who stand in the nearest relationship to the intestate according to the rules of the civil law for computing the degrees of kinship. *Clark v. Mack* (1910) 161 Mich. 545, 28

L.R.A.(N.S.) 479, 126 N. W. 632. Hence, the brothers and sisters of a testator will take to the exclusion of the children of deceased brothers and sisters of the testator, when these words are used in a will. *Ibid.*; *Boys v. Bradley* (1853) 10 Hare, 389, 68 Eng. Reprint, 978; *Sayer v. Bradley* (1856) 5 H. L. Cas. 873, 10 Eng. Reprint, 1146, 25 L. J. Ch. N. S. 593, 2 Jur. N. S. 887, 4 Week. Rep. 808. Compare *GODFREY v. EPPLE* (reported *herewith*) ante, 317.

In the construction of a will which provided that, after the occurrence of certain contingencies, and the death of the testator's wife, the residue of the estate should be divided amongst his "nearest of kin," there being a provision likewise for the life use of certain property by the testator's sister, it was held that those were entitled to take who were the testator's nearest blood relations at the death of the survivor of his wife or sister. *Leonard v. Haworth* (Mass.) *supra*.

The expression "nearest of kin" cannot include either husband or wife, but must be considered to mean children. Hence, where it appeared that the beneficiary of a trust created by a will limiting the estate to her, and after her death to whomsoever she might appoint, designated her husband to receive the estate, it was held that the appointment could not take effect, and that her children, born after the exercise of the power, should take. *Re Jeffery* (1872) L. R. 14 Eq. (Eng.) 136, 42 L. J. Ch. N. S. 17, 26 L. T. N. S. 821, 20 Week. Rep. 667. And where it appeared that a testator, after making certain provisions for his wife and daughter, directed the residue of his estate to be given to the "nearest of kin of my own family forever," it was held that the next of kin of the daughter, who survived the wife, and died without issue, were entitled. *Clapton v. Bulmer* (1840) 10 Sim. 426, 59 Eng. Reprint, 680, 5 Myl. & C. 108, 41 Eng. Reprint, 312.

Under a devise to one for life, with power to appoint in fee to any person of a particular name, remainder in fee to the next and "nearest of kin" of the testator at the time of his death,

the devisee, a first cousin of the testator, in default of appointment, takes the ultimate limitation in fee as against other cousins who are children of a younger brother of the devisee's father. *Pearce v. Vincent* (1833) 2 Myl. & K. 800, 39 Eng. Reprint, 1150, 1 Cromp. & M. 598, 2 Bing. N. C. 328, 132 Eng. Reprint, 129, 2 Keen, 230, 48 Eng. Reprint, 616.

Nearest akin.

In *HAMMOND v. MYERS* (reported herewith) ante, 315, a gift of a remainder to the "nearest akin" of the testator was held to intend his nearest blood relations, so that the remainder went to brothers and sisters, to the exclusion of nephews and nieces.

Nearest kindred.

In *Markham v. Ivatt* (1855) 20 Beav. 579, 52 Eng. Reprint, 727, it appeared that a testator bequeathed a leasehold to trustees for the benefit of another, giving the latter power to convey it by will or deed, on default whereof the trustees were to dispose of the remainder among the "nearest kindred" of the testator according to the statute providing for the distribution of intestate estates. The beneficiary died without having disposed of the remainder. It was held that the next of kin of the testator at her death, and not those at the death of the beneficiary, were entitled to the estate, the court saying that "nearest of kindred" and "next of kin" have the same meaning when reference is made to the statute.

Nearest of kin by heirship.

The words "nearest of kin by heirship" have been construed to mean the heirs of the testator. *Williams v. Ashton* (1860) 1 Johns. & H. 115, 70 Eng. Reprint, 685, 3 L. T. N. S. 177.

"Nearest blood kin" or "Nearest of kin by blood," see *supra*, "Nearest blood or the like."

VI. Nearest relative or the like.

Nearest relative.

In the case of a devise to the testator's wife for life, and at her death or remarriage to his "nearest relatives," on the remarriage of the widow the testator's sisters take to the exclusion of nephews and nieces.

White's Estate (1891) 27 W. N. C. (Pa.) 253. And under a bequest to the two "nearest female relatives or connections" of the testator's mother, the nieces of the mother are entitled to take as against grandnieces by blood and marriage. *Ennis v. Pentz* (1855) 3 Bradf. (N. Y.) 382. In the case of *Altdorfer's Estate* (1909) 225 Pa. 136, 73 Atl. 1068, it appeared that a testator, after leaving the whole of his estate to his wife, further provided that at her death one half should go to his "nearest relatives," brother, sister, or their children, and the other half, in default of disposal by the wife, should go to her "nearest relatives." It was held that these words, as applied to the kin of the wife, could not be interpreted to mean the same as when applied to the kin of the testator, but the presumption was that he meant such relatives as should properly be defined as nearest. Hence, a sister of the wife took to the exclusion of children of a deceased sister.

Nearest relative in male line.

In the construction of a will creating a trust for the purchase of land to be added to the testator's estate, the residue of which, on certain contingencies, was to go to a certain person or his "nearest relative in the male line," the court said that it would be reasonable, in case of the failure of male issue of the person, to insert limitations in favor of his younger brother, and of any future issue male of his father, it being reasonably consistent with the terms used. *Woolmore v. Burrows* (1827) 1 Sim. 513, 57 Eng. Reprint, 670.

Nearest relations.

A devise or bequest to the testator's "nearest relations" has been construed to mean his brothers to the exclusion of nephews and nieces. *Locke v. Locke* (1889) 45 N. J. Eq. 97, 16 Atl. 49.

In considering a will wherein it was stipulated that certain property should be apportioned among the testator's "nearest surviving relations" in Ireland, it was held that the terms should be confined to the next of kin under the Statute of Distributions.

thereby including brothers and sisters, but excluding nephews and nieces, and that it was immaterial whether the persons entitled actually resided in Ireland. *Smith v. Campbell* (1815) 19 Ves. Jr. 400, 34 Eng. Reprint, 566, 13 Revised Rep. 224.

And under a devise to trustees for the benefit of the testator's son for life, then to the latter's eldest son and heirs forever, and in case of their death without issue, to the testator's "nearest relation," and their "nearest relations" forever, it was held that the remainder should go to the nearest relation at that time, the testator's half sister, to the exclusion of representatives of a half brother. *Marsh v. Marsh* (1783) 1 Bro. Ch. 293, 28 Eng. Reprint, 1140.

Similarly, under a devise of property in trust for the "nearest relations of the Pyots" it was held that the heir at law should not take, but that brothers and sisters who were of a closer degree of relationship should receive the remainder, and the fact that one

sister was married and bore another name was not material. *Pyot v. Pyot* (1749) 1 Ves. Sr. 335, 27 Eng. Reprint, 1066. See also *Leigh v. Leigh* (1808) 15 Ves. Jr. 93, 33 Eng. Reprint, 690.

A bequest to the daughter of a testator, and at her death under age to revert to his "nearest relations or connections, as directed by the laws of the commonwealth," does not include the widow. *Storer v. Wheatley*, 1 Pa. St. 506.

It has been held that a bequest to such of the "nearest relations" of the testator as should be considered the greatest objects of charity by his executors extended only to such as would take under the Statute of Distribution; "otherwise it would be endless to find out everybody that were relations." *Edge v. Salisbury* (1749) 1 Ambl. 70, 27 Eng. Reprint, 42, followed in *Goodinge v. Goodinge* (1749) 1 Ves. Sr. 231, 27 Eng. Reprint, 1001.

"Nearest blood relation," see *supra*, "Nearest blood or the like."

W. A. S.

EX PARTE WILLIAM F. HUDGINGS.

United States Supreme Court—April 14, 1919.

(249 U. S. 378, 63 L. ed. 656, 39 Sup. Ct. Rep. 337.)

Contempt — perjury — obstructive effect.

1. A Federal court may not punish a witness for contempt solely because of the opinion of the court that he is committing perjury, without reference to any circumstance or condition giving to such perjury an obstructive effect.

[See note on this question beginning on page 342.]

Supreme Court of the United States — original jurisdiction — habeas corpus.

2. The grant by the Federal Supreme Court of permission to file a petition for a writ of habeas corpus *prima facie* implies that the case is of such a character as to be an exception to the rule of procedure that other available sources of judicial power may not be passed by for the purpose of obtaining relief by resorting to the original jurisdiction of the Supreme Court.

[See 12 R. C. L. 1224.]

— original jurisdiction — relief from commitment for perjury.

3. A habeas corpus proceeding presenting the question whether a Federal district court may punish a witness for contempt solely because of the opinion of that court that he is committing perjury, without reference to any circumstance or condition giving it an obstructive effect, is so exceptional in character as to require the Supreme Court to determine the question in the exercise of its original jurisdiction.

(Mr. Justice Pitney, dissents.)

ORIGINAL PETITION for a writ of habeas corpus to the District Court of the United States for the Eastern District of New York, to secure petitioner's release from custody to which he had been committed for contempt. *Discharge of petitioner ordered.*

The facts are stated in the opinion of the court.

Mr. Jesse Fuller, Jr., for petitioner:

The court was without authority summarily to determine that the answer was a false answer or a refusal to answer, and to adjudge the witness in contempt of court for giving such answer.

Ex parte Robinson, 19 Wall. 514, note, 22 L. ed. 205; Ex parte Creasy, 243 Mo. 679, 41 L.R.A. (N.S.) 478, 148 S. W. 914.

Habeas corpus is the proper remedy.

Ex parte Fisk, 113 U. S. 713, 28 L. ed. 1117, 5 Sup. Ct. Rep. 724; Noble v. Union River Logging R. Co. 147 U. S. 165, 173, 37 L. ed. 123, 126, 13 Sup. Ct. Rep. 271; Ex parte Irvine, 74 Fed. 954; Counselman v. Hitchcock, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195; Ex parte Creasy, supra; Ex parte Rowland, 104 U. S. 604, 26 L. ed. 861.

Application for the writ is properly made to this court.

Ex parte Terry, 128 U. S. 289, 302, 32 L. ed. 405, 408, 9 Sup. Ct. Rep. 77.

Mr. A. C. King, for respondent:

Perjury may constitute a contempt, and may be punished by the court as such.

United States v. Appel, 211 Fed. 495; Re Ulmer, 208 Fed. 461; Re Steiner, 195 Fed. 299; Berkson v. People, 154 Ill. 81, 39 N. E. 1079; Re Rosenberg, 90 Wis. 581, 63 N. W. 1065, 64 N. W. 299.

The discretion of the presiding judge is large in determining questions such as the instant case presents.

Mason v. United States, 244 U. S. 362, 366, 61 L. ed. 1198, 1200, 37 Sup. Ct. Rep. 621.

Mr. Chief Justice White delivered the opinion of the court:

After hearing and leave granted on a rule to show cause, this petition for habeas corpus seeking the discharge of the petitioner from custody under a commitment for contempt was filed. The grounds for discharge were that the court had exceeded its jurisdiction by punishing as a contempt an act which it had no power to so punish, and that

even if the act punished was susceptible of being treated as a contempt, the action of the court was arbitrary, beyond the limits of any discretion possessed, and violative of due process of law under the 5th Amendment. Prior to submission, and after return and the hearing which ensued, an order admitting to bail was made.

The duty to consider the case arises from the permission to file, and therefore prima facie implies that it is of such a character as to be an exception to the rule of procedure that other available sources of judicial power may not be passed by for the purpose of obtaining relief by resort to the original jurisdiction of this court. Ex

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Ex parte Royal, 117 U. S. 254, 29 L. ed. 872, 6 Sup. Ct. Rep. 742; Riggins v. United States, 199 U. S. 547, 50 L. ed. 303, 26 Sup. Ct. Rep. 147; Glasgow v. Moyer, 225 U. S. 420, 428, 56 L. ed. 1147, 1149, 32 Sup. Ct. Rep. 753; Johnson v. Hoy, 227 U. S. 245, 57 L. ed. 497, 33 Sup. Ct. Rep. 240; Jones v. Perkins, 245 U. S. 390, 62 L. ed. 358, 38 Sup. Ct. Rep. 166; Ex parte Mirzan, 119 U. S. 584, 30 L. ed. 513, 7 Sup. Ct. Rep. 341; Re Huntington, 137 U. S. 63, 34 L. ed. 567, 11 Sup. Ct. Rep. 4. Whether, however, definitively the case is of such exceptional character, must depend upon an analysis of the merits, which we now proceed to make upon the petition, the return, argument for the petitioner, suggestions by the United States, a statement by the judge, and a transcript of the stenographer's notes, showing what transpired in the court below, made a part of the argument of the petitioner and in substance conceded by all parties to be the record.

In a trial which was proceeding in the court below, presided over by the judge of the district of Vermont

assigned to the eastern district of New York, the petitioner was recalled as a witness by the government for the purpose of proving by his testimony the handwriting of MacMillan and Van Amburgh. On being shown the writings referred to, in answer to questions by the government, he said that he believed, from having often seen the writing of the persons named, that the writings shown him were theirs, but that he could not so state from having seen MacMillan and Van Amburgh write, because he could not recollect ever having seen them do so. The court thereupon pointedly questioned the witness on the subject of his recollection, and, in view of his persistency in declaring that he could not swear from knowledge derived from a recollection of having seen MacMillan and Van Amburgh write or sign that the writings were theirs, stated to government counsel that because of the evident unwillingness of the witness, the widest latitude would be allowed the government in its examination. This was availed of and an inquiry followed covering a wide field as to the previous association of the witness with the parties in question, his employment in the business in which they were engaged, and other circumstances deemed to persuasively establish that his connection with them had been such that his statement that he could not remember having seen them write was untrue.

The inquiries, however, made no change in the statements of the witness, who persisted in saying: "I cannot say that I can recall that I have ever seen him in the act of writing. I would not say I have not, but I would not say that I have." Finally the court interrupted the examination by saying:

"This witness is going to be committed for contempt of court. The court is thoroughly satisfied, Mr. Witness, that you are testifying falsely when you say that you cannot recall of ever seeing Mr. MacMillan write, and this has happened several times during this trial with

other witness, especially with your wife.

"And it becomes the plain duty of the court to commit you to jail, sir, for contempt, and before doing so, I think it is the duty of the court to explain to you that the answer, 'I do not remember of ever having seen him write,' is just as false, is just as much contempt of court, if you have seen him write, as it would be for you to say that you had never seen him write, without using the expression, 'I do not remember.'"

In the same direction the court said:

"I am not going to allow you to obstruct the course of justice here, and if this nation has delegated power enough to this court, and I am very sure it has, to deal with you in the manner proposed, I am going to do it."

Before the discharge of the witness from the stand, an order for contempt against him was made, and he was committed to the custody of the marshal. On the same day he pleaded not guilty to an indictment for perjury which the grand jury had just presented, and obtained an order for release on bail, which was inoperative, because he continued to be held under the commitment for contempt.

The record states that on July 8th, following, a nunc pro tunc order of commitment was spread upon the minutes, in which the previous commitment was described as having been made for misbehavior of the petitioner in the presence of the court when on the witness stand by wilfully refusing "to answer certain questions truthfully" concerning his having seen MacMillan and Van Amburgh write and sign. The new commitment directed that it should continue in force until the petitioner had purged himself of the contempt for which he was being punished.

That the contumacious refusal of a witness to testify may so directly obstruct a court in the performance of its duty as to justify punishment for contempt is so well settled as to need only statement. Despite some

confusion caused by certain ambiguous forms of expression used by the court below in dealing with the subject, it is indisputable that the punishment for contempt was imposed solely because of the opinion of the court that the witness was wilfully refusing to testify truthfully; that is, was committing perjury.

Whether, then, power to punish for contempt exists in every case where a court is of the opinion that a witness is committing perjury, is the test we must here apply. Because perjury is a crime defined by law, and one committing it may be tried and punished, does not necessarily establish that when committed in the presence of a court it may not, when exceptional conditions so justify, be the subject-matter of a punishment for contempt. For an application of this doctrine to perjury, see *Berkson v. People*, 154 Ill. 81, 39 N. E. 1079; *Re Rosenberg*, 90 Wis. 581, 63 N. W. 1065, 64 N. W. 299; *Stockham v. French*, 1 Bing. 365, 130 Eng. Reprint, 147; and see *Re Schulman*, 101 C. C. A. 361, 177 Fed. 191; *Re Steiner*, 195 Fed. 299; *Re Ulmer*, 208 Fed. 461; *United States v. Appel*, 211 Fed. 495. This being true, we must ascertain what is the essential ingredient, in addition to the elements constituting perjury under the general law, which must be found in perjury when committed in the presence of a court to bring about the exceptional conditions justifying punishment under both.

Existing within the limits of and sanctioned by the Constitution, the power to punish for contempt committed in the presence of the court is not controlled by the limitations of the Constitution as to modes of accusation and methods of trial generally safeguarding the rights of the citizen. This, however, expresses no purpose to exempt judicial authority from constitutional limitations, since its great and only purpose is to secure judicial authority from obstruction in the performance of its duties to the end that means appropriate for the preservation

and enforcement of the Constitution may be secured. *Toledo Newspaper Co. v. United States*, 247 U. S. 402, 62 L. ed. 1186, 38 Sup. Ct. Rep. 560; *Marshall v. Gordon*, 243 U. S. 521, 61 L. ed. 881, L.R.A.1917F, 279, 37 Sup. Ct. Rep. 448, Ann. Cas. 1918B, 371.

An obstruction to the performance of judicial duty resulting from an act done in the presence of the court is, then, the characteristic upon which the power to punish for contempt must rest. This being true, it follows that the presence of that element must clearly be shown in every case where the power to punish for contempt is exerted,—a principle which, applied to the subject in hand, exacts that in order to punish perjury in the presence of the court as a contempt, there must be added to the essential elements of perjury under the general law the further element of obstruction to the court in the performance of its duty. As illustrative of this, see *United States v. Appel*, *supra*. It is true that there are decided cases which treat perjury, without any other element, as adequate to sustain a punishment for contempt. But the mistake is, we think, evident, since it either overlooks or misconceives the essential characteristic of the obstructive tendency underlying the contempt power, or mistakenly attributes a necessarily inherent obstructive effect to false swearing. If the conception were true, it would follow that when a court entertained the opinion that a witness was testifying untruthfully, the power would result to impose a punishment for contempt, with the object or purpose of exacting from the witness a character of testimony which the court would deem to be truthful; and thus it would come to pass that a potentiality of oppression and wrong would result, and the freedom of the citizen, when called as a witness in a court, would be gravely imperiled.

Testing the power to make the commitment which is under consid-

eration in this case by the principles thus stated, we are of opinion that the commitment was void for excess of power,—a conclusion irresistibly following from the fact that the punishment was imposed for the supposed perjury alone, without reference to any circumstance or condition giving to it an obstructive effect. Indeed, when the provision of the commitment directing that the punishment should continue to be enforced until the contempt, that is, the perjury, was purged, the impression necessarily arises that it was assumed that the power existed to hold the witness in confinement under the punishment until he consented to give a character of testimony which, in the opinion of the court, would not be perjured.

In view of the nature of the case, of the relation which the question which it involves bears generally to the power and duty of courts in the performance of their functions, of the dangerous effect on the liberty of the citizen when called upon as a witness in a court which might re-

sult if the erroneous doctrine upon which the order under review was based were not promptly corrected, we are of opinion that the case is an exception to the general rules of procedure to which we have at the outset referred, and therefore that our duty exacts that we finally dispose of the questions in the proceeding for habeas corpus which is before us. It is therefore ordered that the petitioner be discharged.

Supreme Court of the United States—original jurisdiction—relief from commitment for perjury.

Mr. Justice Pitney dissents.

NOTE.

The general question of perjury or false swearing as contempt is treated in the annotation following *RILEY v. WALLACE*, post, 342. The specific question presented in the reported case (*EX PARTE HUDGINGS*, ante, 333), as to the power of a court to punish a witness for contempt solely because of the court's opinion that he is committing perjury, is discussed in subdivision III. b, of that note.

C. B. RILEY et al.

v.

ARTHUR M. WALLACE, Judge of the Jefferson Circuit Court, Chancery Branch, First Division.

Kentucky Court of Appeals—June 18, 1920.

(188 Ky. 471, 222 S. W. 1085.)

Contempt — perjury as.

1. False swearing by a witness is such obstruction of justice as to constitute a direct contempt of court.

[See note on this question beginning on page 342.]

Courts — power to punish for contempt.

2. All courts of record of superior jurisdiction have inherent power to punish for contempt.

[See 6 R. C. L. 515; 7 R. C. L. 1033; see also note in 8 A.L.R. 1543.]

11 A.L.R.—22.

Contempt — proceeding by information — knowledge of falsity of testimony.

3. A chancellor cannot proceed against witnesses for contempt in giving false testimony by information and rule unless he knows that such testimony was false.

Evidence — judicial notice — common knowledge.

4. The court may take judicial notice of common knowledge.

[See 15 R. C. L. 1059.]

Definition — judicial knowledge.

5. Judicial knowledge is the cognizance of certain facts which a judge, under rules of legal procedure or otherwise, may properly take or act upon without proof because already known to him, or that knowledge which the judge has, or is assumed to have, *virtute officii*.

[See 15 R. C. L. 1056.]

Evidence — judicial notice — what is within.

6. Judicial notice will be taken of whatever ought to be generally known within the limits of the court's jurisdiction.

[See 15 R. C. L. 1057.]

Contempt — direct — perjury — knowledge of judge.

7. A chancellor who has granted a divorce on testimony given before him cannot proceed against the witnesses as for direct contempt in consequence of evidence taken at a hearing on motion to set aside the judgment for fraud.

PROCEEDING by petitioners for an order restraining defendant from entering any order or proceeding in any wise to punish them for contempt of court. *Granted.*

The facts are stated in the opinion of the court.

Messrs. Charles P. Johnson and Clem Huggins, for petitioners:

Defendant cannot proceed against petitioners criminally by information he has filed against them, and punish them for crime of perjury as by way of contempt of his court.

Arnold v. Com. 80 Ky. 300, 44 Am. Rep. 480; 1 Bishop, New Crim. Proc. §§ 1412-1417; Lawrence v. Smith, Jacob, 471, 37 Eng. Reprint, 928, 23 Revised Rep. 125; 6 Pom. Eq. Jur. § 644; Re Sawyer, 124 U. S. 200, 31 L. ed. 402, 8 Sup. Ct. Rep. 482; State v. Marshall, 100 Miss. 626, 56 So. 792, Ann. Cas. 1914A, 434; Caskey v. Edwards, 128 Mo. App. 237, 107 S. W. 37; State v. Ehrlick, 65 W. Va. 700, 23 L.R.A.(N.S.) 691, 64 S. E. 935; Bisham, Eq. 7th ed. p. 58; 10 R. C. L. title, Equity, § 17, p. 275; 21 R. C. L. p. 255, Perjury; People v. Prouty, 262 Ill. 218, 51 L.R.A.(N.S.) 1140, 104 N. E. 387, Ann. Cas. 1915B, 155; State ex rel. Webb v. District Ct. 37 Mont. 191, 95 Pac. 593, 15 Ann. Cas. 743.

Messrs. N. C. Cureton, John L. Woodbury, and Grover G. Sales, for defendant:

Defendant has the right, and it was, in fact, his duty, to institute proceedings against petitioners for their contempt in giving the false testimony; and he has a further right to preside upon the hearing, especially in view of the fact that no steps were taken by the petitioners to cause him to vacate the bench prior to the filing of the petition here.

Louisville R. Co. v. Mitchell, 138

Ky. 190, 127 S. W. 770; Melton v. Com. 160 Ky. 642, L.R.A.1915B, 689, 170 S. W. 37; Gordon v. Com. 141 Ky. 461, 133 S. W. 206; Kentucky C. R. Co. v. Kenney, 82 Ky. 154; German Ins. Co. v. Landram, 88 Ky. 433, 11 S. W. 367, 592; Vanoe v. Field, 89 Ky. 178, 12 S. W. 190; Hargis v. Com. 135 Ky. 578, 123 S. W. 239.

The petitioners have a right of appeal should they be convicted; this court has no jurisdiction to entertain this petition, or to grant the relief which it seeks.

Melton v. Com. 160 Ky. 642, L.R.A. 1915B, 689, 170 S. W. 37; Gordon v. Com. 141 Ky. 461, 133 S. W. 206; Edge v. Com. 139 Ky. 252, 129 S. W. 591; French v. Com. 30 Ky. L. Rep. 98, 97 S. W. 427; Feltner v. Com. 30 Ky. L. Rep. 107, 97 S. W. 433; Turpin v. Com. 140 Ky. 294, 30 L.R.A.(N.S.) 794, 140 Am. St. Rep. 378, 130 S. W. 1086; Weaver v. Toney, 107 Ky. 419, 50 L.R.A. 105, 54 S. W. 732; Jenkins v. Berry, 119 Ky. 350, 83 S. W. 594; Dupoyster v. Clarke, 121 Ky. 694, 90 S. W. 1; Renshaw v. Cook, 129 Ky. 347, 111 S. W. 377; Rush v. Denhardt, 138 Ky. 238, 127 S. W. 785, Ann. Cas. 1912A, 1199; Equitable Life Assur. Soc. v. Hardin, 166 Ky. 51, 178 S. W. 1155; Louisville Public Warehouse Co. v. Miller, 26 Ky. L. Rep. 351, 81 S. W. 275; Fish v. Benton, 138 Ky. 644, 128 S. W. 1067; White v. Kirby, 147 Ky. 496, 144 S. W. 369.

Testimony given by the petitioners on the original hearing in the divorce case, which is false, or was not

known by them to be true when they gave it, constituted a contempt of the Jefferson circuit court, and can be punished as such upon rule, the testimony having been given and the contempt committed in a pending action.

13 C. J. p. 25; *United States v. Appel*, 211 Fed. 495; *Re Ulmer*, 208 Fed. 461; *Re Steiner*, 195 Fed. 299; *Berkson v. People*, 154 Ill. 81, 39 N. E. 1079; *Seastream v. New Jersey Exhibition Co.* 72 N. J. Eq. 377, 65 Atl. 982; *Re Rosenberg*, 90 Wis. 581, 63 N. W. 1065, 64 N. W. 299; *Melton v. Com.* 160 Ky. 642, L.R.A.1915B, 689, 170 S. W. 37; *Gordon v. Com.* 141 Ky. 461, 133 S. W. 206; *French v. Com.* 30 Ky. L. Rep. 98, 97 S. W. 427.

Petitioners may be also liable to indictment in the criminal court for perjury or false swearing, which does not prevent their being punished for contempt by the civil court.

Melton v. Com. 160 Ky. 642, L.R.A. 1915B, 689, 170 S. W. 37; *Re Fellerman*, 149 Fed. 244; *Hughes v. Com.* 131 Ky. 502, 31 L.R.A.(N.S.) 693, 115 S. W. 744.

Petitioners are guilty of false swearing or perjury if the facts to which they testified were not true, or were not known by them to be true, at the time they gave their testimony.

Com. v. Miles, 140 Ky. 577, 140 Am. St. Rep. 401, 131 S. W. 385; 13 C. J. p. 25; *Bess v. Com.* 118 Ky. 858, 82 S. W. 576.

Quin, J., delivered the opinion of the court.

W. H. Haney sued his wife for a divorce on the ground of five years' separation. On the proof of two witnesses, C. B. Riley and A. W. Bealmear, a judgment granting the prayer of the petition was entered November 25, 1919. December 2d defendant moved the court to set aside the judgment of divorce on the ground of accident and surprise, and because of fraud in obtention of the decree, setting up in an affidavit filed in support of the motion that her husband had admitted to her that he had no cause for divorce, and had promised to drop the proceedings. For this reason an answer prepared by her counsel was not filed, and she took no further steps in the matter. The first she knew of the judgment was when she saw a

notice in a newspaper to that effect on November 25, 1919.

When the motion was first called on the docket, W. H. Haney filed his affidavit stating that on November 26, 1919, the day following the entry of the judgment, he had married one Gladys Innes, and thus the status of the parties had been changed. The motion was set for hearing on the 17th of December. In the meantime subpoenas were issued for various witnesses, including Riley and Bealmear, to appear on said date. Upon that hearing it was established that Haney and his wife had lived together as man and wife within two years prior to the filing of the petition for divorce. The testimony of Riley and Bealmear substantially showed that the evidence given by them in the divorce case was based upon information received from Haney. Thereafter, to wit, January 3, 1920, an information was filed by Honorable Arthur M. Wallace, judge of the chancery branch, first division, Jefferson circuit court, who had granted the decree, in which he set out in detail the facts as given, charging that the testimony given by the two witnesses aforesaid was false and untrue, and said statements were for the purpose of interfering with the lawful and true administration of justice in said case. A rule returnable January 6, 1920, was issued upon said information. In a response to this rule, filed by Riley and Bealmear, they denied they were guilty of contempt, or that the testimony given by them in the divorce suit was untrue. At the same time they filed a demurrer to the information, as well as a motion to strike same from the record. These were overruled, and the court of its own motion struck out certain parts of the response, and before the rules were called up, to wit, on January 29, Riley and Bealmear petitioned a member of this court for an order restraining Judge Wallace from entering any order or proceeding in any wise to punish the petitioners for contempt of court.

By agreement of the parties the

proceedings in the circuit court were held in abeyance until the matters could be disposed of by this court.

As a general statement it may be said that all courts of record of superior jurisdiction have the inherent power to punish for contempt. *Courts—power to punish for contempt.* *Arnold v. Com.* 80 Ky. 300, 44 Am. Rep. 480. This right is recognized by statute. For instance, in § 1291, Kentucky Statutes, it is provided that a court may for contempt impose upon the offender a fine not exceeding \$30, or imprisonment not exceeding thirty hours, without the intervention of a jury.

In the *Arnold Case*, *supra*, it was held that it was not necessary to provide by statute a mode of trial in contempt cases. The manner of conducting such proceedings was established by a rule of the common law, and all the legislature has said is that the tribunal to whom the contempt is offered shall not, by way of punishment, exceed a fine of \$30, or imprisonment exceeding thirty hours, without the intervention of a jury. The rule of the common law has been modified by giving to the party charged the right to a trial by jury, and the judge is required to have a jury impaneled when, in his opinion, the indignity offered requires a greater punishment than he is authorized to impose by the statute.

Of prime importance is an answer to the question whether the petitioners were guilty of contempt of court.

As said in 13 C. J. 25: "Ordinarily, false swearing by a witness is held to be such an obstruction of justice as to constitute a direct contempt of court."

This, we think, is a fair statement of the rule. Contempts of court are either direct or constructive. It is manifest the court treated the acts of the petitioners as a direct contempt, and we will deal with it as such.

Unless the chancellor knew the testimony given by the petitioners was false, the petitioners could not

be proceeded against by information and rule; hence it becomes necessary to inquire as to whether the court had actual or judicial knowledge or cognizance of the alleged falsity of the statements given or made by the petitioners. *—proceeding by information—knowledge of falsity of testimony.*

Knowledge of notorious facts—i. e., common knowledge—the court may be assumed to share with other intelligent men. Judicial knowledge is not the personal knowledge of the judge; it may be defined as the cognizance of certain facts which a judge, under the rules of legal procedure or otherwise, may properly take or act upon without proof, because already known to him, or that knowledge which the judge has or is assumed to have by virtue of his office—*virtute officii*. *Evidence—judicial notice—common knowledge.*

To announce and enforce the provision of certain laws, substantive or procedural, is one of the judicial powers of the court and a very important object in the creation of the tribunal. Knowledge of such is, therefore, an essential attribute of the office. Cognizance of these rules of law is not, like that of facts in general, something which comes to the judge from without, i. e., *dehors* the judicial office. *Chamberlayne, Ev. §§ 570–572.* *Definition—judicial knowledge.*

As said by Professor Thayer in his *Treatise on Evidence*, the two maxims, that what is known need not be proved,—"*manifesta non indigent probatione*,"—and it matters not what is known to the judge, if it is not known to him judicially,—"*non refert quid notum sit judici, si notum, non sit in forma, judicii*,"—comprise the whole doctrine of judicial notice.

Judicial notice will be taken of whatever ought to be generally known within the limits of the court's jurisdiction. *Evidence—judicial notice—what is within.*

In *Wade on Notice*, § 1403, it is said: "The classes of fact of which

notice will be taken are judicial, legislative, political, historical, geographical, commercial, scientific, and artistic, in addition to a wide range of matters arising in the ordinary course of nature, or the general current of human affairs, which rest entirely upon acknowledged notoriety for their claims to judicial recognition."

See also *Com. v. Gabhart*, 160 Ky. 32, 169 S. W. 514.

Judicial notice of legislative acts and resolutions, and of the official signature of any officer of this state, of the United States, or of any state or territory in the United States is enjoined by Kentucky Statutes, §§ 1624 & 1625.

If the chancellor had had actual knowledge that Riley and Bealmear had made false statements, he would not have entered the decree of divorce, nor could he judicially have known of the alleged false testimony. It was not until after they were ordered to appear at the hearing under process of the court, and in response to questions by attorneys appointed by the court to assist in the investigation, that they gave information which led the chancellor to believe they had made false statements. Petitioners are here insisting that the statements made by them were not false, but we will not enter into a discussion of this question.

As said in *People v. Stone*, 181 Ill. App. 475: "In a case of direct contempt, it [the court] may act upon that of which it may take judicial notice; but it cannot judicially know that evidence is false, unless at the trial it is so made to appear by the witness's own admission, or perhaps by unquestioned or incontrovertible evidence. Otherwise the court would act merely upon its belief or conclusions derived from evidence heard, and not upon matters of fact of which it had judicial cognizance, which is essential to summary proceeding for direct contempt."

And as further said in the foregoing opinion: "If false swearing in the presence of the court constitutes

direct contempt, then judicial knowledge of its falsity is, in our opinion, indispensable to the right of the court to exercise authority to commit therefor, and there is nothing in the record to disclose that the court knew or could know that the testimony was false."

Judge Wallace did not know, indeed could not know from the record, of the alleged falsity of the testimony given by

Riley and Bealmear. At most, he was acting upon a presumption, not upon judicially known facts. With commendable promptness he sought, though by an improper method, to have the parties, if guilty, punished. We do not doubt he was convinced of their guilt. However, the facts were not disclosed until after a hearing of the motions to modify the judgment, and this was held at a date subsequent to the filing of Haney's affidavit, and when it was known that the status of the parties was such that the judgment of divorce could not be annulled.

Contempt—direct—perjury—knowledge of judge.

Gordon v. Com. 141 Ky. 461, 133 S. W. 206, was a proceeding similar to this, but it was disposed of on a plea of limitation. The court intimates that the punishment inflicted on appellant in that case was warranted because of his own admission of guilt when testifying in a pending damage suit,—a situation not presented here. Petitioners are denying they gave false testimony; besides, the alleged falsity was not ascertained until after an independent investigation, in which petitioners were ordered to appear and testify. We cannot give our approval to this plan of procedure.

As said in *Melton v. Com.* 160 Ky. 642, L.R.A.1915B, 609, 170 S. W. 37: "In thus speaking we do not undervalue the importance of protecting courts or of keeping pure the administration of the law; nor do we think what we have said limits in any manner the power courts have always possessed to punish as for contempt persons who were guilty of

contempt as it has always been defined. When a court has full power and authority to protect its dignity, enforce its processes, discipline its officers, and punish those who would impede or bring into disrepute the administration of justice in a pending case, it has all the authority that is needed to be exercised through contempt proceedings, and other offenses should be left to be disposed of in the ordinary way."

If the petitioners were guilty as charged in the information, they should not go unpunished. The practice of attempting to secure court judgments upon false or fraudulent testimony should not and will not be tolerated, nor would we be understood as sanctioning such practice, or any semblance thereof,

because it is deserving of the severest condemnation and censure. We only hold that the facts shown in the record before us do not present a case justifying the procedure adopted. The chancellor could not judicially know the petitioners were guilty as charged. If the petitioners are thought to be guilty, that is a matter that should receive the consideration of the officers of the criminal court, and due notice of the facts should be brought to their attention for such action as may be deemed advisable.

For the reasons given, the relief sought must be granted, and defendant will be enjoined and restrained from proceeding further in the contempt proceedings.

ANNOTATION.

Perjury or false swearing as contempt.

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II. Statement of rules:

- a. In general, 343.
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- d. Proceedings supplementary to execution, 349.
- e. Exceptions in Louisiana and Pennsylvania, 350.

I. Scope and introduction.

The present annotation does not purport to deal with the question whether a refusal of a witness to testify may be punished as a contempt of court. And cases dealing with evasive answers, which might be classed as the equivalent of a refusal to testify rather than as false testimony, are likewise beyond the scope of the note. Refusal to testify, rather than untruthful testimony, appears to be the ground of the decision in *Berkson v. People* (1894) 154 Ill. 81, 39 N. E. 1079, holding a judgment debtor guilty of contempt for refusing to "honestly and truthfully testify and submit to an examination concerning his property, and the disposition he has made of it."

The note does not cover the ques-

III. Evidence to justify conviction and burden of proof:

- a. Where falsity clearly appears or is conceded, 350.
- b. Where falsity is denied or disputed; mere suspicion; judicial notice, 352.

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tion of bribing of witnesses, or attempting to influence their testimony or to induce them to testify falsely. That such action may constitute contempt will be seen from perusal of the following cases: *Re Savin* (1889) 131 U. S. 267, 33 L. ed. 150, 9 Sup. Ct. Rep. 699; *United States v. Carroll* (1906) 147 Fed. 947; *State v. Kayser* (1919) 25 N. M. 245, 181 Pac. 278; *Ricketts v. State* (1903) 111 Tenn. 380, 77 S. W. 1076, 14 Am. Crim. Rep. 301; *Fisher v. McDaniel* (1901) 9 Wyo. 457, 87 Am. St. Rep. 971, 64 Pac. 1056; *Re Hooley* (1898) 79 L. T. N. S. (Eng.) 306.

For the reason that the same principles are involved in other cases, not on facts within the scope of the note, the annotation does not cover the question presented in *State v. Swink* (1909)

151 N. C. 726, 66 S. E. 448, 19 Ann. Cas. 422, as to whether the action of the court in the presence of the jury in ordering a witness into custody for contempt in giving false testimony, is prejudicial to the party calling him, constituting ground for a new trial or reversal.

II. Statement of rules.

a. In general.

The rule is well settled that perjury or false swearing may, at least under some circumstances, be punished as a contempt of court, the fact that a crime for which the offender might be indicted has been committed not preventing the act from being punished also as a contempt. See also authorities cited under II. b, and II. c, *infra*. *EX PARTE HUDGINGS* (reported herewith) ante, 333; *Re Steiner* (1912) 195 Fed. 299 (false affidavit); *Ex parte Steiner* (1913) 124 C. C. A. 89, 202 Fed. 419 (swearing to false affidavits to mislead the court on motion for preliminary injunction); *Re Ulmer* (1913) 208 Fed. 461 (disbarment proceedings); *Berkson v. People* (1894) 154 Ill. 81, 39 N. E. 1079; *People v. Stone* (1913) 181 Ill. App. 475; *People v. Friedlander* (1916) 199 Ill. App. 300 (rule implied); *RILEY v. WALLACE* (reported herewith) ante, 337; *Gordon v. Com.* (1911) 141 Ky. 461, 133 S. W. 206; *Edwards v. Edwards* (1917) 87 N. J. Eq. 546, 100 Atl. 608; *Sachs v. High Clothing Co.* (1919) 90 N. J. Eq. 545, 108 Atl. 58; *Seastream v. New Jersey Exhibition Co.* (1905) — N. J. —, 61 Atl. 1041 (contradictory affidavits); *Moffatt v. Herman* (1885) 8 N. Y. Civ. Proc. Rep. 369, reversed without opinion in (1886) 17 Abb. N. C. 107, 1 N. Y. S. R. 97, which is affirmed on ground beyond the scope of the note in (1889) 116 N. Y. 131, 22 N. E. 287 (interposing of false verified answer); *Re Rosenberg* (1895) 90 Wis. 581, 63 N. W. 1065, 64 N. W. 299; *Stockham v. French* (1823) 1 Bing. 365, 130 Eng. Reprint, 147, 8 J. B. Moore, 381 (Park, J., saying that "perjury is undoubtedly a great contempt of court"). See also *Chicago Directory Co. v. United States Directory Co.* (1903) 123 Fed. 194, and *People ex rel. Nunns v. Coun-*

ty Ct. (1919) 188 App. Div. 424, 176 N. Y. Supp. 858, affirming (1918) 104 Misc. 350, 172 N. Y. Supp. 167 (false statements by juror on examination without oath).

"Prevarication by a witness has the same effect upon the administration of justice as a refusal to answer. To the same effect, it puts the witness in the position of standing out against the authority of the court, and thwarts the court in its effort and purpose of doing justice between the parties. It is contumacy. It is direct contempt of the authority of the court." *Re Rosenberg* (1895) 90 Wis. 581, 63 N. W. 1065.

Perjury, although it may also be punished as a crime, is a contempt and may be punished as such; the one act constituting two offenses, one against the state, the other against the court, as an assault committed in court may be both a contempt and a crime. *Edwards v. Edwards* (1917) 87 N. J. Eq. 546, 100 Atl. 608.

And it was said in *Re Steiner* (1912) 195 Fed. 299, in reply to the contention that perjury could not constitute a contempt, as the same act could not be punished twice, that "if by the same act two distinct offenses are committed, it is difficult to see why the penalty for each offense should not be imposed. If a person should commit an assault in the court room upon the marshal with a deadly weapon, in order to effect the release of a prisoner while his trial was going on, he would be summarily committed for contempt; but such commitment would be no defense to a prosecution for assault with intent to kill. It is thought that perjury upon the witness stand in the presence of the court may well be considered a contempt. It is misbehavior of such a sort as 'to obstruct the administration of justice.'"

The commission of perjury was held in *People ex rel. Nunns v. County Ct.* (1919) 188 App. Div. 424, 176 N. Y. Supp. 858, affirming (1918) 104 Misc. 350, 172 N. Y. Supp. 167, not essential to a contempt by false answers, where a juror on his examination, without being sworn, denied that he knew the defendant, who was charged with con-

ducting a disorderly house, and later, during the jury's deliberations, admitted that he knew the defendant. The false statement by the juror was held to be within the statute empowering courts to punish for criminal contempt a person guilty of "disorderly, contemptuous, or insolent behavior" committed in its presence, and directly tending to interrupt its proceedings or to impair the respect due to its authority.

b. Bankruptcy proceedings.

As to evidence in this class of cases, see III. *infra*.

In a number of cases false or evasive testimony in bankruptcy proceedings has been held punishable as contempt, under § 41 of the Bankruptcy Act of 1898, 30 Stat. at L. 556, chap. 541, Comp. Stat. § 9625, 1 Fed. Stat. Anno. 2d ed. p. 916, providing, *inter alia*, that "a person shall not in proceedings before a referee, . . . after having taken the oath, refuse to be examined according to law;" and the power of the court to punish for contempt has been upheld under § 41b of the same act, which provides: "The referee shall certify the facts to the judge, if any person shall do any of the things forbidden in this section. The judge shall thereupon, in a summary manner, hear the evidence as to the acts complained of, and, if it is such as to warrant him in so doing, punish such person in the same manner and to the same extent as for a contempt committed before the court of bankruptcy, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of, or in the presence of, the court." *Re Fellerman* (1906) 149 Fed. 244; *Ex parte Bick* (1907) 155 Fed. 908; *Re Gitkin* (1908) 164 Fed. 71; *Re Singer* (1909) 174 Fed. 208; *Re Kretsch* (1909) 172 Fed. 523; *Re Schulman* (1910) 101 C. C. A. 361, 177 Fed. 191, affirming (1909) 167 Fed. 237; *Re Bronstein* (1910) 182 Fed. 349; *Re Shear* (1911) 188 Fed. 677; *Re Wiesebrock* (1911) 188 Fed. 757; *Re Michaels* (1912) 194 Fed. 552; *United States v. Appel* (1913) 211

Fed. 495; *Re Kaplan Bros.* (1914) 130 C. C. A. 267, 213 Fed. 753, petition for writ of certiorari denied in (1914) 234 U. S. 765, 58 L. ed. 1582, 34 Sup. Ct. Rep. 998. See also *Re Fogelman* (1913) 204 Fed. 351, and *Re Cantor* (1914) 131 C. C. A. 369, 215 Fed. 61.

In a proceeding in bankruptcy to punish for contempt, the court in *Re Fellerman* (Fed.) *supra*, stated that it was no answer to urge as to that part of the proceeding involving false swearing, that perjury was an indictable offense; and observed that perjury in the presence of the court was a contempt as old as the courts themselves.

And the power of the bankruptcy court summarily to punish the bankrupt for contempt in giving false testimony was sustained in *Re Shear* (1911) 188 Fed. 677, *supra*, the court saying that such power was undeniable, and that the contention that the bankrupt was entitled to trial by jury was untenable.

In *Re Singer* (1909) 174 Fed. 208, *supra*, the rule was applied that when a bankrupt, on examination before a referee, persistently makes false or evasive answers, although it is evident that he must be able to reply fully and correctly, such conduct justifies the court in punishing him for contempt.

And in *Re Schulman* (1910) 101 C. C. A. 361, 177 Fed. 191, *supra*, where an alleged bankrupt repeated the answer "I don't remember," regarding transactions which, it was said, were directly within his knowledge, and as to facts which he must have known, he was adjudged guilty of contempt.

So, in *Re Gitkin* (1908) 164 Fed. 71, *supra*, in holding a bankrupt guilty of contempt because his testimony was wilfully false, vague, and evasive, in effect, a refusal to testify, and therefore amounted to a contempt under § 41 of the Bankruptcy Act, the court said: "If it be true that a refusal to answer is violative of the command of the fourth subdivision of § 41a of the Bankrupt Act, requiring a witness to submit to 'an examination according to law,' can it be said

that one who deliberately and wilfully makes false answers to all questions propounded, thereby as effectually closing the avenues of inquiry as to the bankrupt's estate as if he had refused to answer, has not refused 'to be examined according to law' because he makes answer, when his answers are intentionally and plainly false, and effect the same result as a refusal to answer at all? It is very plain that where a bankrupt persistently, through page after page of his testimony, answers 'I don't know' to questions about his property which he must and evidently does know, and could make full answers, he refuses 'to be examined according to law' with the same effect as though he refused to make answer at all. An 'examination according to law' requires that questions shall be answered, and answered truthfully, and a witness does not satisfy the law by simply making answer which gives absolutely no information whatever in regard to the questions being inquired about, when it is very plain that the witness is entirely competent to give the desired information, but is deliberately and wilfully prevaricating in order that the truth may not be discovered. So that it is our judgment that a witness who refuses to answer, or makes wilfully false answers, and thereby obstructs the prompt and proper administration of the Bankrupt Law, is guilty of contempt, and can be punished under § 41b of the act."

The court in *Re Kretsch* (1909) 172 Fed. 523, supra, while holding that the bankrupt might be discharged notwithstanding the perjury upon his examination, held that for false swearing he might be punished for contempt, and ordered a reference to obtain the master's opinion as to whether the bankrupt had wilfully sworn falsely. It was said: "The master did not believe the bankrupt, and I am not inclined to believe him either. His testimony is full of misstatements, and, while perhaps some of these are to be accounted for by his ignorance of English, it seems hardly possible that some of them do not constitute wilful misstatements of fact. Especially does it seem that his testi-

mony that the title to all property was taken in his wife's name must have been deliberately false. It is extremely unlikely that he should have innocently been mistaken about these facts, or that he misunderstood the question. . . . While, however, those misstatements, even if corrupt, will not bar his discharge, they are none the less a contempt of court if they were in fact corrupt, and in that event I shall punish the bankrupt for them. I shall therefore ask the master, who saw the bankrupt, and whose opinion is alone of moment upon the question of his intent, to certify to me whether in his judgment the bankrupt's statements were deliberately and knowingly false. . . . There is no doubt of the untruth of his statements regarding the taking of title, but as to those regarding his earnings there is some ambiguity. As to both, I cannot decide whether he was wilfully swearing falsely without seeing him; and upon this issue I should especially like the assistance of the learned master."

In *Ex parte Bick* (1907) 155 Fed. 908, supra, it was held that the bankrupt could not defend the proceeding on the ground that, as his testimony was before a special commissioner, it was not testimony taken before the court so that he could be punished for contempt of court, since the special commissioner was only an instrument of the court to take testimony.

The giving of false testimony by an alleged bankrupt was held in *Ex parte Bick* (Fed.) supra, to be "misbehavior" under U. S. Rev. Stat. § 725, Comp. Stat. § 1245, providing in part that the court may punish for contempt witnesses guilty of "misbehavior" in its presence.

In *Re Salkey* (1875) 6 Biss. 269, Fed. Cas. No. 12,253, the bankrupts were held punishable for contempt because they failed to account for certain assets known to have been in their possession within a month preceding the bankruptcy, and because they denied their ability so to account. A writ of habeas corpus was denied in (1875) 6 Biss. 280, Fed. Cas. No. 12,254.

A decision which it seems difficult

to harmonize with the above authorities is *Magen v. Campbell* (1911) 108 C. C. A. 531, 186 Fed. 675, reversing (1910) 179 Fed. 572, in which an order adjudging the bankrupt guilty of contempt was reversed, for the reason that while the case was presented to the district court as though it were one in which the bankrupt had taken the oath, and then refused to be examined according to law, the petitioner in the contempt proceeding, who had charged perjury committed on the examination, had erred in not framing his petition in such manner as to state a case of contempt under the 41st section of the Bankruptcy Act.

In England, there was statutory provision for commitment for contempt of a witness by the court, under § 260, 12 & 13 Vict. chap. 106, and by the commissioners under the Bankruptcy Act in 5 Geo. II. In these cases the commitment of witnesses for a contempt was approved where their answers to proper questions were "unsatisfactory." *Rex v. Perrot* (1761) 2 Burr. 1122, 1215, 97 Eng. Reprint, 745, 796; *Taylor's Case* (1803) 8 Ves. Jr. 328, 32 Eng. Reprint, 381; *Ex parte Legge* (1852) 17 Jur. (Eng.) 415, 22 L. J. Q. B. N. S. 345, 1 Lowndes & M. 163; *Ex parte Lord* (1847) 16 Mees. & W. 463, 153 Eng. Reprint, 1271, 16 L. J. Exch. N. S. 118, 11 Jur. 186; *Ex parte Bradbury* (1853) 14 C. B. 15, 139 Eng. Reprint, 7, 2 C. L. R. 585, 23 L. J. C. P. N. S. 25, 18 Jur. 189; *Ex parte Nowlan* (1804) 6 T. R. 118, 101 Eng. Reprint, 466, 3 Revised Rep. 130, 11 Ves. Jr. 511, 32 Eng. Reprint, 1187; The words of Lord Kenyon, Ch. J., in *Ex parte Nowlan* (Eng.) *supra*, are applicable as explanatory of these English decisions. He said: "There are no technical rules by which cases of this kind are determined, but the question in each particular case is whether the answers given by the bankrupt be or be not sufficient to satisfy the mind of any reasonable person."

c. False justification or pleading.

See III. *infra*, for evidence in this class of cases.

In a number of New York cases, the

question has arisen whether a surety who makes a false justification on a judicial bond, knowing at the time that it is false, is guilty of civil contempt under statute in that state. Some of these cases expressly recognize the rule that at the common law perjury or false swearing is a contempt; others treat the question only as one of statutory construction, frequently without setting out the exact terms of the statute involved. Section 14 of the New York Code of Civil Procedure, which is cited in many of the cases, provides that a court of record has power to punish misconduct by which a right or remedy of a party to a civil action or special proceeding pending in a court may be defeated, impaired, impeded, or prejudiced, in certain cases, among which is specified "a party to the action or special proceeding for putting in fictitious bail, or a fictitious surety, or for any deceit or abuse of a mandate or proceeding of the court." And the cases generally hold that a surety on a judicial bond is liable for contempt in making a false justification of sufficiency which he knows at the time is false. *Egan v. Lynch* (1883) 17 Jones & S. 454, 3 N. Y. Civ. Proc. Rep. 236; *Nathans v. Hope* (1884) 5 N. Y. Civ. Proc. Rep. 401, reversed for insufficiency of evidence in (1885) 100 N. Y. 615, 3 N. E. 77; *Stephenson v. Hanson* (1884) 6 N. Y. Civ. Proc. Rep. 43, 67 How. Pr. 305; *Keating v. Goddard* (1885) 8 N. Y. Civ. Proc. Rep. 377, note; *Diamond v. Knoepfel* (1886) 3 N. Y. S. R. 291; *Simon v. Aldine Pub. Co.* (1887) 14 Daly, 279, 12 N. Y. Civ. Proc. Rep. 290, 8 N. Y. S. R. 377, affirming (1887) 8 N. Y. S. R. 334; *Lawrence v. Harrington* (1892) 63 Hun, 195, 17 N. Y. Supp. 649, affirmed without opinion in (1892) 133 N. Y. 690, 31 N. E. 627; *Re Hopper* (1894) 9 Misc. 171, 29 N. Y. Supp. 715, affirmed without opinion in (1895) 145 N. Y. 605, 40 N. E. 164; *People ex rel. Wise v. Tamsen* (1896) 17 Misc. 212, 40 N. Y. Supp. 1047; *Re Hay Foundry & Iron Works* (1897) 22 App. Div. 87, 47 N. Y. Supp. 802; *Re Sheppard* (1901) 33 Misc. 724, 68 N. Y. Supp. 974; *Buffalo Loan, T. & S. D. Co. v. Medina Gas & E. L. Co.* (1902) 68 App.

Div. 414, 74 N. Y. Supp. 486; *Johnson v. Austin* (1902) 76 App. Div. 312, 78 N. Y. Supp. 501 (holding evidence insufficient to sustain conviction); *Re Goslin* (1904) 95 App. Div. 407, 88 N. Y. Supp. 670, affirmed without opinion in (1904) 180 N. Y. 505, 72 N. E. 1142; *Re Wood* (1909) 134 App. Div. 361, 119 N. Y. Supp. 69.

In holding sureties upon an undertaking guilty of contempt in swearing falsely as to their pecuniary responsibility, the court in *Egan v. Lynch* (N. Y.) supra, stated that no plainer case of an attempt to prevent the course of justice could be shown than the one then presented; that perjury had always been a great contempt of court; that while it was true the sureties might, and should be, indicted for their perjury, such indictment and conviction would be a punishment for the offense committed against the people of the state, but would not purge the contempt; although, if they were afterwards indicted and convicted for perjury, the court in which they were convicted would, in pronouncing sentence, take into consideration the previous punishment.

So one, who, to secure the release of a mechanic's lien, justified as a surety by claiming that he was the owner of certain premises worth a large sum above the mortgage thereon, when he had no substantial interest in the property, was held in *Re Hay Foundry & Iron Works* (1897) 22 App. Div. 87, 47 N. Y. Supp. 802, supra, guilty of civil contempt within the meaning of subd. 2 of § 14 of the Code of Civil Procedure, supra.

A surety on a bond given to procure the discharge of a mechanic's lien, whose formal affidavit of sufficiency as surety was unqualifiedly false and perjurious, was held in *Re Hopper* (1894) 9 Misc. 171, 29 N. Y. Supp. 715, affirmed without opinion in (1895) 145 N. Y. 605, 40 N. E. 164, supra, to have committed an offense against the dignity of the court which it was neither the province nor the right of the lienor to compromise or condone, it being said that it was owing to the court that the offense should not go unpunished, if for no other reason than to

deter others from the commission of like acts.

And the fact that the lienor relied on the truth of the formal affidavit of sufficiency made by the surety, and waived further examination of him, and approved the bond, was held not to affect the question of contempt of court, in case the affidavit was false. *Re Hopper* (N. Y.) supra.

Also in *Re Sheppard* (1901) 33 Misc. 724, 68 N. Y. Supp. 974, a proceeding to punish for contempt a surety who, to discharge a mechanic's lien, falsely swore as to his assets, it was held that the fact that a surety is not examined at the time of his justification does not make the same, if false, any less a contempt of court, the opposing party having a right to rely on the surety's sworn statement of his pecuniary resources.

A surety on a bond given to secure the discharge of an attachment, who, by falsely justifying as surety, obtained the discharge of the attachment and the release of the property on which it was levied, was held in *People ex rel. Wise v. Tamsen* (1896) 17 Misc. 212, 40 N. Y. Supp. 1047, guilty of unlawfully interfering with the proceeding within the meaning of subd. 4 of § 14 of the Code of Civil Procedure, authorizing the punishment of any person for "unlawful interference with the proceeding" in an action, and hence properly committed for a civil contempt.

To a similar effect is *Lawrence v. Harrington* (1892) 63 Hun, 195, 17 N. Y. Supp. 649, affirmed without opinion in (1892) 133 N. Y. 690, 31 N. E. 627, holding that a false justification of the surety on an appeal bond, which was intended to and did result in a stay of execution, constituted a civil contempt under § 14 of the Code of Civil Procedure.

In *Buffalo Loan, T. & S. D. Co. v. Medina Gas & E. L. Co.* (1902) 68 App. Div. 414, 74 N. Y. Supp. 486, supra, the court said: "That the appellant, when he declared under oath that he was . . . worth \$10,000, over and above all his debts and liabilities, committed a deliberate and wilful falsehood, is too clearly established to admit of dis-

cussion; that such false swearing was committed for the express purpose of deceiving the court, and inducing it to adopt a course of procedure which would not otherwise have been adopted, is equally plain; and it having been adjudged by the court at special term that this misconduct upon the part of the appellant was of such character as to defeat, impair, impede, or prejudice a right or remedy of a party to a civil action or special proceeding, it follows that he has been guilty of a civil contempt, which subjects him to punishment, and requires that he be dealt with as summarily as a proper regard for legal procedure will permit. Code Civ. Proc. §§ 14, 2266, 2267."

A decision apparently contrary to the above cases, holding that a surety was not punishable for civil contempt in having sworn falsely to an affidavit as to qualifications as surety on an appeal bond, is *Norwood v. Ray Mfg. Co.* (1886) 11 N. Y. Civ. Proc. Rep. 273.

And it was held in *Schreiber v. Raymond & C. Mfg. Co.* (1897) 18 App. Div. 158, 45 N. Y. Supp. 442, that false justification of a surety on a bond given to indemnify a sheriff on an attachment was not a civil contempt in favor of one not a party to the action, whose property was erroneously levied upon under the attachment. The court referred particularly to that part of § 14 of the New York Code of Civil Procedure, declaring a civil contempt misconduct by which a right or remedy of a "party to a civil action" or special proceedings pending in the court may be defeated, impaired, impeded, or prejudiced.

If the surety is honestly mistaken as to the amount of his debt, and on his justification swears to the true amount which he believes due, though he in fact owes a larger sum, it seems that he should not be convicted of contempt of court for false justification, if, for example, the error is due to a mistaken view as to the legal obligation of claims against him. Thus, it was held in *Nathans v. Hope* (1885) 100 N. Y. 615, 3 N. E. 77, that the evidence was insufficient to sustain a conviction for contempt for false justi-

fication of a surety, in making an affidavit to the effect that he was worth a certain sum over and above all his debts and liabilities, where it appeared that his failure to reckon certain judgments of a bank against him as paid might have been due to his mistake of the law in believing at the time the undertaking was executed that, under a by-law of the bank, which was subsequently held void, it had a lien on stock standing in his name on the books of the bank.

The note does not cover the class of cases presenting the question of liability for contempt in the giving or interposing of judicial bond with fictitious or insufficient sureties, illustrations of which are: *Foley v. Stone* (1888) 15 N. Y. Civ. Proc. Rep. 224, 3 N. Y. Supp. 238, affirmed in (1890) 56 Hun, 640, 18 N. Y. Civ. Proc. Rep. 190; *McAveney v. Brush* (1895) 13 Misc. 79, 34 N. Y. Supp. 101; *Hall v. Lanza* (1904) 97 App. Div. 490, 89 N. Y. Supp. 980.

That one not a party to an action may be punished for contempt of court if he conspires to impose upon it and a party to the action a worthless surety, who swears falsely as to his qualifications and sufficiency, see *Hull v. L'Eplattenier* (1875) 5 Daly (N. Y.) 534, decided under a statute providing that every court of record shall have power to punish by fine and imprisonment any misconduct by which the rights or remedies of a party in a cause may be defeated, impaired, impeded, or prejudiced, in cases where attachments and proceedings as for contempt have been usually adopted and practised in courts of record, to enforce civil remedies or to protect the rights of parties.

And that an attorney for a party in an action, who procures the approval of an undertaking in the action with a worthless or fictitious surety, may be punished for contempt of court, see *Muccio v. Porto* (1902) 72 App. Div. 88, 76 N. Y. Supp. 96.

Whether the interposing of a false verified answer constitutes a contempt of court is a question upon which the New York courts have reached different conclusions.

It was held in *Re Hale* (1895) 85 Hun, 620, 66 N. Y. S. R. 201, 32 N. Y. Supp. 883, that a defendant in an action who interposed a false answer was guilty of contempt of court, and an order was made imposing upon him a fine of the amount of the judgment in the action. To similar effect is *Koehler v. Campbell* (1894) 36 N. Y. Supp. 1110.

And in *Martin Cantine Co. v. Warshauer* (1894) 7 Misc. 412, 28 N. Y. Supp. 139, the interposing by the defendant of a false, verified answer, known by him at the time to be false, was held to be a contempt, the court taking the view that the pleading was a "proceeding" within the meaning of § 14 of the Code above referred to.

But the court in *Fromme v. Gray* (1896) 148 N. Y. 695, 43 N. E. 215, affirming (1895) 14 Misc. 592, 36 N. Y. Supp. 1107, declined to follow this decision, and held that the interposing of a false verified answer by a judgment debtor in supplementary proceedings was not a civil contempt within the meaning of the statute.

The interposing by the defendant in a civil action of a false verified answer, which at the time he knew was false, and which defeated or impeded the rights of the plaintiff, was held in *Moffat v. Herman* (1885) 8 N. Y. Civ. Proc. Rep. 369, to be a civil contempt within the New York statute (Code Civ. Proc. § 14). The decision was, however, reversed without opinion in (1886) 17 Abb. N. C. 107, 1 N. Y. S. R. 97, and, in affirming the latter decision, the New York court of appeals, in (1889) 116 N. Y. 131, 22 N. E. 287, expressly stated that it did not pass on the question whether a contempt, punishable civilly, was committed, holding only that the fine imposed by the lower court was excessive, in view of the absence of proof of the extent of the loss sustained.

That one who makes a false verified answer in contempt proceedings may be prosecuted for the perjury, but must be discharged if the facts stated under oath are sufficient to show that no contempt was committed, is a principle which leads beyond the scope of the present note. See, for example,

Zuver v. State (1919) — Ind. —, 121 N. E. 828, and *People v. Friedlander* (1916) 199 Ill. App. 300.

And, among other cases of the kind, attention is called to *People v. Samuel* (1916) 199 Ill. App. 294, in which it is held that in courts of law one charged with criminal contempt may purge himself by oath, and if he clears himself by his answers the complaint is dismissed; although it was said that in a contempt proceeding in a court of equity, where the party in contempt has answered the interrogatories, his answer may be contradicted and disapproved by affidavit of the adverse party.

d. Proceedings supplementary to execution.

That the interposing of a false verified answer by a judgment debtor in supplementary proceedings is a civil contempt, see *Fromme v. Gray* (N. Y.) under II. c, supra.

It has been decided in several New York cases that false swearing upon an examination in supplementary proceedings is not punishable as a contempt.

Thus, in *Bernheimer v. Kelleher* (1900) 31 Misc. 464, 64 N. Y. Supp. 409, reversing (1900) 30 Misc. 829, 61 N. Y. Supp. 1125, it was held that a judgment debtor who testified falsely, upon his examination in proceedings supplementary to execution, that he had never transferred to his brother any property of any kind, whereas two weeks earlier there had been such a transfer, was not guilty of contempt under the New York statute authorizing punishment, as for contempt, for any "deceit or abuse of a mandate or proceeding of the court." The court said the question was whether false swearing by a judgment debtor, upon his examination in supplementary proceedings touching the disposition of his property, was a contempt for which he could be punished by fine and imprisonment; that, if it was, it must be found within some of the statutory definitions; that it was not a criminal contempt, as defined by the statute, and was not within the statute above referred to, relating to civil contempts; also that there was the further ob-

jection to the order adjudging the debtor guilty of contempt that it did not appear that any right or remedy of the plaintiff was defeated, impaired, impeded, or prejudiced by the defendant's perjury, as was necessary under the statute.

The view is taken also in *Manzella v. Ryan* (1902) 73 App. Div. 137, 77 N. Y. Supp. 132, that, for false answers by the judgment debtor in his examination in supplementary proceedings, punishment for contempt of court is not the proper redress.

A distinction was drawn, however, in *Becker v. Gerlick* (1911) 72 Misc. 157, 129 N. Y. Supp. 614, between a case of false swearing by a judgment debtor on an examination in supplementary proceedings, and evasive or unsatisfactory answers which would make prosecution for perjury difficult and at the same time show that the witness was not disclosing the facts. In this case, where the witness's answers to repeated questions were, the court said, transparently false, in disclaiming memory of the transactions, the court, in holding that he could be punished for contempt, said: "Where the judgment debtor, unwilling to testify truly, and fearing to give false testimony as to his acts or transactions, resorts to the expedient of denying knowledge or recollection concerning them, thus rendering a prosecution for perjury difficult, if not impossible, it by no means follows that he must be held to be equally beyond the reach of this court. I should be sorry to hold that he was, and so to confess that by a palpable and transparent evasion the fraudulent debtor had put himself safely beyond the reach of the civil process of this court, and at the same time, for all practical purposes, beyond the reach of the criminal law. . . . On the contrary, I think that in a perfectly plain case, where the debtor wilfully denies knowledge or recollection of matters concerning which he is properly questioned, and concerning which it is incredible that he should have wholly forgotten, the court may punish him as for a civil contempt, not because he has testified falsely in denying such

knowledge or recollection, but because he has in effect refused to testify at all."

The New York cases in this and the preceding subdivision were regarded in *Re Fellerman* (1906) 149 Fed. 244, as controlled by statute, and therefore as of limited value in the courts of other jurisdictions not so controlled.

e. Exceptions in Louisiana and Pennsylvania.

In *State ex rel. Terence v. Lazarus* (1885) 37 La. Ann. 314, in vacating an order of commitment for contempt in testifying untruthfully, the court said that, while refusing to answer a question that a witness was bound to answer was punishable as a contempt, answering the question untruthfully was perjury, the punishment for which was through the regular criminal law tribunals. But it was also said that in cases of flagrant perjury the trial court had not infrequently directed the prosecuting officer's attention to the matter, and had even ordered the committal of the offender until the criminal machinery could be set in motion for his trial.

False swearing by a witness before the examiner, in a contested election, was held in *Lerch's Contested Election* (1912) 21 Pa. Dist. R. 1113, not an obstruction of justice within the meaning of the statute providing for summary punishment for contempt of court, in cases of "the misbehavior of any person in the presence of the court, thereby obstructing the administration of justice." The court said there was no difficulty in the fact that the proceeding was before an examiner, but that under the statute it was manifest that the misbehavior there referred to did not refer to the commission of perjury. See also quotation from this case under III. b, *infra*.

III. Evidence to justify conviction and burden of proof.

a. Where falsity clearly appears or is conceded.

In most of the cases in which perjury or false swearing has been held to constitute a contempt, the falseness of the statements or allegations made

under oath was either admitted or so clearly shown, generally from the contemner's own statements, as to be apparently beyond question, and the cases do not generally present the interesting question raised in *RILEY v. WALLACE* and *EX PARTE HUDGINGS* (reported herewith) ante, 337, 333, as to whether the court may punish a witness for contempt for false swearing, where he denies the falsity of his statements, or where there is nothing in the testimony itself to show plainly that it is false, although the court may have formed that opinion.

The rule was said, in *United States v. Appel* (1913) 211 Fed. 495, to be that, if the witness's conduct shows beyond any doubt, whatever that he is refusing to tell what he knows, he is in contempt of court; that while that conduct is, of course, beyond question, when he flatly refuses to answer, it may appear in other ways; that a court ought not to be put off by transparent sham, and the mere fact that the witness gives some answer is not an absolute test; that, for instance, it would not be enough for a witness to say that he did not remember where he had slept the night before, if he was sane and sober, or that he could not tell whether he had been married more than a week; that nevertheless this power must not be used to punish perjury, and that the only proper test is whether on its mere face, and without inquiry collaterally, the testimony is not a bona fide effort to answer the questions at all.

So, in *Re Gitkin* (1908) 164 Fed. 71, the court considered the bankrupt's testimony as so palpably false as to warrant his commitment for contempt, stating that the testimony, which was taken by the referee, "shows a determination to refuse to give the trustee and creditors any information whatever as to the disposition of his property, or to explain how it came about that he was indebted in certain amounts, which, from all the facts and circumstances, were plainly and certainly claims set up for the purpose of further depleting the already dissipated estate. He pretended to be ignorant of facts which obviously

would have been known to anyone who had sufficient intellect to perform the most ordinary duties of life, and the evasion and falsity of the answers are so palpable, so clear, and so persistent as to establish beyond any possibility of a doubt, the findings as reported by the referee."

And where a witness before a referee in bankruptcy professed ignorance as to matters respecting which, the court said, he must have had knowledge, it was held in *Re Michaels* (1912) 194 Fed. 552, that he should be cited before the court for punishment for contempt.

So, in *Re Shear* (1911) 188 Fed. 677, the court, in holding a bankrupt guilty of contempt for false swearing, stated that, from a careful perusal of the evidence submitted by the referee and the answering affidavit of the bankrupt, it was difficult to escape the conclusion that the bankrupt wilfully testified falsely and evasively; that, "in utter disregard of the truth and solemnity of the proceeding, he has asseverated untruths and given false testimony, the falsity of which is thought directly established."

The view was taken in *Edwards v. Edwards* (1917) 87 N. J. Eq. 546, 100 Atl. 608, that where the facts are admitted or demonstrated, the court would be shirking a clear duty if it failed to punish perjury as contempt.

In holding that a judgment debtor, who refused to "honestly and truthfully testify and submit to an examination concerning his property," and the disposition he had made of it, was guilty of contempt, the court in *Berkson v. People* (1894) 154 Ill. 81, 39 N. E. 1079, said: "We are of the opinion that the evidence heard upon the motion to commit the respondent for contempt was sufficient to justify the order as made. The testimony taken before the master and all the proceedings had before him were presented and read on the hearing of the motion, and we think the proper conclusion from all the evidence is that the respondent has in his possession, or under his control, a large sum of money, the proceeds of a stock of goods disposed of by him to different parties,

and that he contumaciously refuses to honestly, fairly, and truthfully testify in relation to such proceeds, and as to what he has done with them, and to turn the same over to the receiver. A discussion of the evidence in detail will serve no useful purpose, but no one can read it without being impressed with the belief that the respondent, by various evasions, or by claiming not to remember, is endeavoring to conceal and withhold from the receiver an amount of money more than sufficient to satisfy the complainant's judgment, realized by him from the sale of his goods. We think he was properly adjudged guilty of contempt."

In *Re Bronstein* (1910) 182 Fed. 349, a case where a witness other than the bankrupt was held guilty of contempt because of false swearing, shown by his conflicting and contradictory statements under oath, and *Re Fellerman* (1906) 149 Fed. 244, a case where the bankrupt's testimony appears contradictory, so that from such testimony, taken at different times, the court could apparently conclude that the witness had sworn falsely, the rule was laid down that, to establish the contempt, it is not necessary to "allege or prove with the strictness of criminal practice, or by laxer methods, particular instances of false swearing, demonstrating the falsity by proving the truth."

b. Where falsity is denied or disputed; mere suspicion; judicial notice.

In cases where the falsity of the testimony is denied, and is a matter merely of inference of opinion, the court, it seems, should not weigh the conflicting evidence in a contempt proceeding, but should leave the alleged contemner to be punished criminally, if guilty of perjury. In other words, the contemner is entitled to a jury trial if the facts are substantially disputed, and the court cannot take judicial knowledge that the testimony or allegation is false. This appears to be the doctrine sustained by the authorities, although, in some of the bankruptcy cases, the court seems to have gone a long way in contempt proceedings in weighing conflicting evidence.

In *EX PARTE HUDGINGS* (reported herewith) ante, 333, the court said: "It is true that there are decided cases which treat perjury, without any other element, as adequate to sustain a punishment for contempt. But the mistake is, we think, evident, since it either overlooks or misconceives the essential characteristic of the obstructive tendency underlying the contempt power, or mistakenly attributes a necessarily inherent obstructive effect to false swearing. If the conception were true, it would follow that, when a court entertained the opinion that a witness was testifying untruthfully, the power would result to impose a punishment for contempt with the object or purpose of exacting from the witness a character of testimony which the court would deem to be truthful; and thus it would come to pass that a potentiality of oppression and wrong would result, and the freedom of the citizen, when called as a witness in a court, would be gravely imperiled."

Courts will not ordinarily, when the facts are in dispute, it was said in *Edwards v. Edwards* (1917) 87 N. J. Eq. 546, 100 Atl. 608, punish perjury as a contempt, not because of lack of power, but because sound public policy requires that the offenders should be left to the criminal law.

But circumstances may arise, it was said in *Edwards v. Edwards* (N. J.) supra, which would make it the duty of the court to punish perjury as a contempt, even though it is obliged to weigh evidence, and perjury committed by a petitioner who has induced the court to grant a decree of divorce was said to present a case of this class.

And in *Re Gitkin* (1908) 164 Fed. 71, cited under III. a, supra, the conclusion that a bankrupt's testimony was so palpably false as to justify his commitment for contempt was reached, although the bankrupt denied the falsity of his testimony and asserted its truthfulness, in answer to the rule to show cause why he should not be held in contempt of court.

If false swearing in the presence of the court constitutes direct contempt,

it was said in *People v. Stone* (1913) 181 Ill. App. 475, that judicial knowledge of its falsity is indispensable to the right of the court to exercise authority to commit therefor; and in this case, where there was nothing in the record to show that the court could judicially know that the testimony was false, it was held error to commit for contempt for false swearing, where the answer to the rule to show cause why the witness should not be punished for contempt denied the allegation as to the falsity of the testimony. The court said: "If it was deemed constructive contempt, requiring a hearing to show whether the testimony was false, and one was had for that purpose with respect to which the record is silent, then the court practically converted itself into a tribunal to try a charge of perjury, in utter disregard of the constitutional guaranties afforded one charged with crime. But presumably the court treated it as a direct contempt, on the theory that it judicially knew that the testimony was false, for it entered a rule to show cause without any information or affidavit, which would be unnecessary in a case of direct contempt. But there is nothing in the record to disclose that the court knew that the testimony was false. . . . The substance of the testimony of Stone, alleged to be false in the case on trial, was that he had paid Greenfield a certain sum of money at a certain time and place. Presumably the court was not there, nor in a position to know the actual fact. All it could know, in the nature of things, was that Stone gave one version of the matter under oath, and Greenfield another. It might form a correct conclusion from the entire evidence as to which was telling the truth, but it would not know judicially which had falsified."

In a case of direct contempt, it was said in *People v. Stone* (Ill.) supra, the court may act upon that of which it may take judicial notice, but it cannot judicially know that evidence is false, unless at the trial it is so made to appear by the witness's own testimony, or perhaps by unquestioned or incontrovertible evidence; that, other-

wise, the court would act merely upon its belief or conclusions derived from evidence heard, and not upon matters of fact of which it had judicial cognizance, which is essential to the summary proceedings for direct contempt.

For conclusions in accord with those in the above case, see also *RILEY v. WALLACE* (reported herewith) ante, 337.

And in holding erroneous an order adjudging one guilty of direct contempt of court for falsely stating to it, in a criminal case, that the prosecuting witnesses were out of the state and would not return or prosecute the case, where the party making such statements testified under oath that the statements were made on information given by the prosecuting witnesses, and that he believed them to be true at the time, the court in *People v. Hille* (1915) 192 Ill. App. 139, took the view that, before the contempt under such circumstances arose, it must appear beyond a reasonable doubt from the personal knowledge of the court, or by admission from the defendant himself in open court, and in the presence of the court, and from no other source whatsoever, that the representations were false, that the defendant knew of their falsity when he made them, and that he made them, knowing their falsity, with a wilful and malevolent intention of assailing the dignity of the court and interfering with its procedure and the due administration of justice. And in this case, where the court had no personal knowledge of the falsity of the representations made, nor of the intention or motives of the defendant in making them, but reached its conclusions from the testimony of other witnesses during the proceedings, it was held that the defendant should have been discharged, because his testimony, which was equivalent to a sworn answer specifically denying the facts upon which the charge against him was founded, presented an issue of fact which could not be tried by the court in a proceeding of this nature. It was said that where the contempt charged is criminal in its nature, as in this case,

the contemner may answer the charge under oath, either orally or in writing, and his answer must be accepted as true except in so far as it may contradict the records of the court, or the facts that transpired in the presence of the court, and that if by his answer he purges himself of the contempt charged against him, he must be acquitted thereof.

Mere suspicion by the court that testimony of a bankrupt taken before a special commissioner is false will not justify the court in punishing him for contempt, in the absence of a certificate by the commissioner indicating that, in his opinion, the witness testified falsely, or held back information which he might have given. *Re Cantor* (1914) 131 C. C. A. 369, 215 Fed. 61, where an application was denied to adjudge a member of a bankrupt firm guilty of contempt, for falsely testifying on his examination before a special commission regarding the cash book of the firm which he had been ordered to produce, it appearing merely that he testified that he last saw the book in the office of the firm shortly before the appointment by the court of a custodian of its property, and that he left it where he saw it. The court said: "The testimony of the witness as it reads is, no doubt, rather unsatisfactory; but we did not have the advantage of hearing it as he gave it, and of observing his demeanor on the stand. There is no certificate of the special commissioner, who did hear him, indicating that in his opinion the witness testified falsely, or held back information which he might have given. The district judge held that, in the absence of such a certificate, he was not persuaded to the conclusion that the witness's statements were false, or that he was concealing the book. Still less can we, who never saw or heard him, decide on mere suspicion that his testimony was perjured, and, unless his statements are false, there is no evidence which will support the conclusion that he has the book, or knows where it is."

In this connection, attention is called to the statement of the district

court, whose decision is affirmed in *Re Cantor* (Fed.) supra, that "a judge ought not to commit a man for contempt for perjury, except in so plain a case as makes further attempt to examine the witness a farce, so obviously that no observer who was present could doubt that the witness was obviously trifling with the proceeding. He ought not to judge upon the balance of proof introduced to contradict the witness, and so turn the examination into a trial of perjury; for this trenches on the criminal law itself. And, while the line cannot be abstractly stated with success, it can be so administered, if the judges will remember the purpose which it answers, and loyally accept the limitations which the defendant's right to a jury trial throws upon them."

Although the note does not purport to cover cases generally on the question of contempt for refusal to answer, or for giving an evasive answer, attention is called to *Ex parte Creasy* (1912) 243 Mo. 679, 41 L.R.A.(N.S.) 478, 148 S. W. 914, where a witness, who, before a grand jury, was asked whether on certain dates he had bought whisky for persons named, replied he could not say; that possibly he had; and it was held erroneous to judge him guilty of contempt for refusal to answer, on the ground that the answer was evasive and equivocal, and a subterfuge to avoid answering at all, it being said that if the answer was not truthful, the witness subjected himself to a charge of perjury, for which the courts were open, but that the summary process for contempt did not lie in such a case.

The court in *Re Lerch's Contested Election* (1912) 21 Pa. Dist. R. 1113, in refusing a rule to show cause why an attachment for contempt should not be issued against one who, as a witness, was alleged to have testified falsely before the examiner in a contested election case, said: "The proposition that a witness can be punished for contempt because the party calling him believes that the witness was guilty of perjury, and is able to prove other related facts which might lead to a fair conclusion that perjury

had been committed, is a novel one. It is, in effect, that if the judge believes that a witness is guilty of perjury, he can, if the perjury is committed in open court, fine and imprison him; if it is committed out of court, fine him for the perjury. Perjury is a substantive criminal offense, and has always been triable by indictment by the grand jury and by a petit jury. Any proposition that involves a denial of trial by jury, a sacred constitutional right, should have most serious consideration. . . . While it is true that the court decides an election contest without the aid of a jury, it does not follow that, where a witness swears to facts which he says are true, the court is to punish him if the court finds from the evidence the facts to be otherwise. If a court, without clear authority, should assume the right to punish summarily, or without a trial by jury, witnesses who testified before the court in a way that did not commend itself to the court, the method of procedure might readily become the means of abuse, and in cases like the present, where proceedings were conducted before examiners and other officers of the court, the knowledge that such proceedings could be had might be used for the purpose of intimidating witnesses. . . . When they fail to fulfil this obligation, they can be indicted for perjury, and if twelve of their peers decide that they have sworn falsely, they are sentenced by the court. This is the well-established and well-understood course of procedure."

In *People v. Friedlander* (1916) 199 Ill. App. 300 (abstract of decision only reported), it is held that "on a proceeding for criminal contempt, based on alleged misrepresentations of defendant as to his qualifications as surety on a recognizance in a pending cause, where defendant orally denies under oath in open court that he made the statements as to his qualification, he sufficiently purges himself of the charge, and the rule against him should be discharged."

The question of purging from contempt by a sworn answer or denial is

one which, as before stated, cannot be covered within the limits of the present annotation.

The question of burden of proof and degree of certainty required to show falsity is presented in several cases.

Thus, where a surety on an appeal bond, who was charged with contempt of court in falsely swearing as to his property qualifications, contended that all of his statements were not written down upon the examination when he justified as surety, it was held in *Schmitt v. Livingston* (1897) 20 Misc. 324, 45 N. Y. Supp. 915, affirming (1897) 19 Misc. 353, 43 N. Y. Supp. 494, that upon this disputed question of fact the burden of proof, which was, in the first instance, on the plaintiff in the contempt proceeding to establish the charge of false swearing, was not shifted by the particular defense interposed, but remained on the plaintiff, although he made out a prima facie case of false swearing by proof of two depositions of the surety, the one taken at the time of the justification, which showed a much lower valuation, and the other, taken at the time of his examination as a judgment debtor, when it was sought to enforce his liability as surety.

In a proceeding to punish for contempt a surety on a bond given to discharge a mechanic's lien on the ground that he swore falsely as to his assets, it was said in *Johnson v. Austin* (1902) 76 App. Div. 312, 78 N. Y. Supp. 501, that it was incumbent on the plaintiff to show the insolvency of the surety when he gave the bond in question, and that, as the proceeding deprived the defendant of trial by jury, the fact of insolvency should be made to appear beyond a reasonable doubt, and also that he had been guilty of perjury. And in this case the evidence was held insufficient to sustain a conviction for contempt, the court saying it was not established by the plaintiff's affidavits that the surety was insolvent when he executed the bond, much less that he knew that to be the fact.

IV. *Retraction of false testimony.*

The court was of the opinion in *Re Gordon* (1909) 167 Fed. 239, that, as

a general rule, where the bankrupt has intentionally given false testimony, and during the course of the same examination changes his mind and testifies truthfully, he ought not to be punished for contempt of court; the reason given being that bankrupts who have given false testimony should not be discouraged from afterward admitting the truth by fear of punishment for contempt, although, the court said, the witness took the chances of a prosecution for perjury. In this case, the motion to punish the bankrupt for contempt was denied, where, on his examination, he repeatedly replied to the question whether he had any money in his pockets, that he had none, and finally, when directed to produce whatever he had in his pockets, produced money amounting to \$100, which the referee subsequently decided, as the bankrupt at the time contended, belonged to another.

In exceptional cases, or in cases where the recantation does not take place until adjourned dates, and in the meanwhile, because of the false testimony, an injury has happened to the estate, the court in *Re Gordon* (Fed.) *supra*, stated that a different conclusion might be reached.

The court's jurisdiction to punish a bankrupt for contempt was considered in *Re Wiesebrock* (1911) 188 Fed. 757, as depending upon interference with the exercise of that jurisdiction, and not on injury to the public welfare and morals, which is understood to be the basis for the crime of perjury; and, it was said, while any interference with the activities of the creditors or of the referee in locating assets, including the giving of false testimony with regard thereto, could have been treated as a contempt for the purpose of vindicating the court's authority and discovering assets, the bankrupt would be allowed to purge himself of the contempt, in so far as he could, by giving correct testimony or information as to the property. In this case, however, although the court said that the bankrupt had purged himself of the greater part of the contemptuous acts which had to do with the concealment of assets and

imaginary incurring of debts, it granted an application to punish him for contempt, stating that "he is still liable to punishment for his disregard of his duties as a bankrupt, and the way in which he failed to comply with what the Bankruptcy Statute requires him to do."

V. Miscellaneous illustrations.

In a suit for alleged infringement of a copyright, the fabrication by one of the parties of a part of their city directory, and the introduction of it in evidence in their behalf, were held contempt of court, in *Chicago Directory Co. v. United States Directory Co.* (1903) 123 Fed. 194, the court saying that this was a gross piece of contempt, and that the only reason the imprisonment prescribed was so brief was because the same act constituted a criminal offense, for which, notwithstanding the infliction of a penalty for contempt, the guilty party might be imprisoned.

And it was held that a witness was guilty of contempt of court for giving answers which were plainly a mere sham and, by their falseness and vagueness, an obstruction of justice, the same as though the witness had refused to testify, where, on his examination, it appeared that he had withdrawn more than \$900 within a week previous thereto, but claimed inability to state what he had done with any part of it, except to pay labor, when his pay roll amounted to \$58 a week, and that within about ten days before the examination he had withdrawn other sums, aggregating nearly \$700, and claimed he could not say how it was spent, except that these sums and other large previous withdrawals he might have spent on gambling. *United States v. Appel* (1913) 211 Fed. 495. The court said: "The question, therefore, comes down simply to this: Is the story of his gambling losses so obviously and apparently a mere effort to block the examination that a court must, in protection to itself, hold that it is false, and that he was attempting to prevent any effective examination? One cannot, of course, say that such a

story is in all circumstances necessarily an absurd explanation, but the inability of the respondent to give the names of any places, but one, of those where he had lost any such sum as he stated, and his entire vagueness about matters which were so recent, and which must have impressed themselves upon his memory at the time to a greater extent, leaves no doubt in my mind that he was not stating what he knew, and was attempting to prevent any efficient examination. This, coupled with the impression of the commissioner who heard him testify, seems to me to leave me no alternative, if I am to apply the rule at all, but to hold that he was guilty of a contempt under the circumstances."

So, in *Sachs v. High Clothing Co.* (1919) 90 N. J. Eq. 545, 108 Atl. 58, it is held that one is guilty of contempt who, in order to secure the action of the court in his own interest, presents at one time an affidavit setting up a certain statement of facts, and thereafter, in his own interests, in order to secure the action of the court, presents another affidavit setting up a different state of facts; and that in a proceeding to punish for contempt by such imposition on the court by perjured affidavits, it is immaterial which affidavit represents the true facts.

On petition for habeas corpus by one charged with swearing to false affidavits for the purpose of misleading the court on a motion for a preliminary injunction, it was held that the court was bound to assume, in aid of the jurisdiction of the trial court, that the verifications of the affidavits were made in its presence, in the absence of anything in the record to show where they were made. *Ex parte Steiner* (1913) 124 C. C. A. 89, 202 Fed. 419.

In *Re Shear* (1911) 188 Fed. 677, the bankrupt, who was held guilty of contempt for false swearing, was sentenced only to pay a fine, on failure to pay which it was adjudged he should stand committed, in view of the facts that his estate had not suffered loss by reason of the false testi-

mony, and the value of the property to which it related was not large.

A chancellor who has granted a divorce on testimony given before him cannot proceed against the witnesses as for direct contempt, in consequence of evidence taken at a hearing on motion to set aside the judgment for fraud. *RILEY v. WALLACE* (reported herewith) ante, 337.

The Porto Rico statute making a witness who violates an oath guilty of contempt of court was held in *People v. Fourquet* (1911) 17 P. R. R. 1037, not unconstitutional as offending against the due process of law clause of the Federal Constitution, the statute providing that if the judge should be satisfied that a witness in a case then pending in court, after having taken the required oath, was guilty of perjury, it should be his duty, and he was empowered on his own motion, to cause the arrest of the offender, and to issue an order on him to appear and show cause why he should not be punished for contempt.

And in *People v. Valcourt* (1912) 18 P. R. R. 471, it was said that all that the statute required in proceedings against the witness for contempt was that the court should be satisfied in his own mind, from all the circumstances and the evidence before him, that the perjury had been committed; that he could then proceed, on his own motion, with the inquiry for contempt, and was not required to examine all nor any of the evidence before issuing the rule to show cause, nor was he obliged to incorporate in such order a statement of the evidence.

The court also intimated, in *People v. Valcourt* (P. R.) supra, that the statute was not unconstitutional as in violation of the 5th Amendment of the Federal Constitution, against putting any person twice in jeopardy for the same offense, in that the punishment provided therein for contempt was cumulative, and did not prevent the prosecution and punishment of the offender for perjury under other statutes; although it was held that, since the offender in this case had not been tried for perjury, the question was premature on the trial for contempt.

R. E. H.

DI FERDINANDO
v.
SIMON SMITS & COMPANY.

English Court of Appeal—July 12, 1920.

(89 L. J. K. B. N. S. 1039.)

Contract — performance abroad — measure of damages — foreign currency — rate of exchange.

In an action brought in this country for breach of a contract to be performed abroad, the measure of damages is the loss in English currency to the plaintiff at the time when, and the place where, the contract ought to have been performed. Where, therefore, the plaintiff, a merchant in Milan, obtained judgment against the defendants, shipping agents in London, for damages for nondelivery and conversion of goods intrusted to them for carriage to the plaintiff at Milan, it was held that the damages ought to be assessed at such a sum in sterling as would give the plaintiff the proper compensation in Italian lire at the rate of exchange prevailing on the date when the goods ought to have been delivered to the plaintiff, and not at the rate prevailing at the date of judgment.

[See note on this question beginning on page 363.]

APPEAL from a judgment of Roche, J., in the Commercial Court.

The plaintiff, an Italian merchant carrying on business in Milan, purchased from a seller in London some 25 tons of sodium sulphide c. i. f. from London at £58 a ton. The defendants, a firm of shipping agents in London, contracted to carry these goods for the plaintiff from London to Milan via Havre, and there deliver them to the plaintiff. In September, 1918, the parcels of sulphide were delivered to the defendants under the contract; but the defendants never shipped them, and the plaintiff brought this action, with the result that Roche, J., held that there had been a breach of contract and a conversion of the goods by the defendants, and that they ought to have been delivered in Milan on February 10, 1919, the measure of damages being the value of the goods in Italy on that date. On further consideration of the case the learned judge was of opinion that the price of the sulphide on February 10, 1919, in Italian currency, was 190 lire per 100 kilos, or 1,928½ lire per English ton of 1,015 kilos. On that

date, and for a considerable period thereafter, the rate of exchange was 31 lire to the English pound sterling; but on March 30, 1920, when judgment was delivered, it was agreed that the rate was 62 lire to the pound. The plaintiff contended that he was entitled to judgment in value at the former rate, whilst the defendants contended for the latter. Evidence was given that the defendants had sold the goods for £38 per ton.

Roche, J., held that it was the duty of the court to ask itself this question: What did the figure of 190 lire per 100 kilos mean in English money? To arrive at the result, it was necessary to apply the rate of exchange at that time—February 10, 1919—and on that day the rate was 31 lire to the pound. On the defendants' contention, they would have to pay as damages approximately £30 per ton, while on the basis the learned judge had fixed it, it would be approximately £60 per ton. The defendants had since sold the goods at £38 per ton, so that on

their contention, after they had paid the £30 per ton damages to the plaintiff, they would make a profit of £8 per ton, in addition to the money they were paid for undertaking to carry the goods to Italy. The fact that such a result would follow was not his reason for arriving at his decision, but it was some consolation to him to know that he had not been led to a result which had consequences such as that. The learned judge concluded by saying that there was no inconsistency between his own decision in *Kirsch & Co. v. Allen, H. & Co.* 89 L. J. K. B. N. S. 265, 25 Com. Cas. 174, 637, and the present case, but that if there was he preferred his present decision.

The defendants appealed.

Neilson, K. C. (Langton with him), for the appellants:

The rate of exchange obtaining at the date of the judgment should be adopted.

Kirsch & Co. v. Allen, H. & Co. 89 L. J. K. B. N. S. 265, 25 Com. Cas. 174, 637.

In that case the plaintiffs, New York merchants, sold milk to the defendants in England, who, in breach of their contract, refused to take it. The contract was f. o. b. New York, and the price was fixed in dollars. Roche, J., held that the rate of exchange to be adopted in fixing the damages was that obtaining at the date of judgment. It has been held in America that, when the creditor is claiming there for a sum payable to him in a foreign country, he is entitled to have the sum computed according to the rate of exchange at the time of trial or judgment.

Marburg v. Marburg, 26 Md. 8, 90 Am. Dec. 84.

So, in *Manners v. Pearson* [1898] 1 Ch. 581, 67 L. J. Ch. N. S. 304, 78 L. T. N. S. 432, 14 Times L. R. 312, 46 Week. Rep. 498, the plaintiff, who sued on a contract to pay him moneys in Mexican currency, was not entitled to have the dollars turned into English money until the amount due on taking the whole account was ascertained. The dictum of Bailhache, J., in *Barry v. Van Den Hurk* [1920] 2 K. B. 709, 89 L. J. K. B. N. S. 899, that the damages are "crystallized," does not controvert this principle. Le-

beaupin v. Crispin [1920] 2 K. B. 714, 89 L. J. K. B. N. S. 1024; *Cash v. Ken-nion*, 11 Ves. Jr. 314, 32 Eng. Reprint, 1109; *Story, Conf. L.* 8th ed. §§ 308-811, 313; 3 Kent, Com. 14th ed. § 117, note (c), and Foote, *International Law*, 3d ed. p. 494, were also referred to.

Schiller, K. C., and Micklethwait, for the respondent, were not called upon.

Bankes, L. J., delivered the opinion of the court:

This is an appeal from a judgment of Roche, J., in a matter which has become of considerable importance, owing to the variation in the rates of exchange since the war. The plaintiff brought an action against the defendants for failure to deliver certain goods which they contracted to deliver to him in Milan, the plaintiff himself carrying on business in Milan, the defendants being carriers carrying on business in England. The plaintiff brought his action in England, and Roche, J., held that the defendants committed a breach of their contract in not delivering the goods to the plaintiff, and also that they had been guilty of a conversion of the goods. He held that the date of breach was February 10, 1919, and he proceeded to assess the damages as on that date by inquiring what the value of the goods to the plaintiff in Milan would have been on that date, and he arrived at the conclusion that their value in Italian money on that date was 48,000 lire. At that date the rate of exchange was such that the equivalent of that in English money was £1,555. The action was tried on March 30, 1920, and the rate of exchange had so altered that on that date the equivalent, in English money, of 48,000 lire, was only £780. The defendants contended that they would discharge their obligation to the plaintiff if the learned judge gave judgment for the plaintiff for £780. The plaintiff, on the other hand, contended that he was entitled to £1,555, and the dispute between them was as to the date at which the rate of exchange should be taken. Roche, J., decided that

the right date was the date of breach, and he gave judgment for £1,555. From that judgment the defendants appeal. Counsel for the appellants contended that, having regard to the alteration in the rate of exchange, the plaintiff would be in the same position if he was paid £780 at the date of the judgment, as if he had been paid £1,555 at the date of the breach. It seems to me that the apparent difficulty of the position to a large extent disappears, if one concentrates one's attention on the rule of law which one has to apply. The rule of law is this: The plaintiff is entitled to have his damages assessed as at the date of breach, and the court has no jurisdiction to award damages except in English money. I think that if that rule is kept clearly before one's mind, a great deal of the difficulty which counsel for the appellants suggested disappears. The plaintiff is entitled to his damages as at the date of the breach, and it seems to me the judge must express those damages, and no other damages, in English money; and, in order to do that, he must take the rate of exchange prevailing at the date of the breach.

Contract—
performance
abroad—measure
of damages—
foreign currency
—rate of ex-
change.

We have been referred to a considerable number of authorities, and all, with the exception of one English authority and one American authority, seem to me to be in favor of the view taken by Roche, J. The one English authority is a decision of Roche, J.'s, own, with regard to which he says he is not satisfied whether it is in conflict with his present decision, but, if it is, he prefers the decision he gave in this case. The American authority I need not refer to, there being, as it seems to me, such a weight of English authority in favor of the view taken by Roche, J.

The first case I should like to refer to is *Scott v. Bevan*, 2 Barn. & Ad. 78, 109 Eng. Reprint, 1073, 9 L. J. K. B. 152, which, I think, un-

derstood as I understand it, does not deserve the comments of McCardie, J., upon it (*Lebeaupin v. Crispin* [1920] 2 K. B. at p. 724), and is, I think, an authority in favor of Roche, J.'s, view. There the plaintiff had recovered judgment in Jamaica, and he sued the defendant in England upon that judgment. The judgment was expressed in current money of the island of Jamaica, and the defendant contended that the amount to be paid into court at the rate of exchange prevailing at the date of the judgment in Jamaica was sufficient to satisfy the plaintiff's claim. His calculation was based upon the rate of exchange actually existing at the date of the Jamaican judgment. The plaintiff contended that he was entitled to something more than the amount paid into court, because he said that he was entitled to have the rate of exchange calculated according to a conventional rate of 75, and not upon the actual rate prevailing. The court decided that the defendant's view was right, and that the actual rate, and not the conventional rate, was the material one. The decision also proceeded upon the footing that the material date to consider was the date when the judgment was delivered in England.

Another case which I think is of great importance is the case of *Manners v. Pearson*, because, although the facts are not the same as in the present case, the then master of the rolls, Lord Lindley, and Vaughan Williams, L. J., in their judgments, made statements as to the law which are directly in point, and which really govern the case. The Master of the Rolls says ([1898] 1 Ch. at p. 587): "The necessity for considering what amount the defendants ought to pay in English money arises simply from the fact that the plaintiff, having the right to sue the defendants in this country for a breach of their contract, has chosen to sue them here instead of in Mexico; and, speaking generally, the courts of this country have no jurisdiction to order payment of money

except in the currency of this country. Whatever sum is ordered to be paid, whether for principal, interest, or damages, must be expressed in English money, or such order cannot be enforced by the ordinary writs of execution." Applying that to this case, it seems to me that Roche, J., was bound to express in English money the amount of damages to which the plaintiff was entitled at the date of breach. Vaughan Williams, L. J., more pointedly says ([1898] 1 Ch. at p. 592), after referring to *Scott v. Bevan*: "It seems plain that this mode of computing the value of foreign currency in English sterling, and thus converting the one currency into the other, is based upon damages for the breach of contract to deliver the commodity bargained for at the appointed time and place, and, if this is so, it follows that the date as of which that value must be ascertained is the date of the breach, and not the date of the judgment." Nothing could be more in point than that statement of the law by the late Lord Justice, which seems to be entirely in accordance with *Scott v. Bevan*, and entirely in accordance with what I conceive must be the rule on the subject.

That view was followed by McCordie, J., in the case of *Lebeaupin v. Crispin* [1920] 2 K. B. 714, 89 L. J. K. B. N. S. 1024, and by Bailhache, J., in *Barry v. Van Den Hurk* [1920] 2 K. B. 709, 89 L. J. K. B. N. S. 899. In those two last cases the learned judges expressed their views in different language, but they both came to the same conclusion, which was that, to use Bailhache, J.'s, language, damages become crystallized at that moment. Personally, I should rather put it that the judge is under an obligation to express the amount of damages as at that date in English money, but from whatever point of view it is regarded, or in whatever language it is expressed, I am satisfied the principle laid down by Vaughan Williams, L. J., is right, and this

appeal must be dismissed with costs.

Scrutton, L. J.:

On this question, which is becoming of great importance owing to the great variety of exchange rates and their rapid fluctuation between countries of the world, I agree with the views of Bailhache, J., and McCordie, J., and the second judgment of Roche, J. I regret that I have not had the pleasure of hearing counsel for the respondent explain that the first judgment of Roche, J., and the second judgment of Roche, J., really mean the same thing; I have not had the pleasure of hearing that reconciliation, therefore, I cannot express any opinion about it. Not having heard it, it looks to me as if the first judgment of Roche, J., was erroneous, and his second thoughts the better.

As a matter of principle the matter appears to stand in this way: When damages are claimed for the delivery of goods in a foreign country at a fixed date, the clear measure of damages is, if there is a market, the difference between the contract price and the market value of those goods at the place where they should have been delivered, and on the day when they should have been delivered, and, in arriving at the amount of damages on that principle, it is quite immaterial to prove that at the date of the judgment for damages the goods were either worth more or worth less than they were on that day. It would be no use, if the goods were worth £50 a ton on the day of delivery, proving that they would have been worth £100 a ton on the day of the judgment, or proving that they would only have been worth £25 a ton on the day of the judgment. The reason for excluding that evidence is that subsequent fluctuations in the value of the goods which ought to have been delivered on a given day are too remote, as a consequence of the original breach, to be taken into account by the court, and therefore, shutting out the change in the value of the goods after the day of breach,

one has, if the breach is in a foreign country, usually to do a calculation in foreign currency, and one arrives at a figure in foreign currency. The English courts cannot give judgment in foreign currency—they would have no power to enforce it; therefore, they must translate into English currency the figure they have arrived at, which is the figure of damages in foreign currency on the day of the breach; just as in my view they have to exclude from their calculation the subsequent change in the value of the goods after the date of breach, so they also have to exclude the subsequent changes in the value of the currency after the date of the breach; they exclude it for the same reason that they have excluded the change in the value of the goods, that the changes in the value of the currency are too remote a consequence of the breach to be taken into consideration by the courts. That view of the principle appears to me to be in accordance with all the authorities to which we have been referred, except the first judgment of Roche, J. I think I understand why McCardie, J.'s comment (*Lebeaupin v. Crispin* [1920] 2 K. B., at p. 724) on *Scott v. Bevan* was made, but it proceeds on a misapprehension, because the report is expressed in somewhat ambiguous terms, of the value of that judgment. In *Scott v. Bevan* an action was brought on a Jamaican judgment for money, and the defendants paid into court, on the basis of the exchange at the day of the Jamaican judgment, the actual exchange. The plaintiff said: "I do not care about the actual exchange; there is a conventional method of turning Jamaica money into English money by a ratio of 7 to 5, irrespective of the actual exchange on any particular date." The defendants said that was wrong, and they proved on October 1, 1827, when the Jamaican judgment was obtained, there was a particular exchange. Lord Tenterden at the trial thought the plaintiff's view of the conventional exchange was the right one. When

the matter came before the full court, Lord Tenterden, delivering the judgment of the full court, though saying that he himself was still not quite sure that his original view was not quite right, said the defendants' view was correct. What had been proved was the rate of exchange at the date of the Jamaican judgment, and I think that McCardie, J.'s comment proceeds on the misapprehension that the date of the judgment means the date of the English judgment, and not, as appears to be clear on the authority, the date of the Jamaican judgment.

There is one thing more I wish to say. It had occurred to me—possibly it may be a way of dealing with the matter—that, in some cases of nonpayment of money, interest is recovered by agreement for nonpayment; in other cases, where there is no agreement for the interest on the nonpayment of money, and the nonpayment cannot be brought within any statute that gives interest, one may yet recover damages for the failure to pay on the agreed day under the head of interest by way of damages. The matter is explained, and the reason why it can be done, by the House of Lords in *Cook v. Fowler*, L. R. 7 H. L. 27, 43 L. J. Ch. N. S. 855, 4 Eng. Rul. Cas. 456, and, as explained by Bowen, L. J., in the case of the *London, C. & D. R. Co. v. South Eastern R. Co.* (61 L. J. Ch. N. S. at p. 303, [1892] 1 Ch. at p. 146, 65 L. T. N. S. 722, 40 Week Rep. 194), one can add to one's money at the time of the breach, in some circumstances, damages for not paying it on the agreed date, and postponing its payment until judgment is obtained in an English court. It occurred to me it might possibly be the case that differences of exchange have been included in such damages. I have been unable to find in the time I have had to look into the matter that interest by way of damages has ever been allowed to cover alteration by way of appreciation or depreciation in the exchange, and the learned counsel,

who obviously have shown great industry, have also not found any such case. I think the reason is the reason I have already given: that they are too remote from the actual breach complained of. Changes in the value of money are not sufficiently connected with the breach to be given as in contemplation between the parties. That seems to me in principle the way the matter should be dealt with, and, without going through the authorities, that is the rule that should be followed, and it is the rule laid down by three judges of great experience in the King's bench division.

Eve, J.:

I think the principles applicable in this case are those to be found in *Scott v. Bevan*, and explained, in language more lucid and more ap-

posite than any I can employ, by Vaughan Williams, L. J., in *Manners v. Pearson*, 67 L. J. Ch. N. S. at p. 311, [1898] 1 Ch. at p. 592, 78 L. T. N. S. 432, 14 Times L. R. 312, 46 Week. Rep. 498. In particular, I think the sentence which my Lord has read, and which I will not read again, seems to dispose of the argument that the date on which the value of the foreign currency in English sterling is to be ascertained is the date of the judgment, and not of the breach. I think it is quite clear that the learned Lord Justice took the view that *Scott v. Bevan* had determined that the real date was the date of the breach, and I agree in thinking this appeal fails and should be dismissed.

Solicitors: Wm. A. Crump & Sons, for appellants; Crosley & Burn, for respondent.

ANNOTATION.

Rate of foreign exchange to be taken into account in assessing damages for breach of contract.

With foreign exchange at greatly abnormal rates, owing to the disturbances brought about by the World War, and varying substantially from week to week, the question becomes of much practical importance as to the time at which the rate of exchange should be taken in computing damages for breach of contract to be performed in a foreign country. It is this question, principally, with which the present note is concerned. Incidentally, however, it becomes important to consider also the question whether the rate of exchange, as distinguished from the par of exchange, should be considered at all, there being some American decisions on the negative of this proposition, although it seems that under present conditions the actual rate of exchange, and not merely the par rate, should be the determining factor. The note does not deal with the question whether exchange should be allowed on negotiable instruments. And it should be observed that the term "exchange," as used in the note, means foreign ex-

change, and not a discount or charge made for transmitting money or commercial paper between points in this country.

The English courts appear definitely to have taken the position that, in an action for damages for breach of contract in a foreign country, the damages, which must be adjudged in English money, should be computed by taking the rate of exchange prevailing at the time of the breach of contract.

Thus, in the reported case (*DI FERDINANDO v. SIMON SMITS & Co.* ante, 358), it was held that, in computing the damages in English money for breach of contract to deliver in Italy goods purchased by the plaintiff in England, the rate of exchange prevailing at the time of the breach of contract, and not that at the time of the trial, controlled. This conclusion the court regarded as supported by the case of *Scott v. Bevan* [1831] 2 Barn. & Ad. 78, 109 Eng. Reprint, 1073, 9 L. J. K. B. 152, which is sufficiently set out therein, and which was an ac-

tion on a judgment recovered in Jamaica. The conclusion was also regarded as supported by *Manners v. Pearson* [1898] 1 Ch. (Eng.) 581, 67 L. J. Ch. N. S. 304, 78 L. T. N. S. 432, 14 Times L. R. 312, 46 Week. Rep. 498, where, in a suit for an accounting, the question arose as to the time for computing the rate of exchange between England and Mexico. The defendant had contracted to pay to the plaintiff's intestate 1 cent in Mexican currency for every cubic meter of certain excavation works, payable from time to time as received from the Mexican authorities, with monthly statements of account. The question presented was whether the rate of exchange should be computed monthly, or as of the time when the account between the parties was complete, or only as of the time when the entire amount due was first ascertained, at which latter time the Mexican dollar had greatly depreciated in value, as compared with its value in English money at either of the first two periods. It was decided that the rate of exchange should be taken as of the date when the actual amount due was first ascertained, which was after action had been brought and judgment for an accounting had been taken. The decision in this case turns partly upon special circumstances, as the fact that for nearly two years there was no personal representative to whom payment could have been made. And it will be observed that in the *DI FERDINANDO CASE* the decision that the rate of exchange prevailing at the time of breach of contract, and not that at the time of the trial, governs, is not based upon the result reached in the *Manners Case*, but upon the principles stated in the opinions, particularly in the dissenting opinion by Vaughan Williams, L. J.

The principle on which the rate of exchange is computed as of the date of the breach of contract is stated by Bankes, L. J., as follows, in the *DI FERDINANDO CASE*: "The plaintiff is entitled to have his damages assessed as at the date of breach, and the court has no jurisdiction to award damages except in English money. I think that

if that rule is kept clearly before one's mind, a great deal of the difficulty which counsel for the appellants suggested disappears. The plaintiff is entitled to his damages as at the date of the breach, and it seems to me the judge must express those damages, and no other damages, in English money; and, in order to do that, he must take the rate of exchange prevailing at the date of the breach."

The reasoning of Roche, J., in the lower court in the *DI FERDINANDO CASE*, reported in [1920] 2 K. B. 704, where lire was at the rate of 31 to the pound at the time of breach of contract, and 62 to the pound at the time of the trial, was as follows: "The proper problem for the court is to ascertain what the plaintiff lost by the nondelivery of his goods at the due date. It was not an accident, but an incident in the case, that the figures were given in lire, but I think that when those figures were given it was, in the circumstances of the present case, the duty of the court to ask itself: What did that figure of 190 lire per 100 kilos mean in English money? And to arrive at that result I think I must apply the rate of exchange current at that time—that is, 31 lire to the pound,—and on that basis the plaintiff must recover." And in reply to the contention that, although lire were not as valuable in England at the time of the trial as on the date of breach of contract, they were just as valuable to an Italian living in Italy, the court stated that this was not true, because the latter had to live in relation to the world, spending part of his money in Italy and some abroad.

In view of the other English decisions cited in the note, the case of *Kirsch & Co. v. Allen, H. & Co.* (1920) L. J. K. B. N. S. (Eng.) 265, 25 Com. Cas. 174, 637, must be apparently regarded as overruled, although Roche, J., who decided it, seemed, in his later opinion in the *DI FERDINANDO CASE*, to think that the two decisions were not inconsistent, although he evidently felt some doubt. In the former case, where an American corporation sued an English company for breach of contract to accept and pay

for a quantity of milk, payment for which was, by the contract, to be made in dollars, it was held that the time of the judgment was the proper time at which to calculate the rate of exchange in computing the damages. It may be observed that though the rate of exchange was determined in the *Kirsch & Company Case* as of the date of the judgment, and in the *DI FERDINANDO CASE* as of date of the breach of the contract, the decision in each case was against the contention of the party who had breached the contract; and this may have been the reason why Roche, J., thought they were not inconsistent.

The rule that the rate of exchange at the time of breach of contract should govern has been considered as supported argumentatively by such statements as that of Lord Eldon in *Cash v. Kennion* (1805) 11 Ves. Jr. 314, 32 Eng. Reprint, 1109, that, "where a man agrees to pay £100 in London upon the 1st of January, he ought to have that sum there upon that day. If he fails in that contract, wherever the creditor sues him, the law of that country ought to give him just as much as he would have had, if the contract had been performed." This case, however, presented only the question whether the debtor or creditor should bear the cost of remittance to England of a debt paid abroad, but payable in England, the court deciding that the debtor must bear the cost of remittance.

And in *Barry v. Van Den Hurk* [1920] 2 K. B. (Eng.) 709, 89 L. J. K. B. N. S. 899, the rate of exchange at the time of breach of contract, and not that at the time of the trial, was held to prevail in measuring the damages, although, by this method, if either of the parties could be regarded as profiting by the variation in the rate of exchange, it was the defendant, through the depreciation of sterling, and he was responsible for the delay. The action was by a merchant in New York against a merchant in London, for refusal to accept goods sold by the former to the latter, the purchase price being payable in dollars in New York. It was held that in converting

into English currency the damages in dollars which constituted the breach of contract, the rate of exchange at the time of such breach should govern, although the lapse of nearly two years during the trial was due largely to the taking of evidence in America at the instance of the defendant, and the number of pounds in English currency in which damages were allowed would not, if converted into dollars, yield as large a sum at the time of the judgment as at the time of breach of contract.

The court was of the opinion in *Barry v. Van Den Hurk* (Eng.) *supra*, that for the delay the only damages, if any, would be interest, and that not even this should be allowed under the circumstances of the case.

The rule that in an action for damages for breach of contract to be performed in another country, the rate of exchange at which the damages are to be computed is that prevailing at the date of breach of contract, and not at the time of the trial, is supported also by *Lebeaupin v. Crispin* [1920] 2 K. B. (Eng.) 714, 89 L. J. K. B. N. S. 1024, an action by the buyer for breach of contract to deliver salmon in British Columbia. An award was made that the seller should pay to the buyer a certain number of dollars in sterling, at the rate of exchange at the date of the award. This was held erroneous, the proper rate of exchange being that prevailing at the time of breach of contract, at which time the dollar was of much less value than at the time of the trial, as compared with sterling.

It will be observed that reverse aspects of the exchange question are presented in such cases as *Lebeaupin v. Crispin* (Eng.) *supra*, and the reported case (*DI FERDINANDO v. SIMON SMITS & Co.*) ante, 358; that is, that the interests of the plaintiffs in the two actions were directly opposite. In the former case, as respects British money, the dollar had appreciated in value, while in the latter case the lire had depreciated in value, so that while in the former case it was to the plaintiff's interest that the rate of exchange should be taken as of the date of the

trial, in the latter case it was to the plaintiff's interest that the rate at the time of the breach of contract should prevail.

The fact that there is an element of speculation and of uncertainty as to the damages, in case the rate of exchange is taken as of the date of trial or judgment, is one of the points in the reasoning of the court in the *Lebeaupin Case* (Eng.) *supra*, in favor of the application of the rate as of the date of breach of contract. It was said: "To hold otherwise would produce extraordinary results. The damages payable would depend partly on the date when the plaintiff issued his writ, partly on the length of the interlocutory proceedings, partly on the illness or good health of the parties as the trial approached, partly on the number of prior cases which occupied the time of the court, and partly on whether the judge reserved his decision or not. They might depend also on whether judgment was entered for the plaintiff by the judge of first instance, or by the court of appeal, or by the House of Lords. Such a state of things would, I think, be most unsatisfactory. It would encourage a plaintiff to hasten or postpone the trial according to his view of the money market, and he might gamble on the rate of exchange. If the damages are fixed as at the date of breach where the contract is wholly to be performed in England, such also, I think, should be the result where the breach is out of England. There should not be varying rules in such a case. If the damages are once crystallized at the date of breach, then a definite date is given for the ascertainment of exchange, and the amount found payable at the hearing is awarded without regard to the fluctuations of the possible date of trial." See, in this connection, *Hawes v. Woolcock* (Wis.) *infra*.

The American courts cannot, apparently, be regarded as having definitely adopted a settled rule as to the time at which the rate of exchange should be computed, in actions for breach of contracts to be performed in a foreign country. While there is authority to the general effect that the rate

existing at the time of the trial should govern, this rule has not prevailed in all cases. Many of the actions were not for unliquidated damages, but were merely to recover a certain sum of money, and the English decisions above cited have called attention to the fact that the American courts have sometimes failed to distinguish, on the point under consideration, between an action merely for a certain sum of money and an action for breach of contract for unliquidated damages. It seems that there is plausible ground for a distinction between these two classes of cases. For instance, if the agreement is to pay a certain number of American dollars, and action is brought in England for nonpayment, it is not clear from the above English authorities that the courts would not permit recovery of a sufficient number of pounds sterling to equal the number of American dollars computed at the time of the judgment; in other words, that they would not, in such a case, adopt the rate of exchange prevailing at the time of the rendition of the judgment, rather than at the time of the breach of contract to pay. Since the American authorities are mostly cases where the action was to recover a certain sum of money, they may perhaps be distinguished on this ground from the British authorities cited above, where the action was for unliquidated damages.

It was said in *Lee v. Wilcocks* (1819) 5 Serg. & R. (Pa.) 48, that the settled rule is, where foreign money is the object of the action, to fix the value according to the rate of exchange at the time of trial. In this case the payment was evidently to be made in the Turkish piaster, but the nature of the contract does not appear, nor is it shown where the contract was made, or where it was payable, and the point is not discussed beyond this statement.

And it was held in *Marburg v. Marburg* (1866) 26 Md. 8, 90 Am. Dec. 84, that the amount recoverable by a resident of a European state, suing in this country for a debt payable in Europe, should be computed according to the rate of exchange at the time of the

trial. This decision is approved in *Capron v. Adams* (1868) 28 Md. 529, where the court stated that whenever a debt payable in one country is sued for in another, the plaintiff is entitled to recover a sum sufficient, as of the day of trial, to replace the money in the country where, by the terms of the contract, it was to be paid.

The rule that the rate of exchange prevailing at the time of the trial should govern on an action on a note payable in foreign money is sustained by *Hawes v. Woolcock* (1870) 26 Wis. 629, where a note, payable in 1876, was made for a stated sum in Canadian currency. At the time the note became due the premium on Canadian currency, as regards that of the United States, was 37 per cent, while at the time of the trial it was only about 19 per cent. In the meantime a payment in American money had been made on the note. The court held that credit should be allowed for this payment at the rate of exchange prevailing at the time it was made, and that the rate at the time of the trial or judgment should govern as to the balance due. It was said: "Perhaps a strict application of logical reasoning to the question would lead to the result that the premium should be estimated at the rate when the note fell due. That was when the money should have been paid, and when the default in performing the contract occurred. This conclusion would be supported by the analogy derived from the rule of damages on contracts to deliver specific articles, fixing the market price at the time when they ought to have been delivered as the criterion. This rule might sometimes be to the advantage of the holder of the note, as in the present case. In other cases, where the premium was less at the time the note became due than at the time of trial, it would be to his detriment. And in view of these uncertainties and fluctuations in the rate, upon grounds of policy as well as for its tendency to do as complete justice between the parties as is possible, we have come to the conclusion that the true rule in such cases is to give judgment for such an amount as will, at the time of

the judgment, purchase the amount due on the note in the funds or currency in which it is payable. To accomplish this, of course, the premium should be estimated at the rate prevailing at the time of trial. By this rule, the holder would neither gain nor lose by the fluctuations in the rate, but whenever he obtained a judgment would obtain it for a sum which would then procure him the exact amount to which he was entitled in the proper currency. This does complete justice between the parties, and seems, therefore, to indicate the true extent to which the difference of exchange in such cases should affect the amount of recovery."

In connection with the above case, attention is called to *Lebeauvin v. Crispin* [1920] 2 K. B. (Eng.) 714, 89 L. J. K. B. N. S. 1024, *supra*, where the British court, in an action by the buyer against the seller for breach of contract, took the view that the uncertainty of the damages, in case the rate of exchange was taken as of the date of the trial, was a ground for adopting the rate prevailing at the time of breach of contract.

It is said in *Burgess v. Alliance Ins. Co.* (1865) 10 Allen (Mass.) 221, that if the market value of exchange should be regarded, the amount to be paid to constitute an indemnity would depend on the rate of exchange when the debt should finally be collected on the execution. But this statement was unnecessary to the decision, as it was held that the par of exchange, and not the current rate of exchange, should govern, in an action on an insurance policy on property in a foreign country. See this case, *infra*.

And although the point was not discussed, the case of *Robinson v. Hall* (1864) 28 How. Pr. (N. Y.) 342, a district court case, supports the rule apparently that in an action for money due the rate of exchange at the time of the trial, rather than at the time of breach of contract, governs. This was an action to recover £6 lent in England, to be repaid on the arrival of the parties in New York. It appears that £6 sterling was worth in the market \$78 on the day when the

debt was payable, and \$67 on the day of trial. And the court held that the latter sum was the measure of damages.

That exchange should be calculated according to the rate prevailing at the time of the trial is the statement in the syllabus in *Smith v. Shaw* (1808) 2 Wash. C. C. 167, Fed. Cas. No. 13,107. But it should be observed that in this case the court was not, apparently, considering whether the rate of exchange prevailing at the time of the breach of contract, or that existing at the time of the trial, should govern, but rather whether the par of exchange or the rate existing at the time of the trial should govern. The action was by an English merchant on an account of goods shipped to the defendant's testator, and the court said merely that, this being a sterling debt, the question was whether it should be "turned into currency at the par of exchange, or at the present rate," and held that it should be at the "present rate."

But that the rate of exchange prevailing at the time of the trial is not necessarily the proper rate in computing the amount due in foreign money is supported by the case of *Butler v. Merchant* (1894) — Tex. Civ. App. —, 27 S. W. 193, where, in an action to recover on a loan of 1,000 Mexican dollars made by the plaintiff to the defendant, it was contended that the plaintiff could not recover more than the value of the Mexican dollar at the time of the trial, which was only 66 cents. But this contention was overruled, the court holding that it was not erroneous to permit recovery on the basis of 80 cents on the dollar, where it appeared that between the time when the money was payable and the beginning of the action the value of the Mexican dollar in money of the United States ranged from 69 to 92 cents. The court said that the plaintiff should not be made to lose by the failure of the defendant to repay at the proper time the money he owed.

And *Forbes v. Murray* (1869) 3 Ben. 497, Fed. Cas. No. 4,928, lends some support, perhaps, to the rule that the actual rate of exchange existing at

the time of the breach of contract should govern. This was a libel to recover freight for transportation of goods from another country, and the court, assuming that the provision in the bill of lading for payment of the freight at a specified number of pounds referred to English money, held that the libellants were entitled to recover such a sum as might be shown by the evidence was the equivalent in New York, in gold and silver money of the United States, of the specified amount of British coin, on the date the same was payable. It does not, however, appear that the rate of exchange had varied between the date of breach of contract and of the trial; and the question whether, in case of a different rate at the time of trial, that rate should govern, is not discussed.

In the recent case of *Revillon v. Demme* (1920) 114 Misc. 1, 185 N. Y. Supp. 443, it was held that the rate of exchange prevailing at the time of the beginning of the action should be taken in computing the amount due, where the action was based on notes payable in France in 1915, executed between residents of that country for the purchase price of shares of stock in a French corporation. The question submitted was whether the amount of the judgment in dollars should be computed (1) at the par of exchange, or (2) at the rate of exchange at the maturity of the note, or (3) at the rate of exchange at the date of commencement of the action, or (4) at the rate of exchange at the date of the trial and entry of the judgment. The court said that the rule as to the measure of damages which should be applied was to pay the creditor the exact sum which he ought to have received in France, and that the application of this rule required the court to render judgment for such sum of dollars as would be equivalent to the amount of principal and interest of the notes in francs, computed either at the rate of exchange at the time of the commencement of the action, or at the rate at the time of the judgment, and not at the par rate of exchange; that to compute the sum due at the

par rate of exchange would be, in effect, to require the defendant to pay in gold, although the notes were not made payable in gold; that the plaintiff's loss in the transaction by reason of the depreciation in French money did not arise or result from the defendant's breach of contract in not paying the notes when they became due; but that it would be presumed; in the absence of evidence to the contrary, that the law of France was similar to our own, and that therefore, under the French law, the loss from the depreciation of the money of that country was not an element of the recoverable damages, and that the only damages that might be recovered for non-payment of money was interest. The court said: "As between the rate of exchange at the commencement of the action and the rate of exchange at the time of judgment, it seems to me that the rate at the commencement of the action is the proper rate to be employed in computing the amount of the judgment. The notes became payable in dollars upon plaintiff's demanding of defendant their payment in this state. The commencement of the action was equivalent to such a demand. The amount due in dollars depended upon the rate of exchange existing at the time of the demand, or, in this case, the commencement of the action. Under the law of this state it was the defendant's duty forthwith, upon demand, to pay the amount in dollars, and he should not be permitted to take advantage of a change in the rate of exchange in his favor, by withholding payment."

The rate of exchange at the date of the entry of the decree was applied in *The Saigon Maru* (1920) 267 Fed. 881, where the liability of an export lumber company for failure to deliver lumber to a purchaser in India had been liquidated in the money of that country and constituted one of the elements of damages which the company was entitled to recover from the vessel for failure to carry a full load.

The question whether the rate of exchange existing at the time of the breach of contract, or at the time of the trial, should govern, was avoided

in *Reiser v. Parker* (1868) 1 Low. Dec. 262, Fed. Cas. No. 11,685, by the adoption of the rule that the value of the English pound (the action being by a resident of England to recover a balance of a certain number of pounds for goods sold) should be computed on a gold basis, which in actual value in dollars, thus computed, had not varied materially, but was at the rate of \$4.86 to the pound both at the time of the breach of contract and at the time of the trial, although in Treasury notes the pound was worth \$11 at the time of the breach of contract, and \$6.64 at the time of the trial.

And in *Ladd v. Arkell* (1875) 8 Jones & S. (N. Y.) 150, where a balance was due the plaintiff from the defendant for the sale of goods in England, the proceeds being expressed in English pounds, the court held that the plaintiff was entitled to have the pounds turned into gold at the time the debt became due, that the currency value of gold at that time, and interest thereon, was the correct measure of damages, and that it was erroneous to add thereto the exchange on England. The court, however, called attention to the fact that the contract was made, and the debt was incurred in New York, and that, when paid, the amount of the judgment would not be transmitted to England, but would be retained here.

There are several other cases also, decided at a time when gold was at a premium, holding that payment should be made in gold or silver, or its equivalent in legal tender notes, thus relieving against the injustice of permitting payment in a depreciated currency without reference to the rate of exchange.

Thus, in *Benness v. Clemens* (1868) 58 Pa. 24, an action to recover the balance of a debt contracted in England, which the court held was payable in the legal currency of that country, it was held that recovery should be on a gold basis; and that, as the payment in this country might be made in legal tender notes, the judgment should be the value of the gold in such notes, with interest.

And where the defendant, in charge of the plaintiff's ship, collected freight

in Liverpool, in sterling, it was held in *Bush v. Baldrey* (1865) 11 Allen (Mass.) 367, that he was accountable therefor at the par rate "on a specie basis," and not at the current rate of exchange based on United States paper currency. The court said the rule is clearly settled that, "when a debt is due or a payment made in the currency of a foreign country, its amount is to be computed in the currency of the United States according to the real par of exchange; that is, by ascertaining what sum the standard coin of one will produce, of equal weight and fineness, in the currency of the other. *Com. v. Haupt* (1865) 10 Allen (Mass.) 38; *Hussey v. Farlow* (1864) 9 Allen (Mass.) 263. This is an absolute standard, not liable to vary with the causes which produce fluctuations of exchange; and, in the absence of any special contract, appears to be the most practical and just."

Also in *Stringer v. Coombs* (1873) 62 Me. 160, 16 Am. Rep. 414, the court, in considering whether a commission payable in London in "hard Spanish dollars," which by statute in the United States were the equivalent of our silver dollars, should be paid in currency or in coin, stated that the plaintiff was "entitled to payment in coin or in currency equivalent in value to the coin when and where the debt was payable. The value of legal tender notes may change between the date of a writ and the rendition of judgment—between the date of an execution and any service thereon. If judgment were to be rendered for the amount due in the currency of the country, the plaintiffs might receive more or less than was due, as the currency should oscillate in value."

There are a number of American authorities to the effect that the rate of exchange in an action for money due and payable in a foreign country should not be taken into consideration at all in computing the sum due in American money, but that the par of exchange should govern. However, the weight of authority, outside of Massachusetts and New York, appears to be in favor of measuring the amount of damages or debt, where payable in foreign money, by means of

the rate of exchange between the two countries. In addition to several of the cases already cited, which may apparently be regarded as supporting the view that only the par of exchange, and not the current rate of exchange, should be considered in computing the amount due, attention is called to the following cases which are to this effect: *Adams v. Cordis* (1829) 8 Pick. (Mass.) 260 (where debtor of English creditor was summoned on trustee process); *Alcock v. Hopkins* (1850) 6 Cush. (Mass.) 484 (action by English merchant for price of goods sold to dealer in Boston); *Lodge v. Spooner* (1857) 8 Gray (Mass.) 166; *Com. v. Haupt* (1865) 10 Allen (Mass.) 38; *Burgess v. Alliance Ins. Co.* (1865) 10 Allen (Mass.) 221; *Swanson v. Cooke* (1866) 45 Barb. (N. Y.) 574; *Rice v. Ontario S. B. Co.* (1869) 56 Barb. (N. Y.) 387; *Martin v. Franklin* (1890) 4 Johns. (N. Y.) 124. See also *Scofield v. Day* (1822) 20 Johns. (N. Y.) 102 (assumpsit on note made in Canada payable to a resident of England); and *Hussey v. Farlow* (1864) 9 Allen (Mass.) 263 (the court saying that it was well settled in that state that, except in the case of commercial paper, no allowance is made for exchange, unless there is a special agreement in regard to it between the contracting parties).

The decisions computing the amount payable in dollars at the par rate of exchange were referred to, but not followed, in the recent case of *Revilon v. Demme* (1920) 114 Misc. 1, 185 N. Y. Supp. 443, set out *supra*, where the action was on notes made payable in France, between residents of that country.

As to the meaning of "par of exchange," it is said in *Sutherland on Damages*, 4th ed. § 212: "The gold and silver coins of one country often circulate as money in other countries and are current at their value, which is capable of equivalent expression in the local currency. Whatever the coinage, a like amount of these precious metals will, in all forms of coined money, be of like intrinsic value, depending for its equality on weight and fineness. An amount stated in one currency which is an equivalent for

the same value expressed in another is the par of exchange; it is a literal translation of the language of value in one country, or currency, into that of equal value in another. The true par of exchange between two countries is the equivalent of a certain amount of the currency of one in the currency of the other, supposing the currency of both to be at the precise weight and purity fixed by their respective mints; or, in other words, it is the amount which the standard coin of either country would produce when coined at the mint of the other."

In *Martin v. Franklin* (N. Y.) *supra*, where an action of assumpsit was brought by an English merchant for the value of goods sold in England, it was contended that, as the plaintiff was entitled to his money in that country, he ought to be allowed the price of bills of exchange, or, in other words, the rate of exchange which it would cost to remit the money to that country. But in answer to this argument the court said: "The debt is to be paid according to the par, and not the rate of exchange. It is recoverable and payable here to the plaintiffs or their agent; and the courts are not to inquire into the disposition of the debt, after it reaches the hands of the agent. He may remit the debt to his principal abroad, in bills of exchange, or he may invest it here on his behalf, or transmit it to some other part of the United States, or to other countries, on the same account. We cannot trace the disposition which is to take place, subsequent to the recovery, nor award special damages upon such uncertain calculations. All that the plaintiffs can ask is their debt, justly liquidated and paid, in the lawful currency of the United States." The same reasoning was approved by the Massachusetts court in *Adams v. Cordis* (Mass.) *supra*.

Among possibly other cases of the kind is *Burgess v. Alliance Ins. Co.* (1865) 10 Allen (Mass.) 221, *supra*, where, in an action on an insurance policy, expressed in dollars, on property in Cuba, the court said that the question was whether, in case of a partial loss of property situated in another country and insured here, in

computing the sum to be recovered, anything should be allowed for the expense of transmitting to that country the sum of money, which, if paid there, would furnish an equivalent for the value of the property destroyed by fire. In answer to this question it was said: "We are of opinion that no such allowance can legally be made. In other words, nothing can be added for the cost of exchange, in transmitting the funds which are of intrinsically equal value in this country with those which represent the pecuniary measure of the loss in the country where it occurred. . . . The argument for the plaintiffs is that the contract of insurance is a contract of indemnity; and that an indemnity for the loss recovered here is such a sum of money as would purchase a remittance, which, when collected at the place where the loss occurred, would be an exact equivalent there to the value of the property destroyed. . . . It is true that the object of a policy of insurance is indemnity to the insured; but the standard of value used in estimating the amount of the loss may not, under all circumstances, produce the result of giving an exact indemnity at the place where a judgment is recovered upon the policy. The best practical rule for indemnity seems to us to be, to estimate the loss at the place where it occurred in the currency of that country, and then to find the equivalent in the country where suit is brought, by determining the actual intrinsic value of the currency of that country as compared with that of the other, thus computing the value according to the real par of exchange."

And it was held also in *Burgess v. Alliance Ins. Co.* (Mass.) *supra*, that the above conclusion was not affected by the fact that the policy contained a clause giving the insurer the right to replace the property destroyed by other property of like kind and value.

In an action for failure to pay passage money, expressed in the contract in American money, on the plaintiff's boat to China, payable in that country, it was held in *Lodge v. Spooner* (1857) 8 Gray (Mass.) 166, *supra*, that the stipulated sum, with interest, without exchange on China, was the measure

of damages. This conclusion was reached notwithstanding it was conceded that there were no regular tribunals in China in which the action could have been brought.

But it was held in *Nickerson v. Soesman* (1867) 98 Mass. 364, that the current rate of exchange, and not the par rate, which was less than the actual rate, should govern in an action by a merchant against his factor for breach of contract in refusing to surrender notes and other evidences of indebtedness which the agent had received from sales of merchandise consigned to him in a foreign country, the court distinguishing this case from those where the action is on a contract to pay a certain sum of money in a foreign country. In this case the payment, if made in the foreign country and transmitted to this country at the current rate of exchange, would have been more valuable than if made in the United States at the par or nominal rate; in other words, the rate of exchange was favorable to the foreign country as regards money other than gold. The court said: "The question then arises as to the measure of damages. It is to be borne in mind that this is not a suit on a debt for a sum of money, but is an action brought to recover damages for the breach of duty and of contract by the defendants as agents towards the plaintiffs as principals. The question is not what sum shall the plaintiffs recover for a sum of money due and owing as a debt by the defendants, but what sum will indemnify the former for the neglect and omission of the latter to regard their instructions and fulfil their duty under a contract of agency. The general rule on this point is perfectly well settled. The agent is bound to make full indemnity to his principal for all loss or injury caused by his neglect, misconduct, or other violation of duty. . . . Clearly such indemnity would not be had, if the plaintiffs could recover only such sum in the currency of this country as is nominally equivalent to the sum which they would have been entitled to recover in the currency of Surinam. It would fall just so far short of full compensation for the in-

jury sustained as that sum in the current money of the United States is worth less than the same sum estimated in the currency of Surinam. The only just rule is that in such cases the party who has suffered a loss or injury through the fault of another shall be allowed such sum in the currency of the place where a suit is brought as most nearly approximates to that which he would be entitled to recover in the country where the injury or loss happened and the damage was sustained. The cases in which actions have been brought on a contract to pay a certain sum of money in a foreign country depend on different principles, and are not applicable to transactions like that out of which the present action has arisen."

And in other cases it has been held that the actual difference of exchange between the two countries should be considered.

Thus, in *Hawes v. Woolcock* (1870) 26 Wis. 629, the court, citing *New York* and *Massachusetts* cases, said there were authorities supporting the proposition that, where a note is payable in the currency of a foreign country and is sued upon in this country, the difference of exchange between the two countries should not be considered at all in determining the amount of recovery; but that the weight of authority appeared to be the other way, and at all events that court had adopted the opposite rule,—citing *Pfeil v. Higby* (1866) 21 Wis. 248, where it was held that one who had been obliged to pay an obligation for a certain number of pounds sterling at Riga, and who had discharged the same by procuring exchange on Great Britain and paying therefor in legal tender notes, could recover from the defendant, who had assumed the liability and agreed to indemnify the plaintiff against this obligation, for the amount which the plaintiff had paid, including exchange, the court stating that the weight of authority allowed the creditor the rate instead of the par of exchange.

The general rule was said in *Grant v. Healey* (1839) 3 Sumn. 523, Fed. Cas. No. 5,696, to be that, whenever a debt is made payable in one country

and is afterwards sued for in another country, the creditor is entitled to receive the full amount necessary to replace the money in the country where it ought to have been paid, with interest for the delay; and that in every such case the plaintiff is, therefore, entitled to have the debt due to him first ascertained at the par of exchange between the two countries, and then to have the rate of exchange between those countries added to, or subtracted from, the amount, as the case may require, in order to replace the money in the country where it ought to have been paid.

But in *Grant v. Healey* (Fed.) *supra*, where an advance had been made of a certain number of pounds sterling, by a resident of Boston, to purchase goods for shipment to Austria, it was held that the repayment was to be made in this country, and that therefore the par of exchange, and not the actual rate of exchange, or the amount necessary to transmit the debt to Austria, should govern. In this connection, see also *Capron v. Adams* (1868) 28 Md. 529, as to the effect of custom.

And the rule was stated as follows in *Marburg v. Marburg* (1866) 26 Md. 8, 90 Am. Dec. 84: "A creditor suing here for an amount payable to him in a foreign country, in the currency of that country, is entitled to recover an amount sufficient to produce the sum of the debt where it was made payable; or, in other words, an amount equal to what he must pay to remit the debt to the place where it was payable."

A well-considered statement of the rule which should be applied with respect to the nominal par, or the real par, of exchange, and of the proper relation to this rule of the question of rate of exchange, appears to be that found in *Story on Conflict of Laws*, 8th ed. p. 426, where it is said: "The proper rule would seem to be, in all cases, to allow that sum in the currency of the country where the suit is brought, which should approximate most nearly to the amount to which the party is entitled in the country where the debt is payable, calculated

by the real par, and not by the nominal par, of exchange. This would seem to be the rule also which is adopted by foreign jurists. In some countries there is an established par of exchange by law. . . . In other countries the original par has, by the depreciation of the currency, become merely nominal; and there we should resort to the real par. Where there is no established par from any depreciation of the currency, there the rate of exchange may justly furnish a standard, as the nearest approximation of the relative value of the currencies." This rule has been frequently approved by the courts. See, for example, *Hargrave v. Creighton* (1873) 1 Woods, 489, Fed. Cas. No. 6,064 (action on bill of exchange payable in England); and *Stringer v. Coombs* (1873) 62 Me. 160, 16 Am. Rep. 414 (see this case, *supra*).

It was held in *Robinson v. Hall* (1864) 28 How. Pr. (N. Y.) 342, a district court case, that the current rate of exchange, and not the par of exchange, was the measure of damages, in an action to recover £6 lent in England which was to be paid on the arrival of the parties in New York. Regarding the matter of par of exchange, the court said: "I do not look upon the establishment of a par of exchange in the light of a legal rate or statute fixing the value. It is rather an agreed and conventional standpoint, to serve as a mere basis in estimating the actual value. It supposes the currencies of both nations to be of the precise weight and purity fixed by their respective mints, and it should not, therefore, be adhered to as a fixed rule of value, where the currency of either country has become depreciated."

Although not strictly in point, attention is called, as illustrative of other cases of this class, to *Cushing v. Wells, F. & Co.* (1868) 98 Mass. 550, an action on contract to recover the value of 90 double eagles of the coinage of the United States, delivered by the plaintiff to the defendant in Mexico for transportation to Massachusetts, it being held that this was a contract of bailment to carry and de-

liver a specific article, the plaintiff being entitled to the bag in which the money was delivered and to the identical coins in it, and therefore that he could recover not only the sum represented by the coins as money, but the 30 per cent additional, which, at the time when the package should have been delivered, was the premium on gold in the market.

And although of a somewhat different class of cases than the others in the note, attention is called to *Rasst v. Morris* (1919) 135 Md. 243, 108 Atl. 787, an action to recover the value of a certain sum of "Carrancistas constitutional Mexican currency," which was given by the defendant to the plaintiff as the purchase price of property, and which, it was alleged, was spurious, but was guaranteed by the defendant to be genuine; it being held that the value

of Mexican currency in American money should not be taken as of a date prior to the time when the plaintiff, by performance of conditions precedent, had put the defendant in default under the contract of sale, even though the money had been paid previously.

In an action to recover the amount of freight, which in the charter party was expressed in dollars, payable on discharge of the cargo in England, and which apparently had been paid in part in English money, it was held in *Jelison v. Lee* (1847) 3 Woodb. & M. 368, Fed. Cas. No. 7,256, that, for the purpose of determining the balance due, the English pound should be computed at the mercantile rate of the pound sterling in dollars in England, rather than at any rate fixed by Congress for the customhouse.

R. E. H.

E. C. TISDALE, Appt.,
v.
GEORGE EUBANKS.

North Carolina Supreme Court—October 13, 1920.

(— N. C. —, 104 S. E. 339.)

Attachment — for libel — injury to person.

1. Libel is an injury to the person within the meaning of a statute authorizing attachment for any injury to the person caused by wrongful act.

[See note on this question beginning on page 378.]

Appearance — criminal attachment — effect.

2. One may appear and challenge jurisdiction of the court which depends entirely upon the validity of an

attachment, without subjecting himself generally to the jurisdiction of the court.

[See 2 R. C. L. 335.]

APPEAL by plaintiff from a judgment of the Superior Court for Craven County (Bond, J.) discharging a writ of attachment in an action brought to recover damages for an alleged libel. *Reversed.*

Statement by Hoke, J.:

On the hearing it was made to appear that the action is for libel; that no personal summons has been thus far obtained, and plaintiff is proceeding by publication; that on proper affidavits plaintiff has pro-

cured an attachment in the cause, and same has been levied on property of the defendant situate within the jurisdiction of the court; that defendant has entered a special appearance and moved to discharge the attachment on the ground that,

under the law of this state, no attachment lies in an action for libel, and, the court being of this opinion, judgment was entered that the writ of attachment be discharged, and that thus far no personal service of summons had been obtained.

Plaintiff having duly excepted, appealed.

Messrs. R. E. Whitehurst and Guion & Guion, for appellant:

Any right of action growing out of an injury to the person caused by negligence or wrongful act will support an attachment.

Long v. Home Ins. Co. 114 N. C. 465, 19 S. E. 347; Hood v. Sudderth, 111 N. C. 215, 16 S. E. 397; Jones v. Townsend, 23 Fla. 355, 2 So. 612; Woodford v. McDaniels, 52 L.R.A.(N.S.) 1218, note; Johnson v. Bradstreet Co. 87 Ga. 79, 13 S. E. 250; Worth v. Knickerbocker Trust Co. 151 N. C. 191, 65 S. E. 918.

Defendant has by his motion entered a general appearance.

Scott v. Mutual Reserve Fund Life Asso. 137 N. C. 516, 50 S. E. 221; Grant v. Grant, 159 N. C. 528, 75 S. E. 734; Wooten v. Cunningham, 171 N. C. 123, 88 S. E. 1; Everett v. Wilson, 34 Colo. 476, 83 Pac. 211; Gorham v. Tanquerly, 58 Kan. 233, 48 Pac. 916.

Messrs. Moore & Dunn and D. L. Ward, for appellee:

The judge has jurisdiction.

Cushing v. Styron, 104 N. C. 338, 10 S. E. 258; Zucker v. Oettinger, 179 N. C. 277, 102 S. E. 413.

The defendant may enter special appearance and move to vacate and dismiss. No appeal lies from a finding by the judge that defendant entered special appearance.

Judd v. Crawford Gold Min. Co. 120 N. C. 399, 27 S. E. 81; Warlick v. Reynolds, 151 N. C. 606, 66 S. E. 657.

An attachment will not lie for libel.

Webb v. Bowler, 50 N. C. (5 Jones, L.) 362; Winfree v. Bagley, 102 N. C. 515, 9 S. E. 198; Long v. Home Ins. Co. 114 N. C. 470, 19 S. E. 347; Penoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; Minga v. Zollicoffer, 23 N. C. (1 Ired. L.) 278; Addison v. Sujette, 50 S. C. 192, 27 S. E. 631.

Hoke, J., delivered the opinion of the court:

Our statute on the subject (Re-

visal, § 758) provides that an attachment lies in actions for:

"1. Breach of contract, express or implied.

"2. Wrongful conversion of personal property.

"3. Any other injury to real or personal property, in consequence of negligence, fraud, or other wrongful act.

"4. Any injury to the person, caused by negligence or wrongful act."

The approved writers on the subject, Blackstone, Kent, Cooley, and others, generally mention the security of one's reputation and good name as among the personal rights of the citizen entitled to the protection of the law, and, in this view, the language of the fourth clause of this section is broad enough to include, and in our opinion does include and extend to, an action for libel.

The decided cases on the subject in this and other actions involving substantially the same principle are to like effect. Hoover v. Palmer, 80 N. C. 313; Riddle v. MacFadden, 201 N. Y. 215, 94 N. E. 644; Times-Democrat Pub. Co. v. Mozee, 69 C. C. A. 418, 136 Fed. 761; Johnson v. Bradstreet Co. 87 Ga. 79, 13 S. E. 250; Jones v. Townsend, 23 Fla. 355, 2 So. 612; McKenzie v. Doran, 39 Mont. 593, 104 Pac. 677; and see numerous additional authorities cited in Words & Phrases, 2d series, vol. 3, p. 1004. And in authoritative decisions construing various bankruptcy statutes, wherein judgments and claims growing out of wilful and malicious injuries to persons and property are exempted from the effect and operation of a discharge, libel has been held to come within the exemption, being classed and considered as an injury to the person. McDonald v. Brown, 23 R. I. 546, 58 L.R.A. 768, 91 Am. St. Rep. 659, 51 Atl. 213; Sanderson v. Hunt, 116 Ky. 435, 76 S. W. 179, 3 Ann. Cas. 168; Thompson v. Judy, 95 C. C. A. 51, 169 Fed. 553.

In Johnson v. Bradstreet Co. 87

Ga. 79, 13 S. E. 250, the question presented was whether a statute withdrawing from principle of abatement by death of the litigant, "actions for homicide, injuries to the person, and injury to property" extended to and included actions for libel. It was held that same came within the provisions of the law, and Lumpkin, J., delivering the opinion of the court, said: "If, however, the meaning of the words 'injury to person' cannot be determined by the position of the amended section in the Code, it may be arrived at by reference to the common law. At common law absolute personal rights were divided into personal security, personal liberty, and private property. The right of personal security was subdivided into protection to life, limb, body, health, and reputation. 3 Bl. Com. 119. If the right to personal security includes reputation, then reputation is a part of the person, and an injury to the reputation is an injury to the person. Under the head of 'Security in Person,' Cooley includes the right to life, immunity from attacks and injuries, and to reputation. Cooley, Torts, 2d ed. 23, 24. See also Pollock, Torts, *7. Bouvier classes among absolute injuries to the person batteries, injuries to health, slander, libel, and malicious prosecutions. 1 Bouvier's Law Dict. 6th ed. 636. 'Person' is a broad term, and legally includes not only the physical body and members, but also every bodily sense and personal attribute, among which is the reputation a man has acquired. Reputation is a sort of right to enjoy the good opinion of others, and is capable of growth and real existence, as an arm or a leg. If it is not to be classed as a personal right, where does it belong? No provision has been made for any middle class of injuries between those to person and those to property, and the great body of wrongs arrange themselves under the one head or the other. Whether viewed from the artificial arrangement of law writers, or the standpoint of common sense, an in-

jury to reputation is an injury to person. And oftentimes an injury of this sort causes far more pain and unhappiness, to say nothing of actual loss in money or property, than any physical injury could possibly occasion."

And in *McDonald v. Brown*, supra, Tillinghast, J., speaking to the question, said:

"In view of these definitions, we think it is clear that a libel is a wrong and injury committed against the person of another. As a part of the right of personal security, the preservation of every person's good name from the vile arts of detraction is justly included, and for a violation of this right ample remedies are provided.

"The law, which is supposed to be good common sense crystallized, looks upon and treats a person's character as an inseparable part of the person himself. If that is injured, he is necessarily injured; if that is wronged, he is wronged. Indeed, it is frequently said, and with much truth, that 'character makes the man.' And in this connection we may say that it is difficult to conceive of a greater injury which could be done to a person than to wrongfully and maliciously tarnish or blacken and destroy his good character in the community where he lives. Wounded feelings, mental anguish, loss of social position and standing, personal mortification and dishonor, are clearly injuries that pertain to the person. In so far as we are aware, injuries to the character are always classed in the law with injuries to the person."

A history of our legislation on this subject lends support to the position, if further support were required. Under Code 1868, § 197, an attachment could only be issued in an action arising on contract for the recovery of money only and for wrongful conversion of personal property, and, construing the section, it was held that no attachment would lie for unliquidated damages even in case of breach of contract. Later, in Code 1883, § 347, the Attachment Law was amended so that

the writ would lie in actions to recover a sum of money only and damages in one or more of the following causes:

"(1) Breach of contract, express or implied.

(2) Wrongful conversion of personal property.

(3) Any other injury to personal property, in consequence of negligence, fraud, or other wrongful act."

In chapter 77, Laws 1893, the words "real or" were inserted just before personal, in clause 3 of the section, and thereafter the issuance of the writ was upheld in actions for money and for liquidated damages in the causes specified, and none other. *Judd v. Crawford* Gold Min. Co. 120 N. C. 397, 27 S. E. 81; *Long v. Home Ins. Co.* 114 N. C. 465, 19 S. E. 347; *Winfree v. Bagley*, 102 N. C. 515, 9 S. E. 198.

Again, in 1901, the Attachment Law was amended by adding the section substantially as it now appears in clause 4, § 758, Revisal: "Any injury to the person, caused by negligence or wrongful act,"—thus showing the intent of the legislature to broaden the right to this writ and make the same well-nigh coextensive with any well-grounded demand for judgment in personam; and no valid reason occurs to us for distinction between actions for slander and libel, and any other demand for unascertained and unliquidated damages for injuries to the person.

It is earnestly contended for defendant that this fourth clause of the section is but a return to the pertinent legislation on the subject as it prevailed in Revised Code 1856, chap. 7, § 16, granting the writ for injuries to the "proper person and property" of another, and attention is called to an intimation by Chief Justice Pearson, then associate justice, in *Webb v. Bowler*, 50 N. C. (5 Jones, L.) 362, that the law as it then existed did not extend to slander.

As stated, the point was not presented in *Webb v. Bowler*. The statement is but an intimation of the learned judge, and, on a statute granting the writ for injuries to the "proper person of another [which might very well be restricted to physical injuries], is by no means decisive on the present law, allowing attachment in broader terms for injuries to the person by any wrongful act." And so in reference to the argument that in the statute on arrest (Revisal, § 727) the process is provided for injuries to "person and to character." The statute on arrest from the beginning was much more extensive than that on attachment, and the legislature has since had little, if any, occasion to amend it, but the distinction adverted to should not be allowed significance in the present law, which, as we have seen, has been again and again amended, and is now expressed in language fully broad enough to include all injuries to the person.

On the record as it now appears, the jurisdiction of the court being dependent entirely on the validity of the attachment, the authorities are to the effect that defendant, by special appearance, may challenge the right of the court to proceed by motion to discharge the attachment and without subjecting himself generally to the jurisdiction of the court. *Davis v. Cleveland*, C. C. & St. L. R. Co. 217 U. S. 157, 54 L. ed. 708, 27 L.R.A. (N.S.) 823, 30 Sup. Ct. Rep. 463, 18 Ann. Cas. 907; *Johnson v. Whilden*, 166 N. C. 104, 81 S. E. 1057, Ann. Cas. 1916C, 783.

Being of opinion, however, that under the law of this state attachment lies in actions for libel, we hold that there was error in discharging the writ, and this will be certified that the cause be further proceeded with as the law directs.

Appearance—
criminal attachment—effect.

ANNOTATION.

Attachment in libel and slander cases.

Since the modern remedy by attachment is based on statutes, the question under consideration is one of statutory construction. Generally, regarding the construction of statutes creating the remedy by attachment, it is said in 2 R. C. L. § 6, that, "proceeding upon the theory that the remedy by attachment was unknown at common law, and is purely of statutory origin, and influenced by the further consideration that the remedy is harsh and extraordinary in its character, the courts generally, in the absence of any express provisions relating to the construction of the statutes, are inclined to interpret the enactments creating the remedy strictly in favor of those persons against whom it may be invoked."

Generally, it appears that unless the statute clearly purports to include actions *ex delicto*, the remedy by attachment is not available in this class of actions.

The history of the North Carolina statute, as set out in the reported case (*TISDALE v. EUBANKS*, ante, 374), illustrates the modern tendency, which is apparently to broaden the remedy of attachment, the statute in that state first permitting the remedy in actions on contract for the recovery of money only, and for wrongful conversion of personal property. Later, after several amendments, each enlarging the scope of the remedy, the attachment law was made to apply to "any injury to the person, caused by negligence or wrongful act." Under the latter provision, it was held that attachment would lie in a libel case, libel being held to be an injury to the person within the meaning of the statute.

A search has disclosed only two cases other than the reported case (*TISDALE v. EUBANKS*) directly in point on the question under annotation, and in both those cases, which were decided by the South Carolina court, a contrary conclusion was reached from that in the *TISDALE CASE*. The first of these cases, *Sargeant v.*

Helmhold (1824) 16 S. C. L. (Harp.) 219, does not, however, conflict with the decision in the *TISDALE CASE*, because of a difference in the statute; but this does not seem true of the later South Carolina case, *Addison v. Sujette* (1897) 50 S. C. 192, 27 S. E. 631.

In *Sargeant v. Helmhold* (S. C.) *supra*, the brief opinion is as follows: "The process of attachment was not allowed at common law. Several acts of the legislature of this state have authorized it, in certain specified cases, where the ordinary process of law cannot be served. The first act upon the subject, which was passed in the year 1744 (P. L. 187, 3 Stat. at L. 616), embraces only cases arising upon contract. The Act of 1783, P. L. 315, 4 Stat. at L. 544, § 2, extends it to torts; but it is only to torts, trespasses, or injuries, 'actually done to property, real or personal.' It does not include cases of slander, and we must not extend it, by construction, beyond what the letter or spirit of the act will permit."

The statute construed in *Addison v. Sujette* (S. C.) *supra*, provided for attachment "in any action for the recovery of money, or for the recovery of property, whether real or personal, and for damages for the wrongful conversion and detention of personal property, or an action for the recovery of damages for injury done to either person or property." In holding that attachment would not lie under this statute in an action for slander, the court said: "Our inquiry is narrowed down to the question whether the Code has extended the remedy by attachment to actions for slander or injury to character. . . . The very fact, therefore, that the legislature has chosen to specify actions brought for certain purposes, as those in which the remedy by attachment could be resorted to, affords an irresistible inference that there were actions for other purposes, in which it was not intended that the remedy by attachment should be allowed. . . ."

Now, while in one sense an action for slander, or, as for that matter, any other action on the law side of the court, might be regarded as 'an action for the recovery of money,' yet it is manifest that the legislature did not use those terms in that sense; for in the very same sentence the legislature proceeds to specify actions 'for the recovery of damages for injury done to either person or property,' which, of course, are just as much actions for the recovery of money as an action for slander. When, therefore, we find that under the well-settled law prior to the Code an attachment could not be issued in an action for slander, which it must be assumed was well known to the legislature, and when we further find that the terms used in the Code do not necessarily include an action for slander, and can only be made to do so by a strained construction, the irresistible inference is that the legislature did not intend to change the previously existing law by including the action for slander amongst those in which the remedy by attachment might be resorted to. And when, in addition to this, we find in the very same Code a provision is inserted, allowing another provisional remedy—arrest and bail—to be used in an action where the injury is 'to person or character,' . . . the conclusion is inevitable that there is no statutory provision allowing a resort to the remedy by attachment in an action for slander."

Addison v. Sujette (S. C.) *supra*, was criticized in the opinion of the circuit court (which was affirmed by the supreme court "for the reasons therein stated"), in *Carolina Agency Co. v. Garlington* (1910) 85 S. C. 114, 67 S. E. 225, where the question was whether an attachment might be issued in an action for an accounting. The circuit court's remarks go to the

principles and reasoning of the Addison Case, which it considered in effect overruled by the decision in *Fleming v. Byrd* (1907) 78 S. C. 20, 58 S. E. 965, where the question was as to the right to an attachment in an action for damages for breach of contract, brought against a nonresident. The statements by the circuit court are, of course, obiter, since a different issue was presented than that involved in the cases under consideration in the present annotation, but may serve, argumentatively, to weaken somewhat the force of *Addison v. Sujette* (S. C.) *supra*, as a precedent.

As further illustrative of the class of cases on which the court in the reported case (*TISDALE v. EUBANKS*, ante, 374) relied, in discussing the question whether damages which may be recovered in a libel or slander action are for "injury to the person," although not involving the question of attachment, attention is called to *McKenzie v. Doran* (1909) 39 Mont. 593, 104 Pac. 677, which is cited in the *TISDALE CASE*. The Montana court held that an action for slander was for "injury to the person" within the meaning of a statute conferring jurisdiction on justices of the peace in actions for injury to the person if the damages claimed did not exceed \$300. The court, however, while treating the matter generally from the standpoint of the question whether the term "injury to the person" should include injury to the character from slander, based its conclusion partly on other statutes in that state, which divided actions into two classes, and provided that an injury to property consists in depriving its owner of the benefit of it by taking, withholding, deteriorating, or destroying it, and that every other injury is an injury to the person.

R. E. H.

L. MYRTLE JONES, Appt.,

v.

HAWKEYE COMMERCIAL MEN'S ASSOCIATION of Marshalltown,
et al.

Iowa Supreme Court—July 1, 1918.

(184 Iowa, 1299, 168 N. W. 305.)

Insurance — death from gas — liability.

Asphyxiation from gas escaping into the room where insured is asleep is within a provision of a mutual benefit certificate exempting insurer from liability for accidental death resulting from gas accidentally or otherwise taken or inhaled.

[See note on this question beginning on page 389.]

(Weaver and Salinger, JJ., dissent.)

APPEAL by plaintiff from a decree of the District Court for Polk County (McHenry, J.) dismissing a petition filed to recover the amount alleged to be due under an accident insurance certificate. *Affirmed.*

Statement by Evans, J.:

Action to recover benefits under an accident insurance certificate. The defense was that the death of the insured resulted from a cause which was excepted from the operation of the insurance certificate, in that the insured died from asphyxiation by gas. The trial court dismissed the petition, and the plaintiff appeals.

Messrs. Stipp, Perry, & Starzinger, for appellant:

The lower court erred in its decree in holding that, under the by-laws of the defendant association, death by asphyxiation from the unconscious and involuntary inhalation of illuminating gas while asleep, was an excepted risk.

United States Mut. Acci. Asso. v. Newman, 84 Va. 52, 3 S. E. 805; Paul v. Travelers' Ins. Co. 112 N. Y. 472, 3 L.R.A. 443, 8 Am. St. Rep. 758, 20 N. E. 347, affirming 45 Hun, 313, 10 N. Y. S. R. 306; Pickett v. Pacific Mut. L. Ins. Co. 144 Pa. St. 79, 13 L.R.A. 661, 27 Am. St. Rep. 618, 22 Atl. 871; Fidelity & Casualty Co. v. Waterman, 161 Ill. 632, 32 L.R.A. 654, 44 N. E. 283, affirming 59 Ill. App. 297; Menneiley v. Employers' Liability Assur. Corp. 148 N. Y. 596, 31 L.R.A. 686, 51 Am. St. Rep. 716, 43 N. E. 54, reversing 72 Hun, 477, 25 N. Y. Supp. 230; Fidelity & C. Co. v. Loewenstein, 46

L.R.A. 450, 38 C. C. A. 29, 97 Fed. 17, affirming 88 Fed. 474; Travelers' Ins. Co. v. Ayers, 217 Ill. 391, 2 L.R.A. (N.S.) 168, 75 N. E. 506, affirming 119 Ill. App. 402; 4 Cooley, Briefs on Ins. 1905 ed. 3196; 1 Cyc. 263, and notes 67, 68; 1 Enc. L. & P. (1909) 358, note 14; 2 Biddle, Ins. 1893 ed. § 821; Lowenstein v. Fidelity & C. Co. 88 Fed. 474, 46 L.R.A. 450, 38 C. C. A. 29, 97 Fed. 17.

Death by asphyxiation from inhalation of gas is death effected by "external, violent, and accidental means."

Paul v. Travelers' Ins. Co. 112 N. Y. 472, 3 L.R.A. 443, 8 Am. St. Rep. 758, 20 N. E. 347, affirming 45 Hun, 313, 10 N. Y. S. R. 306; Pickett v. Pacific Mut. L. Ins. Co. 144 Pa. 79, 13 L.R.A. 661, 27 Am. St. Rep. 618, 22 Atl. 871; United States Mut. Acci. Asso. v. Newman, 84 Va. 52, 3 S. E. 805; Travelers' Ins. Co. v. Ayers, 119 Ill. App. 402.

The exemption provisions of its by-laws should be construed most strongly against the defendant association.

Simpkins v. Hawkeye Commercial Men's Asso. 148 Iowa, 543, 126 N. W. 192; Jenkins v. Hawkeye Commercial Men's Asso. 147 Iowa, 113, 30 L.R.A. (N.S.) 1181, 124 N. W. 199; Fidelity & C. Co. v. Chambers, 93 Va. 138, 40 L.R.A. 432, 24 S. E. 896; 1 C. J. 414, 415, and notes; United States Mut. Acci. Asso. v. Newman, 84 Va. 52, 3 S. E. 805; Travelers' Ins. Co. v. Ayers, 119 Ill. App. 402.

(184 Iowa, 1299, 168 N. W. 305.)

Where the insurer continues to issue, without change, policies clauses of which have been judicially construed unfavorably to the insurer's contention, it will be considered as issuing them with that construction placed upon them, even though such construction violates the literal sense of the words used.

Lowenstein v. Fidelity & C. Co. 88 Fed. 474, 46 L.R.A. 450, 38 C. C. A. 29, 97 Fed. 17; *Comstock v. Fraternal Acci. Asso.* 116 Wis. 382, 93 N. W. 22; *Fidelity & C. Co. v. Waterman*, 161 Ill. 632, 32 L.R.A. 654, 44 N. E. 283; *Schmohl v. Travelers' Ins. Co.* — Mo. App. —, 177 S. W. 1108.

Since 1887 the clauses of its by-laws under which the defendant association seeks to exempt itself from liability have been construed by the courts unfavorably to its contention.

United States Mut. Acci. Asso. v. Newman, 84 Va. 52, 3 S. E. 805; *Paul v. Travelers' Ins. Co.* 112 N. Y. 472, 3 L.R.A. 443, 8 Am. St. Rep. 758, 20 N. E. 347, affirming 45 Hun, 313, 10 N. Y. S. R. 306; *Pickett v. Pacific Mut. L. Ins. Co.* 144 Pa. 79, 13 L.R.A. 661, 27 Am. St. Rep. 618, 22 Atl. 871; *Fidelity & C. Co. v. Waterman*, 161 Ill. 632, 32 L.R.A. 654, 44 N. E. 283, affirming 59 Ill. App. 299; *Menneiley v. Employers' Liability Assur. Corp.* 148 N. Y. 596, 31 L.R.A. 686, 51 Am. St. Rep. 716, 43 N. E. 54, reversing 72 Hun, 477, 25 N. Y. Supp. 230; *Fidelity & C. Co. v. Loewenstein*, 46 L.R.A. 450, 38 C. C. A. 29, 97 Fed. 17, affirming 88 Fed. 474; *Travelers' Ins. Co. v. Ayers*, 217 Ill. 391, 2 L.R.A. (N.S.) 168, 75 N. E. 506, affirming 119 Ill. App. 402.

The holdings of courts, justified by elementary principles, were so uniformly in favor of nonexemption at the time of the making of the contract in question as to establish a rule which became a part thereof.

Fidelity & C. Co. v. Waterman, 161 Ill. 632, 32 L.R.A. 654, 44 N. E. 283; *Lowenstein v. Fidelity & C. Co.* 88 Fed. 474, 46 L.R.A. 450, 38 C. C. A. 29, 97 Fed. 17; *Comstock v. Fraternal Acci. Asso.* 116 Wis. 382, 93 N. W. 22; *Pledger v. Business Men's Acci. Asso.* — Tex. Civ. App. —, 197 S. W. 889.

All doubts should be resolved against the insurer, and in favor of the widow of the insured.

Schmohl v. Travelers' Ins. Co. — Mo. App. —, 177 S. W. 1108.

Messrs. Parsons & Mills and Bradford & Johnson for appellees.

Evans, J., delivered the opinion of the court:

The defendant is a mutual accident association. The deceased was conceded a member in good standing at the time of his death. The plaintiff was the beneficiary under the certificate. The death of the deceased resulted from asphyxiation from escaping gas in a hotel room wherein he slept. It was therefore presumably accidental. The insurance certificate specifically excepted from its operation death from certain specified causes, including the inhalation of gas. This particular exception was set forth in the insurance certificate as follows:

"That the association shall not be liable to any member or beneficiary for any indemnity for accidental death, resulting wholly or partially, directly or indirectly, from any of the following causes, conditions, or acts, or when the member is under the influence of or affected by any such cause, condition, or act, to wit, . . . from . . . gases or anything accidentally or otherwise taken, administered, absorbed, injected, inserted, or inhaled—each of the foregoing causes, conditions, or acts are expressly excepted from all the provisions of these by-laws, granting to members or beneficiaries thereof benefits or indemnities.

"Provided, further, that the association shall not be liable . . . for indemnity for any death, resulting wholly or in part from . . . gases . . . accidentally or otherwise taken, administered, absorbed, injected, inserted, or inhaled."

The contention of the appellant is that the foregoing provisions of the certificate should not be held to except from its operation a case of accidental asphyxiation by gas, but that the same were intended to cover only cases of intentional inhalation of gas. The following authorities are cited in support of the contention: *Paul v. Travelers' Ins. Co.* 112 N. Y. 472, 3 L.R.A. 443, 8 Am. St. Rep. 758, 20 N. E. 347; *Menneiley v. Employers' Liability Assur. Corp.* 148 N. Y. 596, 31

L.R.A. 686, 51 Am. St. Rep. 716, 43 N. E. 54; *Pickett v. Pacific Mut. L. Ins. Co.* 144 Pa. 79, 13 L.R.A. 661, 27 Am. St. Rep. 618, 22 Atl. 871; *Fidelity & C. Co. v. Waterman*, 161 Ill. 632, 32 L.R.A. 654, 44 N. E. 283; *Travelers' Ins. Co. v. Ayers*, 217 Ill. 391, 2 L.R.A.(N.S.) 168, 75 N. E. 506; *Fidelity & C. Co. v. Loewenstein*, 46 L.R.A. 450, 38 C. C. A. 29, 97 Fed. 17.

Though some of these cases may be differentiated in some respects from the case at bar, on the whole they fairly sustain the appellant's argument, and we face the responsibility of agreeing or disagreeing with them. We are unable to yield our assent to the soundness of the reasoning put forth in the cited cases. To our minds, it is a clear and arbitrary contradiction of the very terms of the certificate as above quoted. We see no room for candid dispute as to the meaning or construction of the terms used. If the language above quoted does not unequivocally, by its terms, except from the operation of the certificate accidents of this class, then we are unable to conceive of any language which could be used to such end. It is clearly true that all doubtful construction should be solved in favor of the insured, but such rule does not warrant an arbitrary judicial contradiction of the terms of the instrument. The right of the association to make such exception is not questioned, there being no legislative inhibition against it. As a matter of public policy, much could be said in favor of such legislative inhibition. But that question belongs to the legislative field, and does not come within the scope of judicial power. In the absence of inhibitive legislation, we are in duty bound to give effect to these exceptions as they are written. To say that the clause, "death resulting wholly or in part from gas accidentally or otherwise taken or inhaled," should be construed to mean "gas accidentally and voluntarily inhaled," is not only a contradiction of the terms of the certificate, but is a

self-contradiction. The exception covers the taking or inhalation of gas, "accidental or otherwise." The asphyxiation involved in this case was confessedly caused by the taking or inhalation of gas accidentally "or otherwise." If this were an action upon a life insurance policy, a somewhat different question would be presented; but accident insurance only is involved. If the death did not result from accident, there was no liability. The presumption obtains in favor of the plaintiff that the taking was accidental. For the purpose of this case, then, it was accidental. If the gas was inhaled accidentally, it was not inhaled voluntarily. How then could the provision of the exception be construed to mean "gas accidentally and voluntarily inhaled?" Such a construction simply inserts arbitrary contradiction into the plain terms of the exception.

The unsoundness of the holding was well set forth by Judge Sanborn in his dissenting opinion in *Fidelity & C. Co. v. Loewenstein*, supra, as follows: "I am unable to concur in the decision and opinion of the majority in this case. My mind will no more yield its assent to the proposition that an injury from poison involuntarily and unconsciously taken, or inhaled, is not included within the exception of 'injuries fatal or otherwise, resulting from poison or anything accidentally or otherwise taken, administered, absorbed, or inhaled,' than it will to the mathematical proposition that two and two are five. The assent to either, and to one as much as to the other, brings to it a certain feeling of self-stultification to which it will not subject itself. It seeks in vain for answers consistent with the former proposition to the questions: If gas is unintentionally and unconsciously taken or inhaled, why is it not 'accidentally' taken or inhaled? If it is not, then why is it not 'otherwise' taken or inhaled? And how can gas get into the system in any other way than by being 'accidentally

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or otherwise taken, administered, absorbed or, inhaled?" "

We can conceive of no fair answer that can be made to the above reasoning.

To award recovery in this case would be to make arbitrarily a new contract between the parties. This is a mutual association. By the

terms of its certificate its members have clearly chosen

not to insure each other against death from the cause here indicated. By these provisions the insured was at all times protected against assessments for death from such cause. He had the full benefit of the exception during his lifetime. Why, therefore, should not his comembers continue to have the benefit of it now as well as hitherto?

We think the trial court properly directed the verdict, and its order is affirmed.

Preston, Ch. J.; and Ladd, Gaynor, and Stevens, JJ., concur.

Weaver, J., dissenting:

The majority, while conceding that the death of the insured was produced by an accidental cause, deny plaintiff the right to recover, on the sole ground that the insurer is exempt from liability because of certain exceptions embodied in the contract of insurance. It is proper, therefore, at the outset, to look to the law governing an exception in an insurance policy which takes away or neutralizes a right of recovery which, but for such clause, would be indisputable under the general terms of the contract. It is universally held (or perhaps I should say it was the universal holding, until the majority in this case said otherwise) that, a policy of insurance being framed in language chosen by the insurer, every exception and condition embodied therein to relieve it from liability is to be given the construction most favorable to the insured. The precedents to this effect are too numerous and too familiar to call for

citation, but see authorities collected in *Goodwin v. Provident Sav. Life Assur. Asso.* 97 Iowa, 233, 32 L.R.A. 473, 59 Am. St. Rep. 411, 66 N. W. 157. Also *Burkhard v. Travelers' Ins. Co.* 102 Pa. 262, 48 Am. Rep. 205.

For illustration of the application of this rule to fact conditions, I call attention to the following: Not infrequently, accident policies provide exception from liability if death or injury is caused by voluntary exposure to danger; but this is construed by the courts to mean not a voluntary act in the ordinary sense, but an act done intentionally, knowing the risk and recklessly taking the chances. It has also been held that such an exception does not include a case where the insured is injured or loses his life in attempting to save the life of another, even though he acts with knowledge of the danger to himself. *Keene v. New England Mut. Acci. Asso.* 161 Mass. 149, 36 N. E. 891; *Da Rin v. Casualty Co. of America*, 41 Mont. 175, 27 L.R.A. (N.S.) 1164, 137 Am. St. Rep. 709, 108 Pac. 649; *Tucker v. Mutual Ben. Life Co.* 50 Hun, 50, 4 N. Y. Supp. 505, affirmed in 121 N. Y. 718, 24 N. E. 1102; *DeLoy v. Travelers' Ins. Co.* 171 Pa. 1, 50 Am. St. Rep. 787, 32 Atl. 1108; 1 Labatt, Mast. & S. § 360; *Thomp. Neg.* 2d ed. 5435; 1 C. J. 447. A provision against liability where death has been caused wholly or in part by a surgical operation or treatment does not apply where such operation or treatment is reasonably necessary. *Westmoreland v. Preferred Acci. Ins. Co.* (C. C.) 75 Fed. 244; *Vernon v. Iowa State Traveling Men's Asso.* 158 Iowa, 607, 138 N. W. 696; *Travelers' Ins. Co. v. Murray*, 16 Colo. 296, 25 Am. St. Rep. 267, 26 Pac. 774. An exception against death by suicide or from self-inflicted injuries does not relieve the insurer from liability for death of the insured by his own hand or act while temporarily insane. *Accident Ins. Co. v. Crandal*, 120 U. S. 527, 30 L. ed. 740, 7 Sup. Ct. Rep. 685; *Blackstone v. Stand-*

ard Life & Acci. Ins. Co. 74 Mich. 614, 3 L.R.A. 486, 42 N. W. 156. So, also, an exception against liability for injuries from "unnecessary exposure" to danger will not prevent recovery for an injury received in sport or play. *Cornwell v. Fraternal Acci. Asso.* 6 N. D. 201, 40 L.R.A. 437, 66 Am. St. Rep. 601, 69 N. W. 191. Nor does an exception of death or injury "by the hand of the insured" exclude a right of recovery where the self-injury is unintentional. *Northwestern Mut. L. Ins. Co. v. Hazelett*, 105 Ind. 213, 55 Am. Rep. 192, 4 N. E. 582; *Mutual Ben. L. Ins. Co. v. Daviess*, 87 Ky. 541, 9 S. W. 812; *Healey v. Mutual Acci. Asso.* 133 Ill. 556, 9 L.R.A. 371, 23 Am. St. Rep. 637, 25 N. E. 52.

Nor does a limitation of liability to cases where the injury is occasioned by external and violent means exclude such right where death results from poison, drowning, or asphyxiation. And yet none of these decisions could be logically upheld or defended if tested by the narrow and rigid rule to which the majority opinion subjects the contract in this case. Fortunately we are not without many and eminent authorities upon the precise question with which we have here to deal. The exception of liability where death or injury has been caused by poison or gases or anything accidentally or otherwise taken, administered, absorbed, injected, inserted, or inhaled (or other words of the same general effect), is one of frequent occurrence in accident policies, and the meaning and effect of such provision have been considered and determined in many cases. *Paul v. Travelers' Ins. Co.* 112 N. Y. 472, 3 L.R.A. 443, 8 Am. St. Rep. 758, 20 N. E. 347; *Menneiley v. Employers' Liability Assur. Corp.* 148 N. Y. 596, 31 L.R.A. 686, 51 Am. St. Rep. 716, 43 N. E. 54; *Pickett v. Pacific Mut. L. Ins. Co.* 144 Pa. 79, 13 L.R.A. 661, 27 Am. St. Rep. 618, 22 Atl. 871; *Travelers' Ins. Co. v. Ayers*, 217 Ill. 390, 2 L.R.A.(N.S.) 168, 75 N. E. 506; *Fidelity & C. Co. v. Waterman*, 161 Ill. 632, 32 L.R.A. 654, 44 N. E. 283;

Travelers' Ins. Co. v. Dunlap, 160 Ill. 642, 52 Am. St. Rep. 355, 43 N. E. 765; *Metropolitan Acci. Asso. v. Froiland*, 161 Ill. 30, 52 Am. St. Rep. 359, 43 N. E. 766; *Mutual Acci. Asso. v. Tuggle*, 39 Ill. App. 509; *Dezell v. Fidelity & C. Co.* 176 Mo. 253, 75 S. W. 1102; *McMillen v. Elder*, 155 Mo. App. 662, 135 S. W. 496; *Miller v. Fidelity & C. Co. (C. C.)* 97 Fed. 836; *Beile v. Travelers' Protective Asso.* 155 Mo. App. 629, 135 S. W. 497; *United States Mut. Acci. Asso. v. Newman*, 84 Va. 52, 3 S. E. 805; *Fidelity & C. Co. v. Loewenstein*, 46 L.R.A. 450, 38 C. C. A. 29, 97 Fed. 17, affirming 88 Fed. 474; *Dent v. Railway Mail Asso. (C. C.)* 183 Fed. 840; 1 C. J. p. 54; 4 Cooley, *Briefs on Ins.* 3196; 1 Cyc. 263. Each of these numerous cases was based upon a policy of accident insurance; in each death had been caused by asphyxiation or by poison; and in each the policy contained an exception or condition against liability by the insurer for death "resulting from poison, poisonous substances or anything accidentally or otherwise administered, absorbed, or inhaled," or other words of the same general import.

In every one of these cases, representing the views of different state courts of last resort, the United States circuit court, and the circuit court of appeals, the plaintiff has been allowed to recover. No case from any court of higher or equal authority is cited by counsel or by the majority in this case holding to the contrary. Indeed, the majority concedes that these precedents do "fairly sustain the plaintiff's argument," and point to no authority whatever in support of its own conclusion except the dogmatic expression of one judge in a dissenting opinion in an intermediate court. On this frail foundation the majority proceeds to brush aside all the precedents standing in the way of the desired result, by denouncing them as "arbitrary," and declaring that there is "no room for candid dispute" over the correctness of the defendant's interpretation of the

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insurance contract. Were the charge of arbitrary and uncandid expression of opinion directed alone to the writer of this dissent, he would bow to the rebuke with becoming meekness; but he begs leave to suggest that for this court, without the support of a single authoritative precedent, to thus stigmatize the ability, candor, and fairness of the courts of New York, Pennsylvania, Illinois, and Missouri, and other tribunals whose recognized standing and reputation are guaranties of their competence to interpret contracts and recognize and properly apply legal principles, partakes, to say the least, of rashness which ought to be avoided, and indeed ought to convince us of the wisdom and propriety of a re-examination of this case to discover whether, after all, the failure of judicial vision is not due to the beam in the eye of this court. Were there any substantial conflict of view of courts which have so frequently considered this question, the position taken by the majority would appear less rash; but there is none. With one minor exception, the courts which have had occasion to pass upon it are unanimous in sustaining the principle announced in the Paul Case. That there may be no mistake about what the authorities held or about their application to the facts in the instant case, I beg leave to make a more particular statement concerning some of these precedents.

In the Paul Case, as in this, the insured died by suffocation from gas in his sleeping room at a hotel. There was no evidence tending to show that the death was suicidal. The policy sued upon provided certain exceptions to the liability of the insurer, and among these was enumerated "death or disability which may have been caused by the taking of poison, contact with poisonous substances, or the inhaling of gas." The insurer defended on the ground that because of this exception there could be no recovery on the policy. But the court in overruling the defense said that "in expressing its in-

tention not to be liable for death from 'inhaling of gas,' the company can only be understood to mean a voluntary and intelligent act, . . . and not an involuntary and unconscious act. . . . To inhale gas requires an act of volition on the person's part before the danger is incurred. Poison may be taken by mistake, or poisonous substances may be inadvertently touched; but, whatever the motive of the insured, his act precedes either fact. . . . If the exception is to cover all cases where death is caused by the presence of gas, there would be no reason for using the word 'inhale.' If the policy had said that it was not to extend to any death caused wholly or in part by gas, it would have expressed precisely what appellant now says is meant by the present phrase, and there could have been no room for doubt or mistake. Policies of insurance are to be liberally construed, and, as in all contracts, conditions are to be construed strictly against those for whose benefit they are reserved."

In the Menneiley Case, the insured was found dead under very similar circumstances, and the insurer relied upon an exception in the policy which provided for nonliability for death from anything accidentally taken, administered, or inhaled, or from inhaling gas. The trial court held that this exception was more inclusive than the one considered in the Paul Case, and sustained the defense. On appeal the ruling was reversed and the insurer held liable, reaffirming the construction which that decision placed upon the words "inhaling gas." To counsel's contention that the added words, "anything accidentally taken, administered, or inhaled," required a different construction, the court said: "We think otherwise. That provision in the policy clearly implies voluntary action on the part of the insured or some other person. The insured must take, or inhale, or another [person] must administer. . . . We think that the particular accidents intended to be ex-

cepted . . . are the accidental taking or inhaling into the system of some injurious or destructive agency, under the mistaken belief that it was beneficial, or, at least, harmless."

In the Pickett Case, decided by the Pennsylvania court, the insured descended into a well to repair a pump, and was suffocated by gas accumulated there. The exception in the policy on which the insurer resisted payment was to the effect that the insurance did not cover a case of death "from or attributable partially or wholly to inhalation of gas." The court there reviews the New York cases directly in point and other insurance cases involving analogous questions, and sustained a recovery.

Fidelity & C. Co. v. Waterman, 161 Ill. 632, 32 L.R.A. 654, 44 N. E. 283, is another case of suffocation by gas. There the policy, in listing exceptions to the insurer's liability, included "injuries fatal or otherwise from poison or anything accidentally or otherwise taken, administered, absorbed, or inhaled," and here the rule of the cases above cited is approved and followed. In *Metropolitan Acci. Asso. v. Froiland*, 161 Ill. 30, 2 Am. St. Rep. 359, 43 N. E. 766, the insured died from taking chloral by mistake for distilled water. The exception from the insurance was of death by poison "in any way taken, administered, absorbed, or inhaled." Much dependence was there placed by the insurer upon the clause "in any way taken," but it was held that this clause had reference to the manner or mode in which the poison is taken, and not to the motive of the insured in taking it. A very similar rule is applied in *Connecticut Mut. L. Ins. Co. v. Akens*, 150 U. S. 468, 37 L. ed. 1148, 14 Sup. Ct. Rep. 155, where it was held that the words "self-destruction in any form" were not synonymous with "suicide, sane or insane." In the Ayers Case, the court had again to deal with a case of asphyxiation by gas and an exception in an accident insurance policy fully as broad as the one in

the instant case, and the rule of the Paul, Menneiley, and Pickett Cases was again approved. The decision of the United States Supreme Court in *Accident Ins. Co. v. Crandal*, 120 U. S. 527, 30 L. ed. 740, 7 Sup. Ct. Rep. 685, though arising upon a different state of facts, is quite in point in principle. There the policy provided that the insurer should not be liable because of self-inflicted injuries by the insured. He killed himself while insane. Had the court adopted the theory of the majority opinion in this case, it would have pointed out the language of the exception and held that as the provision against liability for self-inflicted injuries is clear and explicit, and as death by suicide is a self-inflicted injury, there could be no recovery. On the contrary, it held, as did the courts of New York, Pennsylvania, Illinois, Missouri, and Virginia, that the reference in the policy to self-inflicted injuries must be interpreted as having reference to injuries so inflicted while the insured was sane and capable of knowing and appreciating the nature of his act. Will the majority say that the court in that case arbitrarily disregarded the contract, or arbitrarily made a new contract for the parties? I take it for granted that the majority will not commit itself to such a holding, but it will require some very agile readjustment of its logic to enable it to say that in the one case the voluntary and intelligent act of a sane man is required, while in the other it is not.

Without tracing the individual cases further upon this point, there is still another aspect of the question which is entitled to consideration, and this has reference to the rule, which the majority concedes, that if there be any doubt of the proper construction of the language of the policy, that doubt is to be solved in favor of the policyholder. Whether any doubt exists requiring an application of this principle is not to be determined simply by the way the question, as an original proposition, appeals to the minds of this

court. It may seem perfectly clear to us or to a majority of our members, but if the courts of last resort in several different jurisdictions have ruled otherwise, and especially if such holding has been practically unanimous wherever such cases have been considered, the very least we can do is to say that such conflict between ourselves and other courts of equal rank and authority leaves the construction in such doubt as to require the application of the rule. Such was the view taken by the United States circuit court of appeals of this district in the Loewenstein Case, *supra*, where it is said that when the insurance in that case was issued, the company must have known that, "as interpreted by the courts of last resort in several states, the policy as drawn would not exempt it from liability, if a poisonous gas" causing death "was unconsciously, involuntarily," taken or "inhaled by the insured. . . . It had knowledge, therefore, that by reason of such adjudications, its policies, if they continued to issue them in the old form, would in all probability be accepted by some, and possibly many, persons, upon the understanding that the company intended to, and did in fact, assume the species of risk last described. If such was not its intention, its plain duty was to so modify the language of its policies as to make its purpose clear, inasmuch as a slight change in the phraseology theretofore employed would have left no room for doubt . . . as to its meaning. We are unwilling to concede that an insurance company may continue to issue policies without any modification of their terms, after certain provisions" of their terms "have been construed by several courts of the highest character and ability, and be heard to insist, in controversies between itself and the insured with respect to such subsequently issued policies, that they do not in fact cover risks which they had been judicially adjudged to cover before they were issued. While it may not be accurate to say that under such

circumstances a technical estoppel arises in favor of the insured, yet the courts in such cases should rigidly enforce the rule requiring policies of insurance to be construed most strongly against the insurer, and they should not hesitate to hold that decisions construing a policy adversely to the contention of the insurer thereafter create a doubt as to its proper interpretation of sufficient gravity to be resolved in favor of the insured."

For another illustration of this rule, see *Davis & R. Bldg. & Mfg. Co. v. Jones*, 14 C. C. A. 30, 32 U. S. App. 32, 66 Fed. 124. Indeed, even without any precedent to appeal to, it would seem evident to reasonable and fair-minded persons that a proposition upon which courts of reputable standing fail to agree is one which neither of them is entitled to declare free from all doubt.

I further beg leave to say that the reasoning by which the majority endeavors to justify its radical departure from the admitted rule of the precedents is not only illogical and mistaken, but, as I shall soon demonstrate, is also wholly inconsistent with the unanimous holding of this court in a very recent case.

Preliminary to this appeal to our own precedents, I may say that the many cases I have already cited are united in pointing out and emphasizing the fact that if the insurer, in framing its policy, intended to relieve itself from all liability for death from poison or gas, and desired the person receiving such policy to so understand it, it was an easy thing for it to so do in terms wholly free from possible doubt. If the policy had said that the insurance thereby provided should not extend to or include any injury or death from poison or gas, which is what the insurer now argues, no one could well misunderstand it. But instead of so doing, it avoids any such clear and comprehensive stipulation, and restricts its exception to cases of injury or death from poison "taken or administered" or from gas "inhaled," which is a very different

proposition. But, says the majority, in effect this policy provides against liability for injury or death from poison or gas in any way taken or administered or inhaled, accidentally or otherwise, and that to construe it as meaning death from an accidental but voluntary taking of poison or voluntary inhaling of gas is a "self-contradiction," an arbitrary distinction where none exists, and that if the gas is inhaled accidentally, it cannot possibly be said to have been inhaled voluntarily. But this is a palpable mistake. It certainly is not correct that a "taking" of poison or "inhaling" of gas may not be at once both voluntary and accidental. Though it may be true that the word "voluntary" is often used in a sense which excludes the idea of an accident, yet this is not always the case, and both words may be properly employed to characterize the same act. The physical act may be voluntary, yet, if owing to facts or conditions unknown to the insured, such act is productive of injury to himself, then such voluntary act is also in a very just sense of the word accidental. This truth is very well put by the Pennsylvania court in *Burkhard v. Travelers' Ins. Co.* 102 Pa. 262, 48 Am. Rep. 205. In that case the insured left the car in which he was riding and, in descending from the platform to a bridge on which the train was standing, fell through an opening and was killed. The insurer sought to escape liability by pleading an exception in the policy. Discussing the facts, the court says: "It is true he voluntarily left the car; but a clear distinction exists between a voluntary act and a voluntary exposure to danger. . . . The act may be voluntary; yet the exposure involuntary. The danger being unknown, the injury is accidental."

There is still another allowable view which is equally decisive against the appellee's contention herein. An act may be neither voluntary nor involuntary, and injury from such act is not included in an exception which mentions only acts

which are voluntary or involuntary. For the purpose of this case, it makes little difference whether we treat the exception as applying only to the conscious voluntary and intelligent taking of poison and inhaling of gas by a sane person, or whether the insured being suffocated in his sleep without consciousness of his peril and without contributing thereto by any act of his own, either voluntary or involuntary, it may be said to be outside of the scope of the exception. Approaching the facts from either angle, it is very clear that the demurrer to the petition was improperly sustained.

I conclude this dissent by recalling to the mind of the court the case of *Riley v. Inter-State Business Men's Asso.* 177 Iowa, 449, 159 N. W. 203, in which some of the vital features are identical with those in this case. There, it will be remembered, the insured, being indisposed, consulted a physician who gave him a medicine which proved to be poisonous and caused his death. His policy provided that the insurer should not be liable for the death of the insured resulting from the voluntary or involuntary taking of poison. Suit being brought, the insurer, adopting the philosophy and reasoning of the majority in this case, demurred to the petition, saying in substance: "The insured took the poison, and, as his taking must have been either voluntary or involuntary, the petition discloses no cause of action."

At the outset, this court adopted that theory and affirmed the ruling of the trial court in sustaining the defendant's demurrer. A rehearing was granted, and on further argument we all united in ordering a reversal. The opinion was written by a distinguished member of the majority in this case, a jurist who excels in keen and incisive criticism and exposition of the meaning and effect of language, and with a brief reference to the views there expressed I am done. After citing the language of the exception in the policy and noting the allegation of the petition that the taking of the poi-

(184 Iowa, 1299, 168 N. W. 305.)

son was neither voluntary nor involuntary, but accidental, the opinion proceeds: "*The words that single out the voluntary or involuntary taking of poison were put into the contract by the defendant, and it must be assumed that they were intended to be effective, and to state the exemptions of defendant to the uttermost extent intended. Therefore they cannot mean that the naked fact of death by poison absolves from liability. It must have been intended that there could be some deaths from poison for which defendant is liable. Had it been the intention that the mere fact that the death was due to poison defeated recovery, a statement that the defendant was not liable if death so resulted would have been plenary, and would have covered any death from poison, no matter how caused.*"

The italics are my own, and I use them to mark the singular and apt adaptation of the words to the case now under consideration. It happily illustrates the rule, very frequently overlooked, that in stating a proposition of a simple contract obligation the shortest and simplest form of expression is the strongest which can be used. There are many, however, who proceed on the theory that, if they expand the brief unmodified statement by adding there-to various expressions of an adjec-

tive or adverbial character, they are increasing its scope, emphasis, and binding force, when in fact in almost every instance every such addition serves only to narrow and restrict the meaning and effect which the principal sentence would have had without them. This, the writer of that opinion points out clearly when he says that, had it been intended to exclude all liability for death by poison, a simple statement to that effect would have been all that was needed; but, when the insurer proceeded to modify the statement by adding "voluntary or involuntary," it so narrowed its exception as to exclude therefrom all other deaths from poison. Applying that rule to this case, which, like the Riley Case, comes to us from a ruling on demurrer to plaintiff's petition, we cannot consistently avoid a reversal. No member of the court dissented in the final opinion in the Riley Case which I assume had passed from their minds; but, now that I have quoted themselves to themselves, I trust they will at once recognize the controlling character of the authority and be ready to join in holding that the judgment below ought to be reversed.

Salinger, J., concurs in this dissent.

Petition for rehearing denied December 14, 1918.

ANNOTATION.

Insurance: death from inhaling gas.

Death from inhaling gas is within the ordinary life policy or accident policies insuring against death from external, violent, and accidental means. *Fidelity & C. Co. v. Loewenstein* (1899) 46 L.R.A. 450, 88 C. C. A. 29, 97 Fed. 17, affirming (1898) 88 Fed. 474; *Travelers' Ins. Co. v. Allen* (1916) 150 C. C. A. 280, 237 Fed. 78; *Fidelity & C. Co. v. Waterman* (1896) 161 Ill. 632, 32 L.R.A. 654, 44 N. E. 283; *Beile v. Travelers' Protective Asso.* (1911) 155 Mo. App. 629, 135 S. W. 497; *Paul v. Travelers' Ins. Co.* (1889) 112 N. Y.

472, 3 L.R.A. 448, 8 Am. St. Rep. 758, 20 N. E. 347; *Menneiley v. Employers' Liability Assur. Corp.* 148 N. Y. 596, 31 L.R.A. 686, 51 Am. St. Rep. 716, 43 N. E. 54; *Herschkowitz v. Mutual L. Ins. Co.* 93 Misc. 522, 157 N. Y. Supp. 436; *Pickett v. Pacific Mut. L. Ins. Co.* (1891) 144 Pa. 79, 13 L.R.A. 661, 27 Am. St. Rep. 618, 23 Atl. 871; *United States Mut. Acci. Asso. v. Newman* (1887) 84 Va. 52, 3 S. E. 805.

In *Beile v. Travelers' Protective Asso.* (1911) 155 Mo. App. 629, 135 S. W. 497, death from dilatation of the

heart due to the administration of chloroform for the performance of a surgical operation is held to be accidental within the meaning of an accident insurance policy, although the heart had been weakened by disease, if the fact was not known to the insured. The court said that in order for the dilatation of the heart not to have been an accident, it must have been, or should have been, expected.

In *Herschkowitz v. Mutual L. Ins. Co.* (1916) 93 Misc. 522, 157 N. Y. Supp. 436, it was assumed that death by inhaling gas was within the operation of an ordinary life policy. The defense in that case was suicide which the court held had not been made out.

In *Travelers' Ins. Co. v. Allen* (1916) 150 C. C. A. 280, 237 Fed. 78, where the question of whether the death was from suicide or accident, the court seems to have assumed that if it was accidental, it was within the policy.

The question whether or not such death is within the exceptions of accident policies depends upon the language of the exception. The leading case upon the subject is *Paul v. Travelers' Ins. Co.* (1889) 112 N. Y. 472, 3 L.R.A. 443, 8 Am. St. Rep. 758, 20 N. E. 347, where the exception provided that this insurance does not extend to any bodily injury of specified kinds "nor by the taking of poison, contact with poisonous substances, or inhaling of gas or by any surgical operation or medical treatment." Insured was killed by inhaling gas escaping into a room in a hotel where he was sleeping and defendant insisted that the case was within the exception in the policy. The court did not agree with this contention, saying: "In expressing its intention not to be liable for death from 'inhaling of gas,' the company can only be understood to mean a voluntary and intelligent act by the insured, and not an involuntary and unconscious act. Read in that sense, and in the light of the context, these words must be interpreted as having reference to medical or surgical treatment, in which *ex vi termini* would be included the dentist's work, or to a suicidal purpose.

. . . If the policy had said that it was not to extend to any death caused wholly or in part by gas, it would have expressed precisely what the appellant now says is meant by the present phrase, and there could have been no room for doubt or mistake."

This case was followed in a short time by *Menneiley v. Employers' Liability Assur. Corp.* (1896) 148 N. Y. 596, 31 L.R.A. 686, 51 Am. St. Rep. 716, 43 N. E. 54, where the language of the exception was "anything accidentally taken, administered, or inhaled, . . . inhaling gas, or any surgical operation or exhaustion consequent thereon," and it was again argued that insured, who also died from asphyxiation in an hotel room, was within the exception, but the court said: "The respondent, however, urges that upon the admitted facts the general term properly held that the provision with reference to 'anything accidentally taken, administered, or inhaled' exempted the company from any liability whatever under its policy. We think otherwise. That provision in the policy clearly implies voluntary action on the part of the insured, or some other person. The insured must take or inhale, or another must administer. The manifest purpose of the provision is to exempt the insurer from liability where the insured has voluntarily and consciously, but accidentally, taken or inhaled, or something has been voluntarily administered which was injurious or destructive of life. We think that the particular accidents intended to be excepted by that provision are the accidental taking or inhaling into the system of some injurious or destructive agency under the mistaken belief that it was beneficial, or, at least, harmless. . . . It is quite difficult to understand how a thing could be involuntarily and unconsciously administered. Coupled together as these provisions are, the same rule of construction must be applied to that portion which relates to something accidentally inhaled as applies to the portion which relates to a substance accidentally taken or accidentally administered."

In accordance with these cases, it

was held in *Pickett v. Pacific Mut. L. Ins. Co.* (1891) 144 Pa. 79, 13 L.R.A. 661, 27 Am. St. Rep. 618, 22 Atl. 871, that inhalation of gas within the meaning of an exception in an accident policy does not include involuntary inhalation of gas in a well, where its presence is not suspected.

Exception in accident policies of injuries from anything accidentally or otherwise taken or inhaled does not include anything taken or administered in good faith to alleviate pain, even though it results in unexpected death. *Beile v. Travelers' Protective Asso. (Mo.) supra.*

In *Waterman v. Fidelity & C. Co.* (1896) 161 Ill. 632, 32 L.R.A. 654, 44 N. E. 283, the language of the policy had been changed from that construed in the above policies so as to read: "This policy does not cover . . . injuries fatal or otherwise, resulting from poison or anything accidentally or otherwise taken, administered, absorbed, or inhaled." Insured was killed by gas in his hotel room, and the argument was again made that this case was within the exception in the policy, but the court said: "It is urged that the exception in the case at bar is broader and more sweeping than the words found in the cases heretofore decided, the words here being, 'poison or anything accidentally or otherwise absorbed or inhaled,' and that these words necessarily include every possible way by which irrespirable gases can be got into the human system so as to cause death. . . . The claim made is not well grounded if the correctness of the point, decided in the cases we have mentioned be conceded. That point, as we understand it, is that the word 'inhaling,' or 'inhalation,' or 'inhaled,' as used in exceptions contained in these policies of life or accident insurance, implies a voluntary and intelligent act as distinguished from an involuntary and unconscious act. Read in the light of the decisions, the words now in question do not mean otherwise than if they explicitly read 'poison or anything accidentally or otherwise consciously and by an act of volition drawn into the system by inspiration.'"

Furthermore the court said: "Appellant is a New York corporation, and made and dated its contract in the city of New York, and this was done several years after the decision in the Paul Case by the court of last resort in that state. It must be presumed that it was then fully advised of that decision, and knew, when it entered into the contract now in suit, what its liabilities were under the agreement that it made." But the court seems to have overlooked the fact that the words, "accidentally or otherwise," appear in this policy, which did not appear in the one in the Paul Case.

The same policy construed in the *Waterman Case* was before the court in *Fidelity & C. Co. v. Loewenstein* (1899) 46 L.R.A. 450, 38 C. C. A. 29, 97 Fed. 17, affirming (1898) 88 Fed. 474, where the insured also met his death by asphyxiation in a hotel room, and the court stated that, irrespective of what its views might be if the question was *res integra*, "the defendant company issued the policy in suit, and doubtless many others of a like character, after it was advised by the decisions to which reference has been made, one of which was a construction of its own contract, that, as interpreted by the courts of last resort in several states, the policy as drawn would not exempt it from liability if a poisonous gas was unconsciously, involuntarily, and accidentally inhaled by the insured, which occasioned his death or injury. It had knowledge therefore that, by reason of such adjudications, its policies, if they continued to issue them in the old form, would in all probability be accepted by some, and possibly many, persons, upon the understanding that the company intended to and did in fact assume the species of risk last described. If such was not its intention, its plain duty was to so modify the language of its policies as to make its purpose clear, inasmuch as a slight change in the phraseology theretofore employed would have left no room for doubt or speculation as to its meaning. We are unwilling to concede that an insurance company may continue to issue policies without any modification of

their terms, after certain provisions thereof have been construed by several courts of the highest character and ability, and be heard to insist, in controversies between itself and the insured with respect to such subsequently issued policies, that they do not in fact cover risks which they had been judicially adjudged to cover before they were issued."

The Paul Case and those following it did not escape criticism. In *McGlother v. Provident Mut. Acci. Co.* (1898) 32 C. C. A. 318, 60 U. S. App. 705, 89 Fed. 688, which was a case of death by poison, Judge Sanborn said: "We must not be understood, however, to adopt or approve those decisions. The path they follow is so narrow, tortuous, and indistinct that we should hesitate long to follow it. Starting in the Paul Case with the thought that the word 'inhaling' implies a conscious act, and invoking the much-abused rule that every policy of insurance of doubtful meaning should be construed most strongly against the company, it reaches the interesting conclusion in the *Fidelity & Casualty Company's Case* that a death from accidentally inhaling gas while sleeping is not a death 'resulting from poison, or anything accidentally or otherwise taken, administered, absorbed, or inhaled,' under an exception in the policy in those words. If gas is unintentionally and unconsciously taken or inhaled, why is it not 'accidentally' taken or inhaled? If it is not, then why is it not 'otherwise' taken or inhaled?" The parties who made the contract did not restrict their exception to death from anything taken or inhaled "consciously and by an act of volition," but expressly extended it over death from "anything accidentally or otherwise taken or inhaled." The construction given by the court to this clause of the policy appears to be cunning and astute to evade, rather than quick to perceive and diligent to apply, the meaning of the words it contains in their plain, ordinary, and popular sense.

And in *Richardson v. Travelers' Ins. Co.* (1891) 46 Fed. 843, where the exception was "inhaling gas," and it was

impossible from the evidence to determine whether or not the death was caused by accident or voluntarily inhaling gas with suicidal intent, the court said: "The language of the policy is so clear as to require no construction. The words are unequivocal that the defendant does not insure against death caused by inhaling gas. There is nothing in the terms of the policy intimating or suggesting that the inhalation of gas must be voluntary or involuntary in order to exempt defendant from liability. . . . All the plaintiff's rights in this action arise under the policy. It constitutes the only relation between the parties. If the policy does not, by the fair and natural import of its words, give a right of action under the facts, then the plaintiff has no right of action. It seems to me . . . that the clause under which defendant claims exemption from liability was expressly adopted because of the impossibility, in most cases of death by the inhalation of gas, to decide whether the death was occasioned by the inhalation of gas with suicidal intent, or whether it occurred accidentally."

The companies made changes in their policies to meet the decisions against them, and these changes have been held to absolve them from liability. Thus, in *Porter v. Preferred Acci. Ins. Co.* (1905) 109 App. Div. 103, 95 N. Y. Supp. 682, affirmed in (1906) 186 N. Y. 599, 79 N. E. 1114, where the exception was "voluntary or involuntary inhalation of any gas or any anesthetic, or injury fatal or non-fatal resulting from any poison or infection accidentally or otherwise taken, administered, absorbed, or inhaled," a recovery was denied where insured died in his hotel room from inhaling gas. The court said: "We think that was the intention of the parties as indicated by the express language used in the policy in question. The meaning is no different than if the policy provided that the defendant would not be liable if the death of the insured resulted from the effects of dynamite, a railroad accident, or from yellow fever. The words employed in the exemption from liability

clause quoted clearly indicate an intention to avoid liability where death is caused by the inhalation of gas. Concededly gas was inhaled by the deceased, and such inhalation caused his death. It was not voluntary; but nonliability for the death of the insured by the involuntary as well as the voluntary inhalation of gas was provided for. The words, 'or any anesthetic,' which follow the clause above quoted, do not in any manner enlarge the scope or meaning of the words, 'voluntary or involuntary inhalation of any gas.' The whole clause, considered together, must mean that if the death of the insured resulted from the voluntary or involuntary inhalation of gas, no recovery could be had, and also that if death resulted from the inhalation of any anesthetic, whether voluntary or involuntary, there would be no liability on the part of the insurer. The courts have gone a long way in construing insurance policies so as to resolve every doubt and every ambiguity in favor of the insured; but in this case there does not seem to be doubt as to what was intended by the parties to the contract, or any ambiguity as to the meaning of the language employed to express such intention."

In *Travelers' Ins. Co. v. Ayers* (1905) 217 Ill. 390, 2 L.R.A.(N.S.) 168, 75 N. E. 506, it was held that death by asphyxiation from the accidental inhalation of gas while asleep is not within the provisions of an accident insurance policy exempting the insurer from liability for death resulting directly or indirectly from any gas or vapor.

And the reported case (*JONES v. HAWKEYE COMMERCIAL MEN'S ASSO.* ante, 380) holds that asphyxiation while asleep, by gas, is within an exception of accidental death resulting from gas accidentally or otherwise taken or inhaled.

In *Minner v. Great Western Acci. Asso.* (1917) 99 Kan. 575, L.R.A. 1917D, 788, 162 Pac. 1160, where the policy provided two kinds of indemnity, accident and sickness, and made sickness indemnity payable only in the event of disability for a period of

seven days or more, and provided for disability or loss, fatal or otherwise, caused by or resulting wholly or in part, directly or indirectly, from gas in any manner taken or administered, voluntary or involuntary, should be classified as sickness, it was held that there could be no recovery for death caused by accidentally and unintentionally breathing illuminating gas which escaped into a sleeping room at night, the court saying that the policy under consideration was evidently phrased with the purpose of avoiding the effect of the decisions permitting recovery for death by inhaling gas.

In *United States Mut. Acci. Asso. v. Newman* (1887) 84 Va. 52, 3 S. E. 805, where the death resulted from inhaling coal gas, and the exception in the policy which was alleged to relieve the insurer from liability was the taking of poison, and the evidence was conflicting as to whether or not the inhaling of such gas was a taking of poison, the court held that an instruction was properly refused which sought to tell the jury that inhaling coal gas was a taking of poison, if the jury believed coal gas to be a poisonous substance which destroys life when inhaled, and that an instruction was correct that it was a question for the jury whether carbonic oxid was poisonous within the exception in the policy, and that, even though they found that it was so, yet, if they believed that insured's death was not caused by such oxid, but by the elements of coal gas with which it was combined, and that such elements were not poisonous, but acted by way of asphyxiation, this would be death by external, violent, and accidental means, and that a recovery might be had.

In *Da Rin v. Casualty Co. of America* (1910) 41 Mont. 175, 27 L.R.A.(N.S.) 1164, 137 Am. St. Rep. 709, 108 Pac. 649, the policy expressly covered injury from anything inhaled, but the defense was voluntary exposure to unnecessary danger. The court held that going to the rescue of a fellow miner who was overcome with gas within 5 feet of the shaft, where insured thought he could reach and

rescue him without danger, did not show such exposure.

Administering chloroform preparatory to the performance of a surgical operation is not surgical treatment within the meaning of an exception in a policy. *Beile v. Travelers' Protective Asso.* (1911) 155 Mo. App. 629, 135 S. W. 497.

In *Westmoreland v. Preferred Acci. Ins. Co.* (1896) 75 Fed. 244, an attempt was made to administer chloroform to relieve insured from the pain of a minor surgical operation. He is alleged to have become black in the face, to have gasped and died, and there is an allegation that this was caused by the chloroform, combined with some cause unknown. The court, however, held that, so far as the facts are shown, chloroform was administered in a proper way, and the insured suffocated, gasped, and died, and that no other conclusion can be reached than that the death of the insured resulted from the inhalation of the chloroform so as to come within two exceptions in the policy, one except-

ing from liability for death resulting from anything accidentally or otherwise taken, administered, absorbed, or inhaled, and the other from death resulting, either directly or indirectly, from the medical or surgical treatment.

An English case holds that an exception in an accident policy of death caused "by medical or surgical treatment, or fighting, ballooning, racing, self-injury, or suicide, or anything swallowed, or administered, or inhaled, absolved the company from liability for death by poisonous gas accidentally inhaled without knowledge of its presence." The court rejected the contention that the exception must be limited to voluntary or intentional inhalation, upon the ground that the language of the policy was plainly to the contrary. *Re United London & Scottish Ins. Co.* [1915] 2 Ch. (Eng.) 167, 8 B. R. C. 327, [1915] W. N. 207, 84 L. J. Ch. N. S. 620, 113 L. T. N. S. 397, 31 Times L. R. 419, 59 Sol. Jo. 529.
H. P. F.

WILLIAM E. G. SAUNDERS et al.

v.

A. S. STULTS and Wife.

WAHKONSA INVESTMENT COMPANY et al., Appts.

Iowa Supreme Court—May 11, 1920.

(— Iowa, —, 177 N. W. 516.)

Receiver — right of one bidding at sale.

One bidding at a receiver's sale acquires no rights until the sale is confirmed by the court, even though the bid has been accepted by the receiver, which will prevent the court from accepting a higher bid subsequently made.

[See note on this question beginning on page 399.]

APPEAL by petitioners, purchasers of real estate, from a decree of the District Court for Winnebago County (Edwards, J.) denying their motion for confirmation of a sale to them made by the receiver, in an action brought for the termination of a joint adventure, and for the appointment of a receiver. *Affirmed.*

The facts are stated in the opinion of the court.

(— Iowa, —, 177 N. W. 516.)

Messrs. Kelleher, Hanson, & Mitchell, for appellants:

Official sales will not be opened on the mere representation that more may be obtained for the property.

Morrisse v. Inglis, — N. J. L. —, 19 Atl. 16; Barlow v. Osborne, 6 H. L. Cas. 556, 10 Eng. Reprint, 1412, 27 L. J. Ch. N. S. 308, 4 Jur. N. S. 367, 6 Week. Rep. 315.

Inadequacy of price does not justify a court in vacating a sale.

Quigley v. Breckenridge, 180 Ill. 627, 54 N. E. 580.

The purchaser has a right to insist that his purchase be not set aside except for reasons that have the approval of the courts.

George v. Norwood, 77 Ark. 216, 113 Am. St. Rep. 143, 91 S. W. 557, 7 Ann. Cas. 171.

A purchaser at such sale acquires actual rights of a legal nature, which are as much entitled to be protected as any other contract or property rights.

George v. Norwood, *supra*; 24 Cyc. 52; Pewabic Min. Co. v. Mason, 145 U. S. 349, 36 L. ed. 732, 12 Sup. Ct. Rep. 887.

A purchaser becomes bound at a judicial sale.

Perrin v. Chidester, 159 Iowa, 31, 139 N. W. 930.

Confirmation will not be refused because more may be obtained for the property than the price for which it was knocked down.

Morrisse v. Inglis, *supra*.

Inadequacy of price is not sufficient reason for refusing to confirm the sale, unless so gross as to shock the conscience. A subsequent advance does not remotely show inadequacy as of the time of the sale. There was therefore no inadequacy at all, certainly no gross inadequacy, and no irregularity is alleged or proven.

Page v. Kress, 80 Mich. 85, 20 Am. St. Rep. 504, 44 N. W. 1052; George v. Norwood, 77 Ark. 216, 113 Am. St. Rep. 143, 91 S. W. 557, 7 Ann. Cas. 171; 24 Cyc. 52; Central Trust & Sav. Co. v. Chester County Electric Co. 9 Del. Ch. 123, 77 Atl. 771; Jacobsohn v. Larkey, L.R.A.1918C, 1176, 157 C. C. A. 650, 245 Fed. 538; Tharp v. Kerr, 141 Iowa, 26, 119 N. W. 267; Jonas v. Weires, 134 Iowa, 47, 111 N. W. 453.

Messrs. E. A. Morling and W. H. Morling, for appellees Saunders et al.:

The purchaser, prior to confirmation, is merely a preferred bidder, and

the court will act in the interest of the parties rather than in that of the purchaser.

Central Trust Co. v. Gate City Electric Street R. Co. 96 Iowa, 646, 65 N. W. 982; Yetzer v. Applegate, 85 Iowa, 121, 52 N. W. 118; Loyd v. Loyd, 61 Iowa, 243, 16 N. W. 117; 30 Cyc. 276, 278; Johnson v. Avery, 51 Am. St. Rep. 532, and note, 60 Minn. 262, 62 N. W. 283; 34 Cyc. 321; 24 Cyc. 22; Osmond v. Evans, 269 Ill. 278, 110 N. E. 16; Re First Trust & Sav. Bank, 45 Mont. 89, 122 Pac. 561, Ann. Cas. 1913C, 1327.

The confirmation or rejection of the sale or bid is matter of sound equitable discretion.

24 Cyc. 34; Central Trust Co. v. Gate City Electric Street R. Co. 96 Iowa, 646, 65 N. W. 982; Freeman, Executions, § 311; Rorer, Judicial Sales, § 106; Wheeler & M. Mercantile Co. v. Wright, — Okla. —, 166 Pac. 184; Duncan v. Eck, — Okla. —, 166 Pac. 121; Re Standwaitie, — Okla. —, 175 Pac. 542; 4 C. J. 838.

Messrs. Clarke & Casson, for appellees Stults:

Under a sale by receiver, where no judicial appraisal was made, no public advertisement, and no public sale, a contract between the receiver and a proposed purchaser is merely tentative in character, and the purchaser can acquire no right until the sale is confirmed by the court.

Central Trust Co. v. Gate City Electric Street R. Co. 96 Iowa, 646; Tennessee v. Quintard, 26 C. C. A. 165, 47 U. S. App. 621, 80 Fed. 829; Carr v. Carr, 88 Va. 735, 14 S. E. 368; Terry v. Coles, 80 Va. 695; Simmons v. Wood, 45 How. Pr. 262; State ex rel. Atty. Gen. v. Roanoke Nav. Co. 86 N. C. 408.

A confirmation of a judicial sale involves the exercise of judicial discretion, and one attacking the judgment of the court must show abuse of such discretion.

Re Finks, 139 C. C. A. 648, 224 Fed. 92.

The rule against opening biddings after acceptance and contract by referee does not apply where the sale was private.

South Baltimore Brick & Tile Co. v. Kirby, 89 Md. 52, 42 Atl. 913; Dickerson v. Talbot, 14 B. Mon. 60; Kelso v. Jessop, 59 Md. 114.

Messrs. Gordon & Osmundson and Senneff, Bliss, Witwer, & Senneff also for appellees Stults.

Gaynor, J., delivered the opinion of the court:

Prior to the happening of the matters involved in this controversy, the defendants Stults had contracted to purchase 790 acres of land. Finding themselves unable to finance the purchase, they induced the plaintiffs, Saunders and the two Sopers, to do so. A contract was entered into between these parties, by the terms of which the land was to be sold and the sum realized divided between them in proportion to the interests of each as fixed in the contract. It appears that a sale could not be effected within the time limited by the contract, and a disagreement arose between them as to the price at which the land should be sold. Thereupon these plaintiffs brought this action to terminate the joint adventure, and to have a receiver appointed. After a hearing the court found for the plaintiffs, and appointed a receiver in the person of one James B. Anderson. Anderson qualified and gave bond, and entered upon his duties as receiver. The decree was rendered in October, 1918, and directed this receiver to sell, convey, and convert into money all real estate, and all personal property covered by the joint enterprise, and to do this as speedily as may be without sacrificing the property. As to the real estate, the receiver was directed to sell the same upon such terms "as are customary in the locality in relation to real estate, when sold in like quantities at private or public sale." Thereafter the receiver endeavored to interest buyers in the property from time to time. The receiver fixed the price at \$135, and undertook to secure a purchaser at that price. He made diligent effort to secure a purchaser. There is no complaint of this. On or about May 26, 1919, the Wahkonsa Investment Company and Furlong & Brennan, after inspecting the land, submitted a bid of \$130. On May 31, 1919, the receiver accepted the bid of these parties, and entered into a formal written contract with them, in which he agreed to sell and con-

vey to them the land aforesaid at the price of \$130, and in the contract they bound themselves to buy at that price and pay \$10,000 down. The terms upon which the Wahkonsa people were to purchase the property were as follows: To pay for said land the sum of \$102,700; \$10,000 in hand; \$30,000 in cash on March 1, 1920; to assume mortgages on the land amounting to \$35,475, and to give a second mortgage on the land of \$27,225, the second mortgage to bear interest at the rate of 6 per cent per annum, payable annually, from March 1, 1920. Shortly after this contract was made, the receiver prepared a report of this sale for submission to the court. The report, however, was not filed. Thereafter, and before any report was made to the court of the sale aforesaid, the First & Second Mortgage Corporation of Iowa presented a bid to the receiver of \$145 per acre, with payments to be made on terms far more favorable to the parties interested than was provided in the Wahkonsa contract.

On the 21st day of July, 1919, the receiver filed a report in which he advised the court of the sale of the land to the Wahkonsa people, and also advised the court of the offer made by the mortgage corporation, and requested such action by the court on his report as might be just and proper. The Wahkonsa people moved for a confirmation of the sale of them. Objections were filed to its confirmation on various grounds, among which were that the sale price was far less than the actual value of the land, and that the manner and times of payment were inequitable. After hearing was had upon this motion and the objections thereto, and evidence introduced, the court refused confirmation of the sale to the Wahkonsa people, and directed the receiver to accept the bid of the First & Second Mortgage Company on the terms set out in its offer, and directed the receiver to enter into a written contract with this party for the purchase and sale of the land. The Wahkonsa Invest-

ment Company and Furlong & Brennan appealed from this action of the court, claiming that the sale to them was a binding sale; that they acquired an interest in the land under the sale, and that the court should have confirmed the sale, and that it erred in ordering the contract set aside, and in recognizing the sale to other parties on bids made after the sale to them, and also erred in directing the receiver to accept the bid of the First & Second Mortgage Corporation.

This is all that is necessary to present the only question that is here for our consideration.

The contention of appellants is:

First. That a bidder, to whom property has been knocked down at a judicial sale, acquires legal rights which are to be as much protected and enforced as are the rights of other purchasers, and that the court erred in not confirming the contract of sale made with appellants.

Second. That a successful bidder has a right to insist that his purchase be not set aside by the court, and that he has a right to a confirmation of the same; that there are no facts shown impeaching the sale, and no reason why the court should not have confirmed the same.

Third. That inadequacy of price, which is not gross, is not sufficient for refusing to confirm the sale; that the fact that more was offered for the land after the receiver had entered into the contract with these appellants did not justify the court in setting aside that contract and refusing to confirm the same.

The appellants' contention overlooks material facts. That is, that the receiver was simply the officer or agent of the court; that this sale was not a completed sale; that it was not in the power of the receiver to make a completed sale which would bind the court to its confirmation; and that those who buy at receiver's sale, such as we have in this case, take with knowledge of the fact that the contract of sale is not

binding on the receiver until the same is presented to the court and approved by the court; that a sale such as we have here is a sale without the right of redemption.

Receiver—right
of one bidding
at sale.

In *Terry v. Coles*, 80 Va. 695, the supreme court of Virginia, quoting from *Rorer on Judicial Sales*, pp. 30, 55, 56, said: "Confirmation is the judicial sanction of the court. Until then the bargain is incomplete. . . . Until confirmed by the court, the sale confers no rights. Until then it is a sale only in a popular, and not in a judicial or legal sense. The chancellor has a broad discretion in the approval or disapproval of such sales. The accepted bidder acquires, by the acceptance of his bid, no independent right, as in the case of a purchaser at a sale under execution, to have his purchase completed, but is merely a preferred proposer, until confirmation by the court of the sale, as agreed to by its ministerial agent. In the exercise of this discretion a proper regard is had to the interests of the parties and the stability of judicial sales. By sanctioning a sale, the courts make it their own. There is a difference between such sales, and ordinary auction sales, and sales by private agreement. In case of sales before a master, the purchaser is not considered as entitled to the benefit of his contract till the master's report of the purchaser's bidding is absolutely confirmed."

See also *Davis v. Stewart*, 4 Tex. 226; *Henderson v. Herrod*, 23 Miss. 434; *Taylor v. Gilpin*, 3 Met. (Ky.) 546; *Ohio L. Ins. & T. Co. v. Goodin*, 10 Ohio St. 563; *Todd v. Gallego Mills Mfg. Co.* 84 Va. 586, 5 S. E. 676. In *Barton's Chancery Practice*, 1070, it is said: "In Virginia, a bid by a purchaser to a commissioner is a bid to the court, and if accepted he is bound by it, but the court, and not the commissioner, is the seller, and the confirmation by the court, and its direction to convey, are essential to the validity of any sale that the commissioner may make."

At page 1094 it is said: "His bid at the commissioner's sale is a mere offer, and, although after confirmation his title relates back to the day of sale, yet he has until confirmation to examine into the matter, and to inquire if there be any defects in the title."

In *Langyher v. Patterson*, 77 Va. 473, the supreme court of Virginia used this language: "Confirmation is the judicial sanction of the court; and by confirmation the court makes it a sale of its own, and the purchaser is entitled to the full benefit of his contract, which is no longer executory, but executed, and which will be enforced against him and for him."

In *Brock v. Rice*, 27 Gratt. 812, Judge Staples, speaking for the court, said: "In considering this case, it is important to bear in mind the rules of law governing judicial sales. All the authorities agree there is a wide distinction between an application to set aside a sale after it is approved by the court, and an application to withhold a confirmation. A decree of confirmation is a judgment of the court, which determines the rights of the parties. Such a decree possesses the same force and effect of any other adjudication by a court of competent jurisdiction. But before confirmation the whole proceeding is in fieri, and under the control of the court. Until then, the accepted bidder is not regarded as a purchaser. His contract is incomplete, and he acquired by his bid no independent right to have it perfected." Further: "It is very certain that with us the commissioner conducting the sale is regarded merely as the agent or servant of the court, and his proceedings are necessarily subject to its revision and control. Whether the court will confirm the sale must, in a great measure, depend upon the circumstances of each particular case. It is difficult to lay down any rule applicable to all cases; nor is it possible to specify all the grounds which will justify the court in withholding its approval."

In *Davis v. Stewart*, 4 Tex. 226,

that court said: "It will be seen that much discretion is left to the judge. If he should believe that the sale was not fair, or that it was not made in conformity with law, it would be his duty to set it aside, and order it to be sold again. He is not required to place upon the record the reasons by which he is governed either in confirming or rejecting a sale. . . . The purchaser could not be injured. When he bid for the land he was aware that he was purchasing subject to the confirmation or rejection of the sale of the probate judge."

Taylor v. Gilpin, 3 Met. (Ky.) 546, confirms the rule stated above and says: "The application to the chancellor was not to disturb a sale which he had approved, but it was to reject a bid or proposal which had been offered. This court has, time and again, held that a purchaser of property, under a decretal sale, does not acquire any independent right by his purchase, until after the same has been approved by the chancellor. He is simply an accepted or preferred bidder; and whether his bid or proposal will be approved depends upon the sound equitable discretion of the court having control of the cause."

In *Tennessee v. Quintard*, 26 C. C. A. 165, 47 U. S. App. 621, 80 Fed. 829, it was said: "The cases, both Federal and state, fully establish the rule that Quintard's bid for the property at the special master's sale was only an offer to take the property at that price, and that acceptance or rejection of that offer was within the sound legal discretion of the court, to be exercised with due regard to the special circumstances of the case. The acceptance of his offer could only have been manifested by an order confirming the sale, and, until that was done, he acquired no title, and there was in his position at the time this petition was filed no element of an innocent purchaser."

In *Todd v. Gallego Mills Mfg. Co.* 84 Va. 586, 5 S. E. 676, it is said: "But before the court had an opportunity to act, before the sale was

reported to the court, another person offered a substantial advance of \$12,000, which was satisfactorily secured. There was then before the court no question as to the inadequacy of price to be determined. One hundred and thirty-two thousand dollars was offered for the same property, under the same circumstances, and, so far as the court was concerned, at the same time, for property which the purchaser claimed the right to buy and have conveyed to him at \$120,000. . . . All the cases agree that the court must sell at the best price obtainable; and when a substantial upset bid, well secured and safe, for 10 per cent advance, is put in before confirmation, it is as much a valid bid as if made at the auction."

The decided weight of authority supports the holdings of the courts above cited. However that may be, we are not without authority in our own state in harmony with these rules. In *Central Trust Co. v. Gate City Electric Street R. Co.* 96 Iowa, 646, 65 N. W. 982, this court recognized the doctrine as announced above. It is true in that case that the decree required the receiver to report the sale for confirmation, but this added nothing to his legal duty,

or to the right of the court to pass upon and determine whether the sale was one that should or should not be confirmed. In the instant case, the sale to the Wahkonsa Investment Company was approximately \$12,000 less than the bid of the First & Second Mortgage Corporation, and required the carrying back of a mortgage on the land of over \$27,000, whereas the bid of the First & Second Mortgage Corporation was a cash bid, and it further appears in the record—though it was not in the decree—that the proposed purchaser, the Wahkonsa people, were informed by the receiver that whatever bid they made and whatever contract was entered into was subject to the approval and confirmation of the court, and this was in the contract which the Wahkonsa people are now insisting was binding, without the confirmation of the court.

The holding of the court from which the appeal was taken is in harmony with these decisions. We find no ground for interfering with its judgment, and its action is therefore affirmed.

Weaver, Ch. J., and Ladd and Stevens, JJ., concur.

ANNOTATION.

Effect of receipt of advance bid before confirmation upon the confirmation of judicial sale.

- I. Introductory, 399.
- II. Doctrine that confirmation will be refused on receipt of higher bid, 400.
- III. Doctrine that higher bid is not sufficient ground for refusal of confirmation, 412.
- IV. Doctrine that entire matter of confirmation rests in the discretion of the court, 417.

I. Introductory.

There are three doctrines as to the effect of the receipt of a higher bid after property has been struck off at a judicial sale, upon the confirmation of the sale. According to one theory, the mere fact that a higher bid has been received is sufficient reason to

refuse confirmation and to open the biddings. According to another theory, the mere fact that a higher bid has been received is not a sufficient reason for refusal to confirm the sale. The adoption of the one or the other of these theories is one of policy. The courts which adhere to the former regard the receipt of a higher bid as conclusive evidence that the property was sold for an inadequate price,—at least that, in this particular case, it is conclusively shown that more might be obtained; while the courts that adhere to the latter theory take the view that judicial sales are rendered more stable and better prices are obtained

for property generally when sold at judicial sale by making the highest bid which is accepted final. Each of these theories has its weak points, and when a strong case is presented for the application of a rule contrary to the one prevailing in the jurisdiction in which it arises, the courts are apt to stamp the case as one having special circumstances, calling for the application of the contrary rule. This attitude of the courts is quite accurately characterized in *Allen v. Martin* (1883) 61 Miss. 78, where it is stated, with reference to a sale upon an inadequate price, that "though the courts of many of the states have iterated and reiterated the proposition that mere inadequacy of price is not sufficient to justify a refusal of confirmation, an examination of a great number of the cases discloses the fact that where this inadequacy exists to any marked extent the court has been first to seize upon exceedingly attenuated reasons, excuses, or pretexts to refuse confirmation."

According to the third doctrine, the entire matter of confirmation of judicial sales is left with the court, to be confirmed or not according to its discretion. This seems to be the view of the court in the reported case (*SAUNDERS v. STULTS*, ante, 394), where a broad view is taken as to the discretion of the court in confirming or rejecting judicial sales. Having adopted this broad view, the fact that there was a higher bid made for the property, while persuasive against the confirmation of the sale, was not essential to the refusal to confirm. The court does not refer to the rules discussed in subds. II. and III. herein.

In jurisdictions in which the rule discussed in subd. III. prevails generally, a distinction has sometimes been made between sales of land belonging to adults and that belonging to infants, it being held that as to infants the court owes a peculiar duty to see that the land brings the highest price, and confirmation of a sale has been refused as to infants, while confirmed as to adults. *Allen v. Martin* (Miss.) supra. A suggestion that a different rule should apply in case

of a sale of adult's land, than in the case of the sale of infant's land, is made in *Duncan v. Dodd* (1830) 2 Paige (N. Y.) 99. In that case a sale upon a mortgage foreclosure of the land of infants, for about half its value, was set aside upon the condition that within ten days a bid that should produce 50 per cent advance upon a resale be made and properly secured. In *LeFevre v. Laraway* (1856) 22 Barb. (N. Y.) 167, where the court refused to set aside a sale in partition because of the mere fact that one of the interested parties had made an advanced bid, the court did set the sale aside where some of the parties were infants and there had been irregularity in the bidding.

But there has been held to be no distinction between the rights of adults and infants as to setting a sale aside and opening the bidding, upon an advanced bid. *Litton v. Flanary* (1914) 116 Va. 710, 82 S. E. 692.

Any distinction between adults and infants has been denied in North Carolina, which adheres to the rule discussed in subd. II. *Re Bost* (1857) 56 N. C. (3 Jones, Eq.) 482.

See also distinction dependent upon character of sale made in *Donaldson v. Young* (1846) 7 Humph. (Tenn.) 266, infra, II.

II. Doctrine that confirmation will be refused on receipt of higher bid.

A practice prevailed in England prior to the Act of 30 & 31 Vict. chap. 48, of opening the biddings in a judicial sale upon the receipt of an advance bid before confirmation, usually required to be an advance of 10 per cent. Under the practice the accepted bid was a mere offer, which was subject to rejection upon the receipt of a higher bid. This rule was recognized in the following cases, which were concerned with the application thereof: *Ambrose v. Ambrose* (1785) 1 Cox, Ch. Cas. 194, 29 Eng. Reprint, 1125; *Anonymous* (1801) 6 Ves. Jr. 513, 31 Eng. Reprint, 1171; *D'Oyley v. Powis* (1786) 1 Cox, Ch. Cas. 206, 2 Bro. Ch. 33, 29 Eng. Reprint, 1130, 17; *Rex v. Hilton* (1824) M'Clel. 595, 148 Eng. Reprint, 249; *Filder v. Bellingham* (1844) 1 Colly. Ch. Cas. 526, 63 Eng.

Reprint, 528, 9 Jur. 8; *Templer v. Sweet* (1845) 8 Beav. 464, 50 Eng. Reprint, 182, 14 L. J. Ch. N. S. 424; *Lovegrove v. Cooper* (1851) 9 Hare, 279, 68 Eng. Reprint, 508; *Banks v. Banks* (1852) 16 Beav. 380, 51 Eng. Reprint, 825, 1 Week. Rep. 50; *Re Jones's Settled Estates* (1859) 1 Giff. 284, 65 Eng. Reprint, 921, 29 L. J. Ch. N. S. 139, 5 Jur. N. S. 1243, 1 L. T. N. S. 186, 8 Week. Rep. 56; *Bridger v. Penfold* (1854) 1 Kay & J. 28, 69 Eng. Reprint, 355, 3 Eq. Rep. 141; *Waterhouse v. Wilkinson* (1864) 1 Hem. & M. 636, 71 Eng. Reprint, 278, 9 L. T. N. S. 799, 12 Week. Rep. 336, 3 New Reports, 369; *Osborne v. Foreman* (1858) 6 H. L. Cas. 556, 10 Eng. Reprint, 1412, affirming (1856) 8 DeG. M. & G. 122, 44 Eng. Reprint, 336. Lord Chancellor Eldon observed in *Andrews v. Emerson* (1802) 7 Ves. Jr. 420, 32 Eng. Reprint, 170, that the rule of 10 per cent "was not a wise rule to establish. The consequence is, you never get more. I remember the time when no such rule prevailed, and desire it to be observed that in future there shall be no such rule." In this case the advance bidder, who had offered exactly 10 per cent, raised his offer to 12½ per cent, and the biddings were opened. An opinion similar to that in *Andrews v. Emerson* was expressed by Lord Chancellor Eldon in *White v. Wilson* (1807) 14 Ves. Jr. 151, 33 Eng. Reprint, 479, that 10 per cent "will not do as a rule. . . . In some cases I should take that advance; in some I shall be satisfied with less; and in others I shall require more." Sales for large amounts, especially, have been opened for a less advance than 10 per cent. In *D'Oyley v. Powis* (1786) 1 Cox, Ch. Cas. 206, 2 Bro. Ch. 33, 29 Eng. Reprint, 1130, 17, a sale for £22,000 was opened upon an offer of £23,000. In *Brooks v. Snaith* (1814) 3 Ves. & B. 144, 35 Eng. Reprint, 433, a sale in a suit by creditors for £10,000, was opened upon a bid of £10,500. A sale for £2,600 was opened upon an advance bid of £2,800, in *Re Jones's Settled Estates* (1859) 1 Giff. 284, 65 Eng. Reprint, 921, 29 L. J. Ch. N. S. 139, 5 Jur. N. S. 1243, 1 L. T. N. S. 186, 8 Week. Rep. 56. The vice chan-

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cellor in *Garstone v. Edwards* (1822) 1 Sim. & Stu. 20, 57 Eng. Reprint, 8, says that the 10 per cent rule is a sort of a general rule, but that the cases establish that where an advance so large as £500 is offered, the court will act upon it, though it be less than 10 per cent. In the case at bar, only £350 advance was offered upon a sale of £5,300, and the court rejected it. A resale was ordered in *Bridger v. Penfold* (1854) 1 Kay & J. 28, 69 Eng. Reprint, 355, 3 Eq. Rep. 141, although the advance offered was only £50, and the expenses of a sale, as shown by the expenses of the former sale, would be £41, so that the benefit to the estate would be very small.

A minimum advance of £40 was required in *Farlow v. Weildon* (1819) 4 Madd. Ch. 460, 56 Eng. Reprint, 775.

By the Act of 30 & 31 Vict. chap. 48, the practice of opening biddings was discontinued, and thereafter the biddings were not opened upon the receipt of an advance bid, unless there had been unfairness in the sale. *Re Bartlett* (1880) L. R. 16 Ch. Div. (Eng.) 561, 50 L. J. Ch. N. S. 205, 44 L. T. N. S. 17, 29 Week. Rep. 279; *Delves v. Delves* (1875) L. R. 20 Eq. (Eng.) 77, 23 Week. Rep. 499.

There were some exceptions to the rule in England, as it prevailed prior to the above-mentioned statute. On a sale by private contract, where the master had once approved of a sale, the ordinary practice as to opening biddings had no application. *Millican v. Vanderplank* (1853) 11 Hare, 136, 68 Eng. Reprint, 1219, 1 Eq. Rep. 429, 17 Jur. 986, 1 Week. Rep. 364. The rule was held not to apply to the sale of a colliery in *Williams v. Attenborough* (1823) Turn. & R. 70, 37 Eng. Reprint, 1021, 2 Mor. Min. Rep. 410, 1 L. J. Ch. 138, 23 Revised Rep. 186.

After the certificate of sale had become absolute by the expiration of eight days from the filing, the biddings would not be opened for a mere advance in price, in the absence of special circumstances; this was true, even though the certificate was filed in vacation. *Ware v. Watson* (1855) 7 DeG. M. & G. 739, 44 Eng. Reprint, 287, 25 L. J. Ch. N. S. 199, 2 Jur. N. S.

129, 4 Week. Rep. 233. After confirmation of the report, the biddings would not be opened unless there was some misconduct on the part of the purchaser; the biddings would not be opened for negligence, surprise, or circumstances of that kind. *White v. Wilson* (1807) 14 Ves. Jr. 151, 33 Eng. Reprint, 479. An advance amounting to one-fourth part of the original price was held not of itself sufficient to set aside the sale after confirmation, in *Watson v. Birch* (1793) 2 Ves. Jr. 51, 30 Eng. Reprint, 518. But in *Chetham v. Gurgeon* (1797) 5 Ves. Jr. 86, 31 Eng. Reprint, 484, the biddings were opened after confirmation upon an advance bid of £366 upon a sale for £305. The court had previously refused to open the biddings upon an offer of £340.

In Canada, the courts have not looked with favor upon the practice of opening biddings upon the receipt of an offer of an advance price. The person who made the advance offer could not be substituted for the purchaser at the sale. *McRoberts v. Durie* (1868) 1 Ch. Chamb. Rep. (U. C.) 211. But in *Harrison v. Patterson* (1868) 1 Ch. Chamb. Rep. (U. C.) 363, a person who offered the advance bid was substituted as purchaser, with the option in the first purchaser, however, of taking at the advanced price. Finally, orders of court seem to have been announced which prohibited the practice of opening biddings except for special circumstances. General Order 388, referred to in *Creswick v. Thompson* (1873) 6 Ont. Pr. Rep. 52, and in *Mitchell v. Mitchell* (1875) 6 Ont. Pr. Rep. 232, provided that biddings "are only to be opened on special grounds, whether the application is made before or after the report stands confirmed." An advance bid, of itself, is not a "special" ground within the meaning of this order. *Creswick v. Thompson* (Ont.) supra. A substantially similar order is referred to in *McDonald v. Gordon* (1867) 2 Ch. Chamb. Rep. (U. C.) 125, and there designated as the Twenty-first Order of December 20, 1865. Special circumstances were held to exist in the *McDonald Case*, authorizing the opening of the biddings. Under this

order, the biddings will not be opened although the purchaser is a party to the suit allowed by an order of the court to bid at the sale, a party to the suit standing upon the same footing as a stranger in this regard. *Mitchell v. Mitchell* (Ont.) supra. After confirmation, the bids would not be opened upon the mere offer of an advanced price. *Dickey v. Heron* (1868) 1 Ch. Chamb. Rep. (U. C.) 149. In *Crooks v. Crooks* (1866) 2 Ch. Chamb. Rep. (U. C.) 29, where there was a claim that the property was insufficiently described, in addition to the advance bid, the court refused to open the biddings. It seems that the motion to open the biddings was made after confirmation; at least, the court says that "the practice is not to open biddings after the completion of the purchase; at all events, unless for misconduct on the part of the purchaser."

As appears in subd. III., the English rule has been rejected by a majority of American courts. It has, however, with some modifications, been adopted by some. Under the English rule the biddings seem to have been opened as a matter of course, upon the receipt of the advance bid. In the American jurisdictions,—viz., North Carolina, Pennsylvania, Tennessee, West Virginia, and, in the early cases, in Virginia,—which incline to the English rule, the courts, with the possible exception of the Tennessee court in its later decisions, have vested a very considerable discretion in the court. The rule seems no stronger than that, in the absence of special circumstances, the biddings will be opened upon the receipt of an advance bid of sufficient amount. The courts which take this view emphasize the fact that the purchaser at a judicial sale is a mere preferred offerer until confirmation. As stated in *State ex rel. Atty. Gen. v. Roanoke Nav. Co.* (1882) 86 N. C. 408, the bidder at a judicial sale "acquires no right, before the confirmation of the report of the commissioner who made the sale under the order of the court. Until then the bargain is incomplete. The highest bidder at such sale acquires, by the acceptance of his bid, no inde-

pendent right, but is regarded as a mere preferred proposer until the confirmation of the sale by the court." Although the purchaser to whom the property was struck off at first sale was held in *Reese v. Copeland* (1880) 6 Lea (Tenn.) 190, to acquire no right to insist upon a resale upon the terms of the original sale, his bid being a mere offer which is of no avail until accepted by a confirmation of the sale, it is stated that he did, by his bid, become so far a party as to entitle him to appeal from any decree affecting his rights.

In North Carolina, the practice has been established by long usage, in courts of equity, of reopening biddings and ordering a resale whenever an advance bid of 10 per cent upon the amount bid at the sale has been offered, provided it is before confirmation of the sale, and in apt time, which is at the term ensuing the sale. *Re Bost* (1851) 56 N. C. (3 Jones, Eq.) 482; *State ex rel. Atty. Gen. v. Roanoke Nav. Co.* (1882) 86 N. C. 408; *Vass v. Arrington* (1883) 89 N. C. 10 (obiter); *Dula v. Seagle* (1887) 98 N. C. 458, 4 S. E. 549; *Perry v. Perry* (1920) 179 N. C. 445, 102 S. E. 772 (increased bid of 20 per cent). In case of sales for larger amounts, an advance bid of less than 10 per cent is sufficient. Thus, in *Upchurch v. Upchurch* (1917) 173 N. C. 88, 91 S. E. 702, an advance bid of \$27,500 was held ground for refusing to confirm a sale of \$26,000. A statute providing that if no exception to a judicial sale is filed within twenty days, the same shall be confirmed, has been urged as entitling the highest bidder to a confirmation of the sale, notwithstanding there may be an advance bid, where such bid has not been made within the twenty days. An advance bid made one day after the expiration of the time limit, but before the bidder had appeared to insist on his rights, was held to be sufficient ground for not confirming the sale in *Upchurch v. Upchurch* (N. C.) supra; but where the advance bid is made after the twenty days, and after the purchaser has moved for confirmation, he is entitled

to a confirmation notwithstanding the advance bid. *Ex parte Garrett* (1917) 174 N. C. 343, 93 S. E. 838.

At first, the Tennessee courts did not go to the extent of the English rule and set aside the sale upon the mere offer of an advance bid, but held that in every case where a sale is set aside, there should be special circumstances rendering it inequitable to confirm the sale. *Morton v. Sloan* (1850) 11 Humph. (Tenn.) 278; *Johnson v. Quarles* (1867) 4 Coldw. (Tenn.) 615. The court in *Johnson v. Quarles* (Tenn.) supra, thus laid down the rule: "In cases of application to open biddings before confirmation, in such cases the settled rule is that, although it is not a matter of course to open biddings upon the application of a party and the offer of a larger sum, yet it is the duty of the chancellor to see that sales made under his order be fairly conducted, and under such circumstances as to insure the best price for the property sold." Therefore, there should, in every case where such sale is set aside, be special circumstances rendering it inequitable to confirm the sale." In this case, no special circumstances appearing, the judgment of the chancellor setting aside the sale and ordering a resale upon the offer of a 20 per cent advance bid was reversed, and the sale confirmed. In *Morton v. Sloan* (1850) (Tenn.) supra, there were held to be special circumstances rendering it inequitable to confirm the sale, where land, which was sold by the acre under the supposition that it contained a stated number of acres, proved to contain less, so that the entire purchase price was less than was supposed. The land sold in this case consisted of several tracts, one, supposed to contain 45 acres and having improvements upon it, containing actually only a little over 15 acres, the court stating that if the purchaser had known there were but 15 acres, he would have given a much greater price per acre than he would be willing to give upon the supposition that there were 45 acres, because of the improvements. The court in this case, however, refused to deprive the purchaser

of the benefit of his purchase, but decreed that if he should choose to complete his purchase at the sum which would have been produced if the land had contained the number of acres supposed, the sale would be confirmed. In *Houston v. Aycock* (1858) 5 Sneed (Tenn.) 406, 73 Am. Dec. 131, the court, after stating that under the English rule a mere advance in price is sufficient to open the biddings, says: "But our cases, on grounds of well-considered policy, require something more."

But in *Childress v. Hurt* (1852) 2 Swan (Tenn.) 487, it is stated that "the course of decision upon this subject in our courts has conformed rather to the English practice than to that of some of the American courts." It is stated, further, that it is the object and duty of the court to see, not merely that the sale is properly conducted, but also that the property shall go for the best price that can be had, and that, since this is true, "it is allowable to open the biddings alone upon the ground of the offer of a larger price, if the advance be so considerable as to furnish a sufficient inducement, under all the circumstances, to a resale of the property." The court refuses to lay down any definite rule as to what advance ought to be deemed sufficient to require the biddings to be opened, but says that, without attempting "to prescribe any uniform rule upon this subject, we think it sufficient to say, in the decision of the case under consideration, that under the circumstances the advance offered of 30 per cent was sufficient to require the biddings to be opened." And a decree of the trial court, refusing to open the biddings and confirming the master's reports, was reversed. In *Coffin v. Corruth* (1850) 1 Coldw. (Tenn.) 194, it is stated, obiter, that, before confirmation, the biddings will be opened on slight grounds; that "advance on the price bid alone is sufficient." This statement is treated as obiter, in the subsequent case of *Johnson v. Quarles* (1867) 4 Coldw. (Tenn.) 615, *supra*.

Finally, in *Click v. Burris* (1871) 6 Heisk. (Tenn.) 539, the English rule

was adopted that when there is an increased bid of 10 per cent or more the biddings shall be opened. This rule has been followed in *Wilson v. Shields* (1873) 3 Baxt. (Tenn.) 65; *Reese v. Copeland* (1880) 6 Lea (Tenn.) 190; *Dupuy v. Gorman* (1882) 9 Lea (Tenn.) 144; *Mabry v. Churchwell* (1882) 9 Lea (Tenn.) 488; *Irby v. Irby* (1883) 11 Lea (Tenn.) 165; *Parsons v. McNickle* (1873) 1 Shannon, Cas. (Tenn.) 264. The Tennessee rule was followed in *Blackburn v. Selma R. Co.* (1880) 3 Fed. 689, and a sale of a railway for \$1,000 reopened upon an advance bid of \$2,000, and a sale of bonds of a par value of \$81,000 for \$510 reopened upon an advance bid of \$750. In fact a sale was opened upon an advance bid of less than 10 per cent in *Ahen v. East* (1874) 4 Baxt. (Tenn.) 308, but no question was raised as to this in that case. The right to reopen the bidding upon a tender of a sum less than 10 per cent is expressly asserted in *Robertson v. Bush* (1912) 3 Tenn. C. C. A. 154, where a bid for \$13,000 was opened upon an advance bid of \$13,750.

In *Glenn v. Glenn* (1872) 7 Heisk. (Tenn.) 367, decided after *Click v. Burris*, the biddings were opened upon an advance offer of 10 per cent, but the matter was held to rest in the discretion of the court. The case of *Click v. Burris* (Tenn.) *supra*, is not referred to.

In the early case of *Roudabush v. Miller* (1879) 32 Gratt. (Va.) 454, the Virginia court states the rule as follows: "In a proper case, where it would be just to all the parties concerned, this court may be understood as having sanctioned a practice in the circuit courts, in the exercise of a sound discretion, of setting aside a sale made by the commissioners under a decree, and reopening the bidding upon the offer of an advanced bid of sufficient amount deposited or well secured; and to that extent the former English practice has been allowed in this state. But it has never been held that it is imperative upon the courts to set aside the sale and reopen the bid. It is a question addressed to the sound discretion of the court, subject to the

review of the appellate tribunal, and the propriety of its exercise depends upon the circumstances of each case, and can only be rightfully exercised when it can be done with due regard to the rights and interests of all concerned—the purchaser as well as others. Where the sale has been fair, and for a fair price, it should never be set aside when there is good reason to believe that the upset price has been offered to gratify ill will or malice toward the purchaser.” This statement of the rule was approved in *Berlin v. Melhorn* (1881) 75 Va. 639, and *Hansucker v. Walker* (1882) 76 Va. 753. In the subsequent case of *Coles v. Coles* (1887) 83 Va. 525, 5 S. E. 673, the court, after a review of the earlier cases in this state, concludes that the court “will ordinarily set aside the sale and open the bid-dings at any time before confirmation upon the offer of a substantial upset bid.”

In *Todd v. Gallego Mills Mfg. Co.* (1888) 84 Va. 586, 5 S. E. 676, the court, while approving of the foregoing statements of the rule, very nearly announces the English rule that, when there is an advance bid of 10 per cent, the biddings will be opened. The court says that “all the cases agreed that the court must sell at the best price obtainable, and when a substantial upset bid, well-secured and safe, for 10 per cent advance, is put in before confirmation, it is as much a valid bid as if made at the auction.” The *Todd Case* is approved in *Ewald v. Crockett* (1888) 85 Va. 299, 7 S. E. 386. But the above statement in the *Todd Case* is explained in *Moore v. Triplett* (1899) 96 Va. 603, 70 Am. St. Rep. 882, 32 S. E. 50, not to require the acceptance of the upset bid under all circumstances; but the court in the later case says that the court, in the *Todd Case*, found no equitable circumstances which in the exercise of a sound legal discretion called for a rejection of the upset bid, and the *Todd Case* is explained as follows: “We understand the decision in that case to be simply that a substantial and well-secured upset bid should be accepted, unless there are circumstances going

to show that injustice would be done to the purchaser or other person.”

The subsequent Virginia cases have adopted the majority American doctrine, thus overruling the above cases. The subsequent cases are discussed in subd. III.

While the doctrine of the above cases prevailed in Virginia, sales were usually set aside upon the receipt of a substantial advance bid. When the property was sold at a grossly inadequate price, and there was an upset bid of 10 per cent made by a responsible party with good and sufficient security, where the purchaser was not insistent on the confirmation, the only persons demanding a confirmation being certain lien creditors whose debts were well secured, and who would not be prejudiced by a resale, there should be a resale of the premises. Accordingly a decree of the trial court refusing to order a resale was reversed. *Hansucker v. Walker* (1882) 76 Va. 753. In *Coles v. Coles* (1887) 83 Va. 525, 5 S. E. 673, a second sale of land was set aside upon the filing of an upset bid of 30 per cent advance upon each separate tract sold, and an advance of about 33½ per cent upon the entire tract. A sale of property for \$120,000 was opened upon the receipt of an upset bid of \$132,000 in *Todd v. Gallego Mills Mfg. Co.* (1888) 84 Va. 586, 5 S. E. 676. The court here states that if there had been no advanced bid the sale would probably not have been set aside for inadequacy of price upon mere testimony that it was inadequate, and continues: “But before the court had an opportunity to act, before the sale was reported to the court, another person offered a substantial advance of \$12,000 which was satisfactorily secured. There was then before the court no question as to the inadequacy of price to be determined. One hundred and thirty-two thousand dollars was offered for the same property under the same circumstances, and, so far as the court was concerned, at the same time, for property which the purchaser claimed the right to buy and have conveyed to him at \$120,000.” In *Teel v. Yancey* (1873) 23 Gratt. (Va.) 691, where

there was an advance bid in connection with an inadequate price, and a sale in which a commissioner was interested, the sale was set aside.

But in some cases the advance bid was rejected. The court in *Roudabush v. Miller* (Va.) supra, having reached the conclusion that an advance bid was offered because of ill will towards the purchaser, and that it was merely a contrivance to defeat the sale, sustained the action of the trial court in refusing to set the sale aside. And in *Moore v. Triplett* (Va.) supra, which marks the transition from the English to the American rule, it was held not to be error to reject an upset bid, put in by one who had an agent at the sale who bid for him, and where every fair means was resorted to in the conduct of the sale that were likely to realize the best possible price, and where the purchase was made of the land in separate tracts, and upset bids were only made as to part of the tract. This decision makes it clear that, in Virginia, the confirmation of the sale rests in the discretion of the court.

In West Virginia, in *Stewart v. Stewart* (1885) 27 W. Va. 167, it was held to be error to refuse to order a resale, where there was an advance bid of over 16 per cent on the former bid, and in *National Bank v. Jarvis* (1886) 28 W. Va. 805, an upset bid of more than 20 per cent advance on the former bid was held of itself sufficient to set aside a confirmation made at the same time as that in which it was set aside. According to the West Virginia rule, however, there is a certain discretion vested in the court. This discretion, it has been held in one case in which there was an advance bid of more than 60 per cent, must be exercised soundly in ordering a resale, and thus bringing to the parties in interest larger returns for their property. It is stated that there are, of course, cases "in which considerations adverse to the acceptance of an upset bid may outweigh the ordering of a resale. But in this case the only consideration was strongly and plainly the other way. An unconfirmed judicial sale, appearing by the tender of a

properly secured upset bid to be at a greatly inadequate price, should ordinarily be set aside, and a resale ordered. It should certainly be set aside and a resale ordered when there are no considerations to the contrary." The judgment of the trial court in refusing to recognize the upset bid and order a resale of the property was reversed. *Gillmor v. Rinehart* (1914) 73 W. Va. 779, 81 S. E. 549. In the early case of *Kable v. Mitchell* (1876) 9 W. Va. 492, the court, after referring to the rule that a sale by commissioners made under a decree of the court of equity is not an absolute sale until confirmed by the court, says that the court may, "in the exercise of a sound discretion, either affirm or set aside the sale or direct the biddings to be reopened, where, upon the facts and evidence and circumstances before it, it appears clearly that the sale was made at a greatly inadequate price; that the court may solve and determine this question upon affidavit or deposition, in connection with the fact that a greatly larger price is offered to the court for the land, and secured or offered to be secured, as was done in this case by Mitchell, who made the offering, or it may do it upon any evidence of fact, or facts, before it, which clearly shows that the land sold at a greatly less price than it was worth."

In Pennsylvania, the right of the court to set aside sales before confirmation is quite broadly stated. *Hamilton's Estate* (1865) 51 Pa. 58 (refusing to confirm a sale in partition for \$24,825.93, where an advance of \$300 over this price was offered); *Armstrong's Appeal* (1871) 68 Pa. 409 (obiter); *Herr's Estate* (1893) 12 Pa. Co. Ct. 622 (setting aside an administrator's sale for \$65 per acre, where there was an advance bid of \$75 per acre). Thus, as regards a sale in a partition action brought by the heirs of a decedent, it has been stated that the heirs stand in no relation of trust or confidence to the bidders at the sale, and "even the highest bidder, whose bid has been returned to the court as the best offered, has acquired no right which debars the heirs or their counsel from endeavoring to

have his bid rejected and a resale ordered. It is their right to have as much obtained for the property as can be, and until a sale has been made and confirmed, they may seek for purchasers who are willing to give more than was offered at the public auction. They may ask the court to open the biddings, to order a new exposure of the property to auction. This is no wrong to the person who bid most at the former auction. His bid, though the highest, was but an offer to purchase, subject to the approval or disapproval of the court, and, in approving sales made in partition, it is the duty of the court to regard primarily the interests of the heirs." *Hamilton's Estate* (Pa.) *supra*. An order entered upon a petition by the trustee and beneficiaries under a will, asking the court to authorize the trustee to make a private sale of the decedent's property, as had been agreed upon with a prospective purchaser, in which the court directed the sale as prayed for, may be revoked before anything further has been done under the order, upon it appearing that another purchaser had offered more for the premises, and upon the condition that the first purchaser be reimbursed his expenses, incurred under the expectation of becoming the purchaser. *Brown's Appeal* (1871) 68 Pa. 53. The advance bid is, in some cases, accompanied with other circumstances. *Sheesley's Estate* (1905) 80 Pa. Co. Ct. 577 (refusing to confirm an assignee's sale for \$8,377, where there was an advance bid of \$8,700 and where the first purchaser was guilty of misrepresentation which depressed the price). But an execution sale which is not ordinarily regarded as a judicial sale will not be set aside upon the mere offer of an advance bid, although the sale was upon an inadequate price. *Nutt v. Berlin Smokeless Coal & Clay Min. Co.* (1918) 262 Pa. 417, 105 Atl. 627. The effect of an advance bid upon an execution sale has not been generally considered herein.

The English rule with some modifications has been adopted by statute in Mississippi. *Chaffe v. Aaron*

(1884) 62 Miss. 29, sustaining the constitutionality of the statute. In *Horton v. Horton* (1852) 2 Bradf. (N. Y.) 200, a decision by a surrogate, it is stated that if a sum exceeding by 10 per cent the bid at which the property had been struck off, exclusive of the expense of a new sale, be obtained, it would be the duty of the court to vacate the sale and direct that another be had. A statute is referred to in the opinion, but it is not clear whether the statute relates to the question under annotation. See contrary decisions in this state, *infra*.

A statute providing that a report of judicial sales should be made and that such a sale should be confirmed if the court should approve it, and that no sale should be confirmed by the court until the court should be satisfied by evidence that the property had been sold "at the highest and best price the same would then bring in fact," has been held not to establish the English rule. *Bethlehem Iron Co. v. Philadelphia & S. S. R. Co.* (1892) 49 N. J. Eq. 356, 23 Atl. 1077.

In some cases, in jurisdictions which adhere generally to the rule now under consideration, a distinction has been made as to the character of the sale involved. Where the owners in common of land procure it to be sold for purposes of division, it has been held that the owners should be permitted to control the sale; and where the clerk, upon the advice of the circuit judge, refuses to postpone the sale upon the request of the owners, who are unable to attend at the day appointed, the sale will be set aside where there is an advance bid about 50 per cent higher than the sum for which the land was sold. *Donaldson v. Young* (1846) 7 Humph. (Tenn.) 266. The court here states that, without discussing the question whether in an ordinary case of a chancery sale, the circumstances disclosed in the record would demand a resale, we think that sales made for the accommodation of parties, under the statute, stand upon a different footing, and are not subject to precisely the same principle.

Whether a conditional offer can be

received depends upon its character. A proposition to advance the bid 10 per cent if the title to the property be settled cannot be considered. *Lucas v. Moore* (1878) 2 Lea (Tenn.) 1; *Irby v. Irby* (1883) 11 Lea (Tenn.) 165. Nor can an advance bid, on condition that any expenses to which the bidder may be subjected shall be refunded to him in the event that he does not become the purchaser, be considered. *Blackburn v. Selma R. Co.* (1880) 3 Fed. 689. But an offer of an advance of nearly 100 per cent on condition that the terms of sale be changed from cash to a credit of one, two, and three years was regarded as ground for opening the bidding, in *Reese v. Copeland* (1880) 6 Lea (Tenn.) 190.

Not every person is entitled to have the biddings opened by making an advance bid. The right to have the bidding opened is for the benefit of the parties litigant. A creditor who has been paid in full from the proceeds of the sale which was made to the owner of the premises is not entitled to have the bidding opened upon an offer of an advance bid. *Bright v. Bright* (1883) 12 Lea (Tenn.) 630.

Sales of personal property may be opened upon an advance bid the same as sales of real estate. *Blackburn v. Selma R. Co.* (Fed.) *supra* (opening up sale of railroad bonds).

As stated above, under the American cases which adhere to the rule under consideration, considerable discretion is vested in the trial courts.

Thus, in some of the cases in the foregoing states, the appellate courts have refused to interfere with a judgment of the trial court refusing to apply the rule. In North Carolina it is held not to be reversible error for the trial court to refuse to reopen the bids upon an advance of 10 per cent being offered, on the theory that the trial court's discretion will not be interfered with. *Trull v. Rice* (1885) 92 N. C. 572. The court, after referring to the general rule that the sale will be reopened upon an advance bid of 10 per cent, said: "But we have been referred to no cases in which, upon the mere ground of a proposal to increase the bid, and without re-

gard to surrounding circumstances, this court has undertaken, in the exercise of an appellate jurisdiction in matters of law, to compel the judge in the superior court to refuse the proposal of the reported bidder and to direct a resale of the property. . . . The confirmation or vacation of the sale rests in the sound discretion of the court below, and we recognize no inexorable principle of law which requires a vacation of a sale upon the ground of an offer of a larger price, merely, in disregard of all considerations which prompt the acceptance of the bid." In *Pritchard v. Askew* (1879) 80 N. C. 86, where there was an advance bid, it was held that "the court may confirm the sale, or set it aside and order a resale, as in the exercise of a sound discretion it may determine to be right and proper." The action of the trial court in refusing to reopen the bids was held not to be reviewable, in *Uzzle v. Weil* (1909) 151 N. C. 131, 65 S. E. 755. The advance bid, however, was not made at the next ensuing term, and this decision is based in part upon the principle that the bid was not made in apt time within the North Carolina rule. But in *Dula v. Seagle* (1887) 98 N. C. 458, 4 S. E. 549, a sale had in pursuance of a decree for the sale of land to pay a judgment obtained by the vendor against the vendee for a balance of the purchase money, the supreme court reversed a judgment of the trial court refusing to set aside a sale upon an advance bid of 10 per cent. The trial court based its refusal upon the ground that the decree of sale directed the commissioner to make title and to distribute the money produced by the sale without reporting for confirmation; and without retaining the cause. The supreme court, in reversing the judgment of the trial court, says that this view would be forcible, and perhaps unassailable, if the judgment had been regular according to the course of the court. But the judgment was held irregular in this regard.

In other jurisdictions, also, the power to set aside a sale upon the receipt of a higher bid has been held to be one

the exercise of which rests in the sound discretion of the trial court, and as a general rule the exercise of that discretion will not be interfered with unless there is a palpable and gross abuse. *Bower's Appeal* (1877) 84 Pa. 311 (affirming a decree of the orphans' court confirming an administrator's sale for \$1,626, although there was an advance bid of \$2,000); *Owen v. Owen* (1844) 5 Humph. (Tenn.) 352 (affirming a decree of the trial court setting aside the sale of a slave for \$100, when there was an advance bid of \$150).

That the setting aside of the sale upon the receipt of an advance bid is a matter which rests within the discretion of the court is held also in *Clark's Estate* (1910) 38 Pa. Co. Ct. 302, but this case places some limitations upon the right to set a sale aside which had not been placed by other Pennsylvania cases. It is stated that "before exercising this power (to set the sale aside) the court should first be satisfied that at the time of the sale the price was inadequate." The court then states, what is contrary to the statement contained in previous cases, that "while it is true that the highest bidder is not in a position to enforce the consummation of the sale, he has rights that should be considered by the court. Having purchased the property, his bid could be enforced against him; upon his failure to pay he could be held liable for any deficiency that might occur on a resale. Bidders at judicial sales should not be discouraged."

That a motion to confirm or set aside a sale is one addressed to the legal discretion of the court, to be governed by the circumstances of the particular case, and that if improperly exercised it will, in a proper case, be corrected by appeal, is stated in *Childs v. Hurd* (1885) 25 W. Va. 530. And see *Gillmor v. Rinehart* (1914) 73 W. Va. 779, 81 S. E. 549.

Ten per cent of the bid is the amount of advance usually required, but there is no hard-and-fast rule to this effect. In *Murphy's Estate* (1882) 11 W. N. C. (Pa.) 419, the court states that it has adopted as a

safe rule for ordinary cases that an advance of at least 10 per cent over the price realized should be proffered and secured before a sale will be set aside for inadequacy of price. The sum named by the petitioner in that case being below this amount, the court refused to set the sale aside. Other Pennsylvania cases do not set any limit, but vest the confirmation largely in the discretion of the trial court. In *Effinger v. Ralston* (1871) 21 Gratt. (Va.) 430, a sale under the foreclosure of a vendor's lien in which the owner had some objections to the regularity of the sale, the court ordered the sale set aside on condition that the owner should enter into a bond with good security, conditioned that, at the next offer of the land for sale, he would bid 5 per cent more than the commissioners sold the land for, including the cost of sale, and upon the same terms. A commissioner's sale for \$5,000 will not be set aside and the biddings opened, upon the receipt of an advance bid of \$5,100. *Hudgins v. Lanier* (1873) 23 Gratt. (Va.) 494.

The amount of the advance necessary has been stated to be a matter left to the discretion of the court upon the facts of each case. *Parsons v. McNickle* (1873) 1 Shannon, Cas. (Tenn.) 264; *Kable v. Mitchell* (1876) 9 W. Va. 492. The court in *Atkison v. Murfree* (1872) 1 Tenn. Ch. 51, approves of the statement of McKinney, J. in *Childress v. Hurt* (1852) 2 Swan (Tenn.) 487, to the effect that, "with respect to the advance which ought to be deemed sufficient to require that the biddings should be opened, no very definite rule can be laid down; this must be left to depend in some measure on the circumstances of the given case;" and continues: "The English minimum is manifestly too high for our state. Land in England is a commodity in which none but the wealthy can indulge, and the cost of all judicial proceedings, even the opening of biddings at a master's sale, are heavy. In this state, on the other hand, land is comparatively cheap and a commodity in which all may deal, and it is the policy of our institutions to

keep it in the hands of the many." The court concludes: "It is not necessary for me in this case to fix a minimum, nor to express an opinion as to what it should be. It is enough for me to say that an advance of \$1,600 is sufficient to render it 'inequitable to confirm the sale,' and to authorize the opening of the biddings." The sale in this case was for \$8,900. The advance offer was \$10,500. In *Childress v. Hurt* (Tenn.) *supra*, the court states that "without attempting to prescribe any uniform rule upon this subject, we think it sufficient to say, in the decision of the case under consideration, that under the circumstances the advance offered of 30 per cent was sufficient to require the biddings to be opened." But see the rule announced in *Click v. Burris* (1871) 6 Heisk. (Tenn.) 539, *supra*.

See *Allen v. East* (1874) 4 Baxt. (Tenn.) 308; *Robertson v. Bush* (1912) 3 Tenn. C. C. A. 154, *supra*.

It has been held that the court cannot accept the higher bid, but must reopen the bidding. *Wood v. Parker* (1869) 63 N. C. 379. But in *Dupuy v. Gorman* (1882) 9 Lea (Tenn.) 144, the bidding was opened in the clerk's office merely for ten days, there being no further public sale, and this action was sustained as a proper exercise of the chancellor's discretion. And in *Irby v. Irby* (1883) 11 Lea (Tenn.) 165, where there was an advance bid on a price obtained at a second sale, the court confirmed the sale to the second purchaser upon his raising his bid to meet the advance. Upon an advance bid and the opening of the sale, the first purchasers are entitled to increase their bids to the same amount as those advanced, and claim in preference, but upon a second advance the purchasers are not entitled to claim in preference. *Blackburn v. Selma R. Co.* (1880) 3 Fed. 689.

See *Morton v. Sloan* (1850) 11 Humph. (Tenn.) 278, *supra*.

Upon the second sale the bidding should be started at the advance bid, the party making it being regarded as having made a standing bid for the advance price. *Mason v. Martin* (1886) 64 Miss. 572, 1 So. 756; *Marsh*

v. Nimocks (1898) 122 N. C. 478, 65 Am. St. Rep. 715, 29 S. E. 840. The sale to the former purchaser cannot subsequently be confirmed. *Mason v. Martin* (Miss.) *supra*. After the advanced bid has been made, the bidder becomes a quasi party and is bound by subsequent proceedings; having taken no exception to the subsequent sale, he is liable for any deficiency resulting therefrom. *Allen v. East* (1874) 4 Baxt. (Tenn.) 308.

Upon the opening of the sale, the purchaser is required to execute his notes as of the date of the sale, the biddings at which are opened in the absence of any controlling equity. *Mabry v. Churchwell* (1882) 9 Lea (Tenn.) 488.

The person making the advance bid in *Ewald v. Crockett* (1888) 85 Va. 299, 7 S. E. 386, was given twenty days in which to perfect his bid, and this allowance of time was held not to be error.

Bids were reopened twice in *Hinson v. Adrian* (1885) 92 N. C. 121, and *Coles v. Coles* (1887) 83 Va. 525, 5 S. E. 673, and three times in *Perry v. Perry* (1920) 179 N. C. 445, 102 S. E. 772. It was announced in *Click v. Burris* (1871) 6 Heisk. (Tenn.) 539, that the biddings would not be opened a second time. And in *Collins v. Wood* (1890) 88 Tenn. 779, 14 S. W. 221, it was held that "the rule that a mere advance bid of 10 per cent will be sufficient to authorize the reopening of the bids does not apply, even in case of a sale for partition, to cases where the bids have been once reopened upon an advance bid." But see *Irby v. Irby* (1883) 11 Lea (Tenn.) 165, *supra*. In *Vaughn v. Smith* (1877) 3 Tenn. Ch. 368, biddings were opened a second time upon the application of one who failed to see the advertisement of the sale, although he looked for the same. In *Atchison v. Murfree* (1878) 3 Tenn. Ch. 728, the court adheres to the rule of *Click v. Burris* (Tenn.) *supra*, that biddings will not be opened a second time, "except under extraordinary circumstances."

While the present note does not deal with the general question of opening up judicial sales after confirmation, it

should be noted that the doctrine now under consideration, that the mere fact that a higher bid has been received is sufficient ground for setting aside a sale, does not prevail after confirmation. *Pewabic Min. Co. v. Mason* (1891) 145 U. S. 349, 36 L. ed. 732, 12 Sup. Ct. Rep. 887; *Ashbee v. Cowell* (1853) 45 N. C. (Busbee, Eq.) 158; *Blue v. Blue* (1878) 79 N. C. 69; *Houston v. Aycock* (1858) 5 Sneed (Tenn.) 406, 73 Am. Dec. 151; *Coffin v. Corruth* (1860) 1 Coldw. (Tenn.) 194; *Berlin v. Melhorn* (1881) 75 Va. 639; *Langyher v. Patterson* (1883) 77 Va. 470. An offer of an advance price after the confirmation of a sale was rejected in *Pewabic Min. Co. v. Mason* (U. S.) *supra*, the court stating that to set aside a sale after confirmation something more than mere inadequacy of price must appear, and it is added that, "even before confirmation, the sale would not be set aside for mere inadequacy, unless so great as to shock the conscience." The court in *Ashbee v. Cowell* (N. C.) *supra*, reversed an order of the trial court setting aside a sale and opening the biddings, after confirmation, upon the offer of an advance of about 30 per cent.

The court in *Houston v. Aycock* (1858) 5 Sneed (Tenn.) 406, 73 Am. Dec. 151, states that after confirmation of the sale the purchaser has become the owner of the estate, and no advance of price, however large, will have the effect to open the biddings; it can only be regarded as auxiliary to other grounds of greater weight. A similar decision appears in *Coffin v. Corruth* (1860) 1 Coldw. (Tenn.) 194, where it is stated that after the report is confirmed and title vested, advance of price alone is not sufficient to set aside a sale; that there must be something else, some particular principle arising out of the character of the purchase as connected with the ownership of the estate, or some abuse of confidence, misconduct, or fraud on the purchaser's part.

In *Berlin v. Melhorn* (1881) 75 Va. 639, where a judicial sale of real estate was set aside after confirmation upon the offer of an advance bid, the

appellate court, in reversing the decree, declared that after a judicial sale has been confirmed, it will not be set aside except for fraud, mistake, surprise, or other cause, for which equity would give like relief if the sale had been made by the parties in interest, instead of by the court.

A reopening of bids upon an advance bid has been refused in North Carolina, although there was no express confirmation prior to the advance bid, but where the decree ordering sale, which was entered by consent, directed the sale and execution of a deed to the purchaser, who was to be let into possession, and the manner in which the proceeds should be distributed, and where there was a compliance with the decree and a report made to the court, but no further action taken by the court. *Vaughan v. Gooch* (1885) 92 N. C. 524.

After confirmation, a sale cannot be set aside except upon petition for rehearing, and notice to the purchaser and the parties to the cause, even at the same term of court at which the confirmation decree is entered. *Langyher v. Patterson* (1883) 77 Va. 470. But in *National Bank v. Jarvis* (1886) 28 W. Va. 805, it was held that in chancery cases other than admiralty all decrees are in fieri and in the breast of the court, and subject to its absolute control until after the end of the term at which they are rendered. In other words, a decree does not properly become a decree until the term ends. Accordingly, the court was held to have absolute control of all interlocutory decrees during the whole of the term at which they were entered, and might at its discretion set them aside without notice and of its own accord. An order setting aside the confirmation of the sale upon the filing of an upset bid was therefore sustained.

The appellate court, in *Mann v. McDonald* (1849) 10 Humph. (Tenn.) 274, refused to interfere with the exercise of the discretion of the chancellor setting aside a sale after confirmation, where there was an advanced bid 50 per cent higher than the bid at which the sale was made.

In this case there was the additional ground that the successful bidder upon the first sale was the guardian for minors who had a share in the estate which was being sold.

III. Doctrine that higher bid is not sufficient ground for refusal of confirmation.

The doctrine prevails in a majority of American jurisdictions that a court will not refuse to confirm a sale which has been regularly held and is free from fraud, because a higher bid is made than that at which the property was struck off. In some of the cases the doctrine has been applied without reference to the adequacy of the price on the former sale. *Re Third Nat. Bank* (1880) 9 Biss. 535, 4 Fed. 775 (refusing to set aside a sale for \$30,000 upon an advance bid of \$32,000, and a further advance bid of \$35,000 upon the rejection by the court of the \$32,000 bid); *Bean v. Johnson* (1891) 13 Ky. L. Rep. 36, 16 S. W. 140 (sale of land for \$5,650 in an assignment proceeding confirmed, although there was an advance bid of \$7,450); *Alms v. Shackelford* (1895) 17 Ky. L. Rep. 908, 32 S. W. 1088 (sale of property, appraised at \$4,000 in an assignment proceeding, for \$2,700 to the debtor's wife, confirmed, although there was an advance bid of \$3,500); *LeFevre v. Laraway* (1856) 22 Barb. (N. Y.) 167 (advance bid for \$12,000 not sufficient of itself to set aside a sale in partition for \$7,000); *Wesson v. Chapman* (1894) 76 Hun, 592, 23 N. Y. Supp. 192; *Wilber v. Wilber* (1907) 119 App. Div. 740, 104 N. Y. Supp. 179 (advance bid of \$2,000 no ground for refusing to confirm a receiver's sale for \$1,250); *Ackerman v. Cornell* (1912) 33 Ohio C. C. 102 (confirming a sale in foreclosure for \$4,000, which sum was two thirds of the appraised value, although there was a higher bid of \$5,000); *Watkins v. Jones* (1907) 107 Va. 6, 57 S. E. 608 (commissioner's sale under chancery decree for \$2,100 confirmed, where commissioners recommended its confirmation, although there was an upset bid for \$2,400); *Howell v. Moiren* (1909) 109 Va. 200, 63 S. E. 1073 (sale in partition confirmed, although there was an advance bid of 10 per cent and the commis-

sioners recommended a resale); *Hardy v. Coley* (1913) 114 Va. 570, 77 S. E. 458 (sale confirmed, although there was an advance bid of 10 per cent, and the commissioners advised a resale); *Litton v. Flanary* (1914) 116 Va. 710, 82 S. E. 692 (sale confirmed, although there was an advance bid of 10 per cent).

See *Pewabic Min. Co. v. Mason* (1891) 145 U. S. 349, 36 L. ed. 732, 12 Sup. Ct. Rep. 887, *supra*, II.

Other cases have held that the courts will not refuse to confirm because of an advanced bid, where the bid at which the property was struck off is reasonably adequate, or, as expressed in other cases, where the property is sold for its market value. *Glennon v. Mittenright* (1888) 86 Ala. 455, 5 So. 772 (register's sale for \$305 confirmed, although there was an advance bid of \$900); *Parker v. Bluffton Car Wheel Co.* (1895) 108 Ala. 140, 18 So. 938 (public sale by receiver confirmed, although there was an advance bid of 10 per cent, where the advance bidder was present at the sale, but refrained from bidding); *Bethea v. Bethea* (1902) 136 Ala. 584, 34 So. 28 (partition sale for \$9,500 confirmed, although there was an advance bid of \$10,000); *Colonial & U. S. Mortg. Co. v. Sweet* (1898) 65 Ark. 152, 67 Am. St. Rep. 910, 45 S. W. 60 (commissioner's sale under a foreclosure decree for \$2,500 confirmed, although there was an advance bid of \$3,981.67 by the plaintiff in the foreclosure suit); *George v. Norwood* (1905) 77 Ark. 216, 113 Am. St. Rep. 143, 91 S. W. 557, 7 Ann. Cas. 171 (commissioner's sale for \$4,000 confirmed, although there was an advance bid of \$5,000); *Stump v. Martin* (1872) 9 Bush (Ky.) 285 (sale by the marshal of the chancery court in an equitable action, for \$190,100, confirmed, although there was an advance bid of 10 per cent); *Harris v. Gunnell* (1888) 10 Ky. L. Rep. 419, 9 S. W. 376 (guaranty that 80 acres would bring as much on a resale as 110 did on first sale not sufficient to set the first sale aside; the sale was set aside for other reasons); *Lawson v. Hill* (1889) 11 Ky. L. Rep. 213, 11 S. W. 606 (execu-

tion sale for \$751, of land appraised at \$1,000, confirmed, although there was an advance bid of \$851; *Page v. Kress* (1890) 80 Mich. 85, 20 Am. St. Rep. 504, 44 N. W. 1052 (sale under foreclosure decree for \$890 confirmed, although there was an advance bid of \$1,000); *Fiske v. Weigel* (1891) — N. J. Eq. —, 21 Atl. 452 (sale in partition for \$4,000 confirmed, although there was an advance bid of \$5,000); *Rogers v. Rogers Locomotive Co.* (1901) 62 N. J. Eq. 111, 50 Atl. 10 (private sale by receivers for \$602,000 confirmed, although there was a higher bid for \$655,000).

Some cases have adhered to the rule where the sale was not grossly inadequate. *Morrisse v. Ingle* (1889) 46 N. J. Eq. 306, 19 Atl. 16 (sale by master in chancery in a partition action confirmed, although there was an advance bid of slightly more than 10 per cent); *Bethlehem Iron Co. v. Philadelphia & S. S. R. Co.* (1892) 49 N. J. Eq. 356, 23 Atl. 1077 (receiver's sale for \$185,000 confirmed, although there was an advance bid of \$225,000); *Bliss v. New York L. Ins. Co.* (1893) 51 N. J. Eq. 630, 25 Atl. 381; 30 Atl. 429 (foreclosure sale for \$19,475 affirmed, although there was an advance bid of \$20,475); *Fleming v. Fleming Hotel Co.* (1905) 70 N. J. Eq. 509, 61 Atl. 739 (receiver's sale for \$6,000 confirmed, although there was an advance bid of \$8,000). The New Jersey court has departed from this theory in some decisions. See *Porch v. Agnew Co.* (1904) 66 N. J. Eq. 232, 57 Atl. 726, *infra*. Some cases have gone so far as to hold that an advance bid is not a sufficient reason for refusing to confirm a sale, even if the price at which the land has been sold is inadequate. The Mississippi court has adhered to this rule in an action in partition as against adult parties, but as against infants has held that the court owes them a peculiar duty, and accordingly refuses to confirm the sale as against infants, while confirming it as against adults. *Allen v. Martin* (1883) 61 Miss. 78.

The English rule, opening bids in chancery sales upon the mere offering of an advance upon the purchaser's

bid, has been expressly disapproved, or treated as not prevailing, in many jurisdictions in this country.

United States.—*Graffam v. Burgess* (1885) 117 U. S. 180, 29 L. ed. 839, 6 Sup. Ct. Rep. 686.

Alabama.—*Littell v. Zuntz* (1841) 2 Ala. 256, 36 Am. Dec. 415.

Arkansas.—*Penn v. Tolleson* (1859) 20 Ark. 652.

Maryland.—*Cohen v. Wagner* (1847) 6 Gill, 236; *Johnson v. Dorsey* (1848) 7 Gill, 269; *Andrews v. Scotton* (1826) 2 Bland, Ch. 629; *Boyd v. Smith* (1916) 127 Md. 359, 96 Atl. 526.

Michigan.—*Page v. Kress* (1890) 80 Mich. 85, 20 Am. St. Rep. 504, 44 N. W. 1052.

Mississippi.—*Henderson v. Herrod* (1852) 23 Miss. 434; *Mitchell v. Harris* (1870) 43 Miss. 314.

New Jersey.—*Conover v. Walling* (1852) 15 N. J. Eq. 173; *Delaware, L. & W. R. Co. v. Scranton* (1881) 34 N. J. Eq. 421; *Morrisse v. Inglis*, *supra*.

New York.—*Williamson v. Dale* (1919) 3 Johns. Ch. 290; *Duncan v. Dodd* (1830) 2 Paige, 99, but see decisions *supra*, I.

Wisconsin.—*Adams v. Haskell* (1859) 10 Wis. 123. The court in *Andrews v. Scotton* (1826) 2 Bland, Ch. (Md.) 629, after referring to the English rule, states that "in this state there has been no instance of opening the biddings or suspending the sale merely to let in another and a higher bid, and for no other cause. But in this state, as well as in England, if there should be made to appear, either before or after the sale has been ratified, any injurious mistake, misrepresentation, or fraud, the biddings may be opened, the reported sale rejected, or the order of ratification rescinded, and the property again sent into the market and resold."

The chief reason advanced by the courts for refusing to open up the bids upon the receipt of an advance bid has been that to do so would discourage bidding at judicial sales. The court in *Page v. Kress* (1890) 80 Mich. 85, 20 Am. St. Rep. 504, 44 N. W. 1052, says that "the only reason for ordering a resale is that Allen was willing to pay \$110 more than was offered

at a public sale at which Allen was present, and the consequential benefit to the mortgagor who is entitled to the surplus. If this is a sufficient reason, a resale may be ordered in nearly every case of a judicial sale, the direct tendency of which would be to destroy the confidence of bidders at such sales, and prevent bidding, thus affecting the price which the property will sell for. When property is exposed for sale under a judicial decree and offered to the highest bidder, and the sale is without fraud, and is fairly conducted after proper notice, and is struck off to a third person, it will require a strong case and some peculiar exigency to warrant a court in setting it aside." The Arkansas court in *George v. Norwood* (1905) 77 Ark. 216, 113 Am. St. Rep. 143, 7 Ann. Cas. 171, 91 S. W. 557, states that "courts have adopted as a wise public policy the rule that confidence in the stability of judicial sales should be maintained, so that competitive bidding may be encouraged by the assurance that in the absence of fraud or misconduct the highest bidder will be accepted as the purchaser of the property offered for sale. And while it is often said that the accepted bidder at such a sale acquires no independent rights until the sale be confirmed by the court, and that the court may exercise a discretion in either confirming or rejecting the sale, yet this discretion must be exercised according to fixed rules, and not arbitrarily, and the bidder has the right to insist upon its exercise in this manner only. He can insist that his purchase be not set aside by the court upon reasons which are condemned." The stability of judicial sales is the main reason advanced by the court in *Stump v. Martin* (1872) 9 Bush (Ky.) 285, for holding that a sale is not to be reopened for an advanced bid of 10 per cent. Although the court here recognizes that the chancellor has a certain discretion of the confirmation of such a sale, it is held that he cannot exercise a mere arbitrary discretion. The court states: "If the chancellor can exercise a mere arbitrary discretion, or has unlimited power over sales

made in pursuance of his decrees, it would render unnecessary any advance upon the bidding to enable him to disregard the rights of the purchaser by setting aside the sale; and if the practice is tolerated of allowing the advance of 10 per cent to be a sufficient reason for the exercise of this power, it might well be argued that it is proper to enlarge his discretion by enabling him to set aside all sales at his mere will and pleasure. It is the duty of the chancellor to look to the rights of parties litigant where property is placed under the control and custody of his commissioner by the judgment, and where there has been fraud, surprise, accident, etc., to disregard the acts of his agent by ordering a resale, but where there is an entire absence of all unfair dealing, and the sale has been conducted pursuant to the judgment, good faith requires that the rights of the purchaser as well as of the parties to the original proceeding should be protected." The later Virginia cases have adopted the rule of the majority of American courts, reversing the earlier cases set forth in subd. II. *supra*. In holding that the mere fact that there was an upset bid offered did not justify the refusal to confirm the sale, the court, in *Watkins v. Jones* (1907) 107 Va. 6, 57 S. E. 608, says that "of course the object of a sale is to secure the best price for the property, and this result can be best accomplished, not by accepting every upset bid offered under circumstances such as are disclosed by this record, but by the establishment of and adherence to rules which will inspire confidence in the stability of judicial sales, as was said by Mr. Minor in 2 *Minor's Institute*, 4th ed. 380, rather than by the introduction of a practice that will induce bidders to feel that judicial sales are not to be seriously taken." Practically the same reasoning appears in *Howell v. Morien* (1909) 109 Va. 200, 63 S. E. 1073, and in *Hardy v. Coley* (1913) 114 Va. 570, 77 S. E. 458.

As appears from the foregoing cases, the right of the successful bidder is to be considered by the courts, as

well as the stability of judicial sales. This idea is further emphasized by the court in *Re Third Nat. Bank* (1880) 9 Biss. 535, 4 Fed. 775, where it is said: "I think a purchaser at a judicial sale may be said to be clothed with some rights, when he makes a bid for the property, and the hammer falls, and the bid is accepted by the master or receiver. True, his rights are subject to the action of the court; but that action depends upon the general principles and usages of law. It cannot be said that it is a discretion which is merely arbitrary on the part of the court, or capricious; but it must act upon well-settled and generally recognized principles of equity in cases of this kind, and if it disregards those principles the rights of the purchaser can ordinarily be protected in another court. So that the bidder certainly has rights which can be protected by a court of equity." There is an excellent discussion of the status of a judicial sale before a confirmation thereof in the case of *Allen v. Martin* (1883) 61 Miss. 78. Although that case is discussed as one of inadequacy of the sale price, the chief fact in the determination of that inadequacy was an advanced bid of twice the amount at which the land was sold. The court refers to the English rule, and states that in England sales made by a commissioner "are treated as if made by the court itself. A bidder acquires no right but to have his offer considered by the court, and to accept or refuse the offer lies wholly within the power and discretion of the chancellor. A mere offer to advance the bid is sufficient to produce an order for a resale. But this rule of the English court has not been adopted in the states of this Union. With us, the sale partakes somewhat of the nature of a sale in chancery under the English practice, and somewhat of that of a sale under execution at law. Until the confirmation the sale is in fieri, and subject to the control of the court, but this control is a judicial, not an arbitrary one, and confirmation must follow, unless there exists some reason recognized by law as warranting a refusal to confirm. A bidder at a

sale in chancery assumes certain obligations which he must discharge. He submits himself to the jurisdiction of the court, and becomes a party to the cause in which the sale has been decreed, and he may be compelled to stand by the offer he has made. On the other hand, he acquires certain legal rights which are to be as much protected and enforced as are other rights of other persons. He is entitled not only to ask, but to have confirmation, if there is no reason valid in law for refusal." The court, in *Bethlehem Iron Co. v. Philadelphia & S. S. R. Co.* (1892) 49 N. J. Eq. 356, 23 Atl. 1077, states that the discretion of the court after the confirmation of a judicial sale is not an arbitrary one, that the confirmation is referred to the "chancellor's judicial action, not to his arbitrary will, and unless there be some substantial reason for overthrowing the sale, resting upon misconduct of the receiver, or in fraud, accident, or mistake prejudicial to the objectors, the sale must be confirmed." It is stated obiter in *Re Berryhill* (1907) 7 Ind. Terr. 593, 104 S. W. 847, that the highest advance bidder at a public sale, had under an order or decree for such sale, acquires a legal right to a confirmation of his purchase, in the absence of fraud, accident, or mistake, for the reason that he may be compelled by the order of the court to complete his sale by paying the price bid.

The courts which take this view recognize that in the confirmation of judicial sales the trial courts are vested with a discretion, but hold that this discretion must be exercised according to established principles. In some cases the appellate court has reversed an order of the trial court refusing to confirm the decree, where the action of the trial court has not been according to established principles. *George v. Norwood* (1905) 77 Ark. 216, 113 Am. St. Rep. 143, 91 S. W. 557, 7 Ann. Cas. 171; *Stump v. Martin* (1872) 9 Bush (Ky.) 285; *Lawson v. Hill* (1889) 11 Ky. L. Rep. 213, 11 S. W. 606; *Morrisse v. Inglis* (1889) 46 N. J. Eq. 306, 19 Atl. 16. The later cases in Virginia have expressly held that the mere fact that

there is an upset bid of 10 per cent, or more, is not sufficient to defeat the confirmation of a judicial sale, fairly made at a fair price; and judgments of the trial courts refusing to confirm the sale have been reversed. *Watkins v. Jones* (1907) 107 Va. 6, 57 S. E. 608; *Howell v. Morien* (1909) 109 Va. 200, 63 S. E. 1073; *Hardy v. Coley* (1913) 114 Va. 570, 77 S. E. 458; *Litton v. Flanary* (1914) 116 Va. 710, 82 S. E. 692. In *Ayers v. Baumgarten* (1854) 15 Ill. 444, an order of the trial court refusing to confirm a sale by a guardian was reversed, and the sale ordered confirmed by the appellate court, where the weight of evidence showed that the purchase price was a fair one, although two witnesses testified that they would have given about double the price for which the sale was made. The court, after stating that the English practice of opening the bidding upon a reasonable advance upon the same bid never prevailed in this country, says that, even if the English practice prevailed here, the case at bar would not fall within it, as no money was brought into court, nor was any binding offer made of an advance upon the price, and there was, therefore, no certain assurance that the property would bring any more on a resale. The Illinois court subsequently took a modified position, as may be seen by reference to *Jennings v. Dunphy* (1898) 174 Ill. 86, 50 N. E. 1045, *infra*, in which the matter was left largely to the discretion of the court. The court in that case set aside the sale, where the advance bid was secured. In subsequent cases in this state, the court has reversed decrees of the trial court refusing to confirm and ordering the sale confirmed where the advance bid was not secured. *Quigley v. Breckenridge* (1899) 180 Ill. 627, 54 N. E. 580. That an unsecured advance bid was not sufficient ground for setting aside the sale is held also in *Wilson v. Ford* (1901) 190 Ill. 614, 60 N. E. 876. In *Bondurant v. Bondurant* (1911) 251 Ill. 324, 96 N. E. 306, Ann. Cas. 1914D, 18, where a sale was set aside for irregularity, as well as for inadequacy in price received, the court states that if the ob-

jection to the sale of the property is that it went for less than it is worth, and a resale is asked to secure more money, the party objecting should bring the money into court, or make a binding advance bid or guaranty against loss on the resale.

There has been a refusal to set aside a sale on the ground that mere indefinite offers cannot be considered. Thus, sales were confirmed in *Boyd v. Smith* (1916) 127 Md. 359, 96 Atl. 526, and *People v. Bond Street Sav. Bank* (1877) 53 How. Pr. (N. Y.) 337, although there were some indefinite offers of a higher price. The court will not refuse to confirm a sale merely because it is alleged that there is a probability that an unnamed person would bid higher than the price at which the property was struck off. *Central Trust & Sav. Co. v. Chester County Electric Co.* (1910) 9 Del. Ch. 123, 77 Atl. 771.

In South Carolina, commissioners are not limited to receiving bids or offers, but are directed to sell to the highest bidder and to execute title. The court in *Young v. Teague* (1830) 8 S. C. Eq. (Bail.) 13, in refusing to set aside a sale upon the receipt of an advanced offer, referring to this practice, says that this practice makes the application of the English rule impracticable, that in England the master first opens books for the purpose of receiving offers or bids for a given time, at the expiration of which the books or the biddings are closed, and the master reports his proceedings to the chancellors; that if in the meantime, and before the report is confirmed, a higher offer is made, such offer may be received; but where, as in South Carolina, the commissioners are not limited to receiving bids, but are directed to sell, the sale will not be set aside upon the receipt of a higher bid.

Some jurisdictions, while adhering to this rule generally, will set aside a sale where the property is sold for much less than its real value, and there are additional circumstances rendering it inequitable to confirm it. *Hazel v. Buckner* (1914) 158 Ky. 618, 165 S. W. 969; *Mitchell v. Harris*

(1870) 43 Miss. 314. In *Hazel v. Buckner* (Ky.) supra, a sale by a master commissioner upon the foreclosure of a mortgage of property reasonably worth \$20,000, for \$13,995.26, will be set aside and not confirmed, where parties who subsequently made an advance bid of \$17,000 failed to attend the sale, because of reliance upon their attorney being present and representing them, the attorney being unable to be present on account of sickness. A sale was set aside in *Kelse v. Jessop* (1882) 59 Md. 114, where it was made by the trustee at a private sale, instead of public as directed by the trustee, and subsequent to the making of the sale a higher offer was received. In *Mitchell v. Harris* (1870) 43 Miss. 314, a sale by a commissioner under a decree of foreclosure for \$100 was set aside where there was an advance bid of \$3,000, and it appeared that the sale took place under circumstances which failed to give the complainant in the foreclosure suit a chance to bid. The court states that the gross inadequacy of price alone would perhaps not be sufficient to justify the court in refusing to confirm the sale, but when taken in connection with the surprise or misapprehension of the parties interested in the sale, evidently created by the officer who conducted the same, it was abundantly sufficient to sustain the action of the trial court in setting aside the sale and ordering a resale of the property. In *Conover v. Walling* (1852) 15 N. J. Eq. 173, where there was an advance bid offered, the court refused to confirm the sale, and this action was affirmed by the appellate court. There was a misunderstanding between the auctioneer and some bidders, which resulted in a sale at a less price than otherwise would have been obtained. In *Rowan v. Congdon* (1895) 53 N. J. Eq. 385, 33 Atl. 404, where there was a suggestion that a purchaser would make an advance bid of 150 per cent of the price at which the property was struck off, the court ordered the sale to be confirmed unless the purchaser within a stated time should file a bond that he would purchase at the advanced price indi-

cated. There was in this case a misapprehension as to the time of sale, and this is one of the grounds on which the resale is ordered. In *Porch v. Agnew Co.* (1904) 66 N. J. Eq. 232, 57 Atl. 726, where property was shown to be worth from two to three times, probably four times, the amount at which it was sold at a receiver's sale, the court refused to make an order setting the sale aside unless something was tendered in the way of a better bid, which should be secured to be made at a future sale. The sale in this case was made by a receiver under a special statutory order by which all the liens antecedent to the receivership would be discharged, and the court states that, this being true, the sale stands upon a different footing than if a foreclosure of the mortgage upon the property had taken place, or other liens had been foreclosed, in which event the lienors foreclosing would have the right to select the time and manner of the sale. A mortgage foreclosure sale which had not been confirmed was opened in *Lansing v. M'Pherson* (1818) 3 Johns. Ch. (N. Y.) 424, where a party defendant, who, not knowing that the plaintiff intended to ask for a deficiency decree against him, made no defense, but subsequently, upon a deficiency decree against him being rendered, offered to give 50 per cent advance on the bid of the purchaser, who was plaintiff in the proceedings. In *McGann v. Segal* (1899) 34 C. C. A. 323, 92 Fed. 252, the sale of a railroad property for \$160,000 was set aside and the bidding opened, where a purchaser, who, by failure of his financial arrangement necessary to qualify him as a bidder, was unable to bid at the sale, subsequently perfected a financial arrangement and offered an advance bid of \$210,000.

IV. Doctrine that entire matter of confirmation rests in the discretion of the court.

As appears from the foregoing, a certain amount of discretion is vested in the court under the rules discussed in subds. II. and III. In some jurisdictions the entire matter of confirmation is left in the discretion of the

court. See the reported case (*SAUNDERS v. STULTS*, ante, 394). In this view the receipt of an advance bid is not given any definite weight or effect. It may of itself be sufficient to prevent confirmation, but whether or not it is, rests entirely with the court. In other words, the court is unhampered by any rule definitely prescribing a certain effect or weight to the fact that an advance bid has been received.

In *Auerbach v. Wolf* (1903) 22 App. D. C. 538, where a sale by trustees in chancery had been reported and an order of ratification nisi passed and published, the court refused final ratification where, before final ratification was had, the trustees made a second report that they had been offered by other responsible parties a very much larger price for the property, and for the good faith of which a deposit had been made; and prayed that the bid first made and reported should be rejected by the court, and the property be ordered to resale. The first sale was made at the price of \$1,350; the advance bid was \$2,250. The theory of this case can best be understood from the language of the court, which is as follows: "Whether the reported offer by the appellant should be accepted, or not, rested largely in the discretion of the court below directing the sale of the property, and who was in legal contemplation the vendor of the property. The discretion of the court below over the subject of the sale should not be controlled by an appellate power unless it be made apparent that the discretion has been abused to the actual prejudice of the party complaining. The general rule is, doubtless, that the sale will not be set aside or its ratification refused for mere inadequacy of price, unless the court believes that such inadequacy was the result of fraud, surprise, mistake, or unfairness in the sale. . . . In this case there is no suggestion of fraud, mistake, or unfairness in making the sale. But the settled principle is that, in chancery sales, the contract of sale made between the court as the vendor of the property through the agency of a trustee, and the purchaser, is never regarded as

consummated until it has received the sanction and ratification of the court. . . . And in determining the question whether the sale shall be ratified or rejected as reported, any circumstances showing that the sale as proposed would be injurious to the parties concerned, or that a better sale might reasonably and probably have been made, will be regarded as sufficient to induce the court to refuse ratification. The trustees in their second report would seem to have acted upon the assumption that it would be unfair and unjust to the parties concerned that the bid of the appellant should be accepted and ratified, when so much larger price could be obtained from other parties for the property, and this presented a question for the exercise of discretion by the court below; and we think the exercise of that discretion, resulting in the rejection of the sale to the appellant, should not be controlled or disturbed by this court. We must not be understood, however, in so holding, that we intend to give any sanction to the old English practice of opening biddings in chancery sales, upon the mere offering of an advance upon the purchaser's bid. That practice has never obtained in this District or in the courts of Maryland." A sale was confirmed in *State Bank v. Green* (1881) 11 Neb. 303, 9 N. W. 36, although there was an advance bid which was not, however, secured by the person making it. The court says that even if the offer had been amply secured, the forms of law having been fully complied with in making the sale, it was a matter of discretion with the court to which the offer was made, to accept it or not. There was a refusal to confirm a sale under a mortgage foreclosure in *Wyandotte State Bank v. Murray* (1911) 84 Kan. 524, 114 Pac. 847, upon what seems to have been regarded as a higher bid. A statute governing this case provided that the sale could be confirmed if the court "finds the proceedings regular and in conformity with law and equity." It was held that under the statute the trial court had substantially the discretion of a chancellor, and that while

a sale should not be set aside at maturity, or capriciously, it might be set aside when to confirm it would permit inequitable and unfair practices or conduct to be rewarded at the expense of one who had been fair and honest. A distinction has been drawn between sales by a master in chancery, and those by an administrator or guardian, the court holding that in the case of a sale by an administrator or guardian, it is the primary duty of the chancellor to watch over and protect the interest of the parties whose property is being sold. *Jennings v. Dunphy* (1898) 174 Ill. 86, 50 N. E. 1045: In this case the decree directed the guardian of an insane person to dispose of the land at public sale and to report to the court, and upon approval and record thereof, to execute a deed to the purchaser. After stating it to be the primary duty of the court to watch over and protect the interest of the insane person, the court said, further, that as soon as the report was filed exceptions were presented in which it was made to appear that confirmation of the sale would result in a loss to the estate of the ward of at least \$400, and the court concludes: "We are of the opinion in this case that the county court did not abuse its discretion in disapproving the report and ordering a resale."

In this case the action of the trial

court in refusing to confirm the sale and ordering that the property be resold was sustained where property was struck off at \$2,150, and an advance of \$400 was offered.

The doctrine in Illinois does not, however, vest an uncontrolled discretion in the court. See Illinois cases discussed in subd. III.

In *Adams v. Haskell* (1859) 10 Wis. 123, where a sale of mortgaged premises for \$150 was set aside upon the offer of an advanced bid of \$529, the supreme court, in affirming the setting aside of the sale, says that the practice of the English court of chancery to open biddings upon a master's sale before the confirmation of the report, upon the offer of a reasonable advance upon the amount bid, has not obtained in this country; that here the sale is only set aside in special cases, and then upon such terms as the courts deemed right and proper.

In *Kneeland v. Smith* (1861) 13 Wis. 591, where the supreme court reversed the order of the trial court in setting aside a sale of mortgaged premises for the sum of \$7,601, upon a secured agreement to bid \$8,600 on a resale. The supreme court says that, taking into consideration the additional expenses and the amount of interest accruing on the judgment, the increase is too inconsiderable to warrant an order for resale.

W. A. E.

R. N. McDONOUGH et al.

v.

WARWICK SAUNDERS.

Alabama Supreme Court—November 15, 1917.

(201 Ala. 321, 78 So. 160.)

Joint adventure — forfeiture of interest.

1. Members of a joint adventure to purchase real estate for resale cannot exclude from the enterprise and forfeit the right of one who has contributed valuable services in developing a plan for securing the property and getting a renewal of contract through his right of action for a breach by the vendors of the original agreement, merely because, in the absence of special emergency, he fails to meet his payments toward the purchase money as they accrue.

[See note on this question beginning on page 432.]

— accrued assets — right to participate.

2. Default by a member of a joint adventure will not justify the other members in excluding him from participation in the accrued assets.

[See 15 R. C. L. 502.]

Forfeiture — when enforced.

3. Equity will not enforce a forfeiture unless necessary to enforce the law and to do justice between the parties.

[See 10 R. C. L. 336-338.]

Contract — agreement to pay additional compensation — validity.

4. An agreement by purchaser to

pay a vendor an additional sum for performance of his contract is without consideration and void.

[See 6 R. C. L. 664.]

On Petition for Rehearing.

Joint adventure — joint and several liability.

5. A member of a joint adventure, wrongfully excluded from participation in the assets of the enterprise, is entitled to a joint and several decree against his coadventurers.

CROSS APPEALS from a decree of the Chancery Court for Jefferson County (Benners, Ch.) in favor of plaintiff in a suit to enjoin a sale, pledge, or transfer of stock and bonds of a certain ore company, and for an accounting of the proceeds of a joint adventure in the purchase and sale of certain land; defendants appealing from the decree in plaintiff's favor for an accounting, and plaintiff appealing from so much of the decree as denied him relief. *Affirmed.*

The letter agreement which is referred to in the opinion is as follows:

Birmingham, Ala. July 5, 1912.

Mr. Warwick Saunders,

Birmingham, Alabama.

Dear sir:—With reference to the sale of two certain tracts of ore land, one of about 1,515 acres and the other of about 800 acres, controlled by us in Shades valley, will say that we desire to have you become interested with us in the sale of this property, and in doing so we are willing to allow you 20 per cent of the profits derived from the sale of the above-mentioned land. But it is understood that you are to defray your own expenses, and will not be paid from the proceeds of the sale of land. If you are willing to give this your time and best efforts, we will give you the exclusive sale of same; but, on the contrary, should you become negligent and, in our opinion, abandon the proposition, then we would reserve the right to cancel the agreement, giving you ten days' notice, providing that should we avail ourselves of the negotiations pending under the terms of this letter, that your commission will be recog-

nized. This agreement will be considered in force and effect until the 15th day of November, 1912. We will further agree that in the event we decide it is to the best interest of all parties to this agreement to form a corporation, with the view of purchasing the lands mentioned above, we will allow you the privilege of bonding the lands to enable us to develop and mine the ore. If you are successful in this undertaking, we will give you 33 per cent of the corporation's stock after all encumbrances, including our profits, together with your pro rata, are paid on the properties. In the event we should sell either tract of the land by November 15, 1912, or no sale be effected, we will give you the option or right to join us in the purchase of either or both tracts of land at the same rate per acre as we pay, to the extent of 20 per cent of the same. We reserve the right to control the price on this land at all times, and no price will be made or changed without permission. In the event that any part of this land cannot be delivered on account of reasons unknown to parties of this agreement, we will not be held liable for any

damages or fees that might be claimed by you. We will use our best efforts to keep you posted, and you will have our co-operation in all negotiations pertaining to the sale of the above land, and we will expect you to keep us posted at all times, giving in detail as near as possible all transactions.

[Signed] J. J. Shannon.
R. N. McDonough.
W. A. Porter.
J. H. McDonough.

July 5, 1912.

The terms and conditions expressed in the above letter or agreement is hereby approved and accepted. [Signed] Warwick Saunders.

Messrs. Percy, Benners, & Burr and Garber & Garber, for defendants:

Defendants could not deprive plaintiff of his rights or use his rights as one of the considerations of the purchase.

Comstock v. Brosseau, 65 Ill. 39; Merriman v. Norman, 9 Heisk. 269; Fancher Bros. v. Bibb Furnace Co. 80 Ala. 481, 2 So. 268; Painter v. Munn, 117 Ala. 322, 67 Am. St. Rep. 170, 23 So. 83.

There was no consideration for the option given plaintiff to join in a purchase.

Christian v. Stith Coal Co. 189 Ala. 500, 66 So. 641; Collins v. Smith, 151 Ala. 133, 43 So. 838; Petroleum Co. v. Coal, Coke & Mfg. Co. 89 Tenn. 388, 18 S. W. 65.

It being shown that all of the parties to the letter agreement of July 5, 1912, mutually and concurrently understood that it terminated on November 15, 1912, and that they so acted in reference to it, the court must also give the letter agreement, or ambiguous portions of it, the same construction in arriving at the true meaning of the contract as a whole.

Birmingham Waterworks Co. v. Windham, 190 Ala. 634, 67 So. 424; Crass v. Scruggs, 115 Ala. 258, 22 So. 81; Bixby-Theisen Co. v. Evans, 174 Ala. 571, 57 So. 39; Comer v. Bankhead, 70 Ala. 136; Mobile Bldg. & L. Asso. v. Robertson, 65 Ala. 382.

Messrs. Tillman, Bradley, & Morrow, John S. Stone, and William B. White, for plaintiff:

The relation of coadventurers is governed by the law of partnerships.

Goldsmith v. Eichold Bros. 94 Ala. 116, 33 Am. St. Rep. 97, 10 So. 80; Bestor v. Barker, 106 Ala. 250, 17 So. 389; Roby v. Colehour, 135 Ill. 300, 25 N. E. 777.

The agreement with Aldrich and Towers was made under coercion, not as a thing voluntarily agreed to be done in modification of an existing contract, but a thing unlawfully required to be done as a condition to performing a contract which had been unlawfully breached.

Shriner v. Craft, 166 Ala. 146, 28 L.R.A.(N.S.) 450, 139 Am. St. Rep. 19, 51 So. 884; Burkham v. Mastin, 54 Ala. 122; Lingenfelder v. Wainwright Brewing Co. 103 Mo. 578, 15 S. W. 844; King v. Duluth, M. & N. R. Co. 61 Minn. 482, 63 N. W. 1105; Scott v. Rawls, 159 Ala. 399, 48 So. 710; Alaska Packers' Asso. v. Domenico, 54 C. C. A. 485, 117 Fed. 99; Davis v. Morgan, 117 Ga. 504, 61 L.R.A. 148, 97 Am. St. Rep. 171, 43 S. E. 732; Easterly Harvesting Mach. Co. v. Pringle, 41 Neb. 265, 59 N. W. 804.

If it be true that defendants made demands of plaintiff, it is equally true that, by acquiescing in his failure to comply with those demands, they not only waived the right to forfeiture on account of such failure, but thereby lulled him into a sense of security as to future demands, upon the faith of which they obtained his continuing services in any event.

Walker v. McMurchie, 61 Wash. 489, 112 Pac. 500; Welsh v. Dick, 236 Pa. 155, 84 Atl. 769; Boone v. Templeman, 158 Cal. 290, 139 Am. St. Rep. 126, 110 Pac. 947; Keator v. Ferguson, 20 S. D. 473, 129 Am. St. Rep. 947, 107 N. W. 678; Fergusson v. Talcott, 7 N. D. 183, 73 N. W. 207; Kansas Lumber Co. v. Horrigan, 36 Kan. 387, 13 Pac. 564.

The dominant faction of a partnership cannot use the partnership assets in the purchase of property, without accounting to the partnership and to every member of the partnership for the fruits of their acts.

Lind v. Webber, 36 Nev. 623, 50 L.R.A.(N.S.) 1046, 134 Pac. 461, 135 Pac. 139, 141 Pac. 458, Ann. Cas. 1916A, 1202; Bestor v. Barker, 106 Ala. 250, 17 So. 389; Johnson's Appeal, 115 Pa. 129, 2 Am. St. Rep. 539, 8 Atl. 36; Dikis v. Likis, 187 Ala. 218, 65 So. 398; Boqua v. Marshall, 88 Ark. 373, 114 S. W. 717; Edwards v. Johnson, 90 S. C. 90, 72 S. E. 643; 2 Lindley, Partn. Rapalje's Am. ed. p. 863; Boyd v. My-

natt, 4 Ala. 79; Turnipseed v. Goodwin, 9 Ala. 372; Patterson v. Ware, 10 Ala. 444; Pierce v. Whitley, 39 Ala. 172; Karrick v. Hannaman, 168 U. S. 336, 42 L. ed. 490, 18 Sup. Ct. Rep. 139.

All joint tort-feasors are jointly and severally liable for all recoverable damages flowing from the commission of the tort.

Bloomfield v. Buchanan, 14 Or. 181, 12 Pac. 238; 30 Cyc. 748; Lord v. Anderson, 16 Kan. 185; Morris v. Wood, — Tenn. —, 35 S. W. 1013; Rowley, Partn. § 756, p. 1051.

Mayfield, J., delivered the opinion of the court:

Most all of the equities of the bill and questions of law involved in this appeal were stated and settled on the former appeal, and it is therefore unnecessary to restate them on this appeal. See report of that appeal and opinion in 191 Ala. 119, 67 So. 591. The questions involved on this appeal, and upon which the rights of the parties thereto depend, are mainly, though not exclusively, disputed questions of fact.

The appellee sought by his bill, and obtained a decree in the lower court, an accounting between the appellants and himself as to the proceeds of a joint adventure in the purchase and sale of a body of land rich in iron ore—the main defense relied upon being that complainant was not a member of the adventure when the land was bought or sold by them; that, by a failure to perform his part of the joint adventure contract or agreement, the joint adventure, so far as he was concerned, terminated by his breach or failure to perform, as agreed, and his rights to further participate with appellants in the purchase and sale of the lands were forfeited; that, after complainant had thus forfeited his right in the joint adventure, the complainants entered into another and a subsequent agreement between themselves and the owners of the land, whereby the lands were purchased and sold; that complainant was not a party to this agreement, and therefore not entitled to share in the profits. There can be no doubt

that a joint adventure once existed between the parties as alleged in the bill, for the purpose of buying and selling these lands, the subject-matter of the suit.

There is likewise no doubt about the fact that all parties operated for several months as partners under their joint adventure agreement; that all parties contributed more or less time, labor, and means to the adventure, and that the adventure ultimately succeeded, and large profits were, or will be, realized by each of the appellants—the much-disputed question being whether or not complainant is entitled to share these profits with the appellants, and that question is made to depend almost, if not entirely, upon the question as to whether or not he forfeited his rights under the joint adventure agreement by failing or refusing to perform his part of the agreement. Appellants contend that he did so forfeit his rights to further participate in the enterprise, while he contends, and the chancellor so found, that he had not so forfeited his rights, and that he was entitled to participate in the proceeds of the adventure; that he was required to bear his pro rata share of the burdens, and was entitled to share in the profits.

It is conceded by appellants that if the lands had been acquired on the 2d day of January, 1913, under an agreement then existing, that complainant would be entitled to share with appellants in the adventure. Appellants, however, insist that the lands were not acquired on that day, or under the then-existing agreement or contract with the owners, for the sole reason that complainant failed to pay, or even to offer to pay, his part of the purchase price required to be in cash; that on account of this failure of complainant, the appellants were entitled to terminate the joint adventure, and so notified complainant, and the next day appellants, under a new and different contract with the owner, acquired the lands, and that complainant was not a party to this

agreement, and had no legal or equitable right to participate in the last agreement, which was consummated. If the joint adventure, in which complainant was interested, was lawfully terminated on January 2d, then of course he would have no right to an accounting as for a purchase and sale of the lands by the appellants on the 3d day of January, as to which he was not a party, whatever rights he might have to other remedies against appellants or the owners of the land. We, however, agree with the chancellor that the evidence fails to show that the joint adventure was lawfully terminated on January 2, 1913, so as to eliminate the complainant from his right to share with appellants in the purchase and resale of the lands.

It may be that one particular contract or agreement which the joint adventurers had with Aldrich and Towers, the owners of the land, to acquire it by purchase, expired on January 2, 1913, and it may be conceded that this particular agreement to purchase from the owners was not consummated because complainant failed to meet his part of the agreement, but this did not, in law or fact, terminate the joint adventure to acquire the lands. It only necessitated the remaking of a new agreement or contract by the joint adventurers with the owners, which was in fact done by four of the five joint adventurers. The complainant was given no opportunity to join with them in this last agreement, by which they acquired the lands. There is no claim that he declined or failed to join with them in this last contract or agreement of January 3d, by which the lands were acquired; the contention of appellants being that, having failed to perform his part under the contract with the owners which expired on January 2d, that this, without more, ended the joint adventure, so far as complainant was concerned, or, if it did not ipso facto terminate it, that it

was sufficient ground for appellants to terminate the joint adventure by electing so to do, and giving notice thereof to complainant that it was so terminated and he thereby eliminated.

If the joint adventure had consisted solely and exclusively of the contract of November 26th, if that had been its inception and its end, then a failure on the part of complainant to perform his part of the agreement would be ground for his coadventurers to terminate the first adventure and to eliminate complainant when this was done, and his coadventurers could have alone entered into new compacts with Aldrich and Towers, the owners, as to purchasing the lands. The contract or agreement of November 26th, however, was not the beginning nor the end of the first adventure between the parties to acquire the lands in question. It was merely one of several plans by which the joint adventurers were to acquire the lands from Aldrich and Towers. The failure of that plan or scheme did not alone end the joint adventure, any more than did the failure to exercise the option to purchase of August 8th, or the failure to sell by November 15th. Each of these was really one of several plans, schemes, or modes by which all of the joint adventurers had planned and hoped to realize large profits from the purchase or sale, one or both, of the lands. The joint adventure between the five parties to this suit, the two McDonoughs, Shannon, Porter, and Saunders, had its inception by letter agreement of July 5, 1912; while one plan or scheme of the joint adventure expired November 15, 1912, another scheme or plan only began on that date, and, unlike the first, did not provide when it should end, but, so far as the language of the contract was concerned, was to continue indefinitely, or until the end desired was attained; that is, until the land was acquired by a purchase thereof and resold, or operated by them jointly. The reporter will set out this letter contract of July 5th in

Joint adventure
-forfeiture of
interest.

full. By the terms of this joint adventure Saunders was given the exclusive option to sell the lands under the option held by his coadventurers, until November 15, 1912. This exclusive right to sell, however, expired by its terms on November 15, 1912, but this did not end the joint adventure. If the first plan did not succeed, the contract provided that after November 15, 1912, another or other plans should be adopted or pursued to promote and accomplish the desired end; that is, to purchase and resell the lands for a profit, or to operate them after being acquired. To this effect the letter contract of July 5th provided: "This agreement will be considered in force and effect until the 15th day of November, 1912. We will further agree that in the event we decide it is to the best interest of all parties to this agreement to form a corporation, with the view of purchasing the lands mentioned above, we will allow you the privilege of bonding the lands to enable us to develop and mine the ore. If you are successful in this undertaking, we will give you 33 per cent of the corporation's stock after all encumbrances, including our profits, together with your pro rata, are paid on the properties. In the event we should sell either tract of the land by November 15, 1912, or no sale be effected, we will give you the option or right to join us in the purchase of either or both tracts of land at the same rate per acre as we pay, to the extent of 20 per cent of same."

So the plan or scheme by which the lands were acquired could not begin until after November 15, 1912, when the original agreement of joint adventure was changed. This agreement, as before stated, did not provide when the first adventure should end, no matter what plan should thereafter be pursued in order to promote or consummate the joint adventure. In other words, the agreement of joint adventure only provided when Saunders's exclusive right to sell should terminate. It did not provide when his right to

purchase jointly with his coadventurers should cease or terminate. Therefore, unless this original written contract or agreement as to the joint adventure was subsequently abrogated or changed, Saunders had as much right to join in the purchase of January 3, 1913, as he did to join in the purchase under the plan of November 26th, or its subsequent modification. So far as the written agreement of July 5th as to the joint adventure is concerned, Saunders had as much right to join and share with appellants in the purchase of January 3d as he had on November 26th, 27th, or January 2d. Of course, this would not be true if for any reason the original agreement was changed, or was otherwise terminated by the fault or wrongs of Saunders,—such, of course, which were sufficient in law to terminate the joint adventure or enterprise, or to eliminate him therefrom.

It is made to appear from a close scrutiny of all the evidence that the complainant, Saunders, was not a voluntary interloper in the joint adventure, nor does it appear that he obtained his connection with appellants in the joint adventure by any fraud or misrepresentation on his part. He was first solicited by appellants, or some of them, to join with them in the venture. He accepted their proposition as to the terms of joint adventure. See letter agreement of July 5, 1912. It is evident that his connection with the enterprise was desired because of the fact that he was a promoter of some experience and reputation along the lines of the proposed joint adventure. It was his personal services as a promoter that were desired, and not financial aid. It was known by all the parties during the entire progress of the joint adventure that complainant had very little financial means or commercial credit. It was not financial aid that was desired of him. The aid desired of him was to devise a plan, scheme, ways, or means, by which the land in question could be sold at a profit

to all the joint adventurers; or (2) by which the land could be purchased by the joint adventurers, and operated as a mining proposition, or resold at a profit, with as little outlay of money as possible. The appellants, or some of them, had, for quite a while before complainant was connected with them, an option to purchase the lands in question from the owners, and the option continued for quite a while after complainant was connected with them. According to appellants' testimony and theory, they had supplied capital or credit with which to exercise the option to purchase, but did not desire to exercise the option until the land could be tested by drill holes to ascertain the quantity and quality of the iron ore on the land, and therefore its real or market value. Complainant's services were sought, first, to find a buyer who would purchase at a price which would allow a profit to the appellants over and above the option price; and if this could not be done, then the lands were to be purchased by the parties, or by a corporation to be formed by them, and either operated as an ore mine or resold for a profit.

The complainant was given the exclusive right to sell the lands to other parties from the 5th day of July, 1912, to the 15th day of November, 1912; then, and not until then, the complainant was to have an option or right to join with appellants in the purchase of the lands from the owners at the same price which they paid, or were to pay and to the extent of 20 per cent of the same. We are unable to find, after a careful study of the evidence, that this feature of the letter agreement was ever changed by subsequent agreement, oral or written, or that complainant forfeited his right to join in the purchase which was finally consummated, whether it was consummated on the 2d or 3d of January, 1913.

There is much testimony to the effect that an oral agreement was entered into by and between the par-

ties on or about November 26, 1915, by which complainant agreed to pay to appellants his pro rata share of all past and future expenses of promoting the enterprise, and to pay to Aldrich and Towers, the owners, \$31,000, or part thereof, as for certain lands of the corporation to be formed, in order for him to participate in the joint purchase, or the contract to purchase of date November 26th, as subsequently amended. We are satisfied from the evidence in this case that complainant originated and devised the plan by which the land was ultimately acquired by appellants, and that they have reaped the benefit of his services in this matter. It is, we hold, certain from the evidence in this case that the written agreement of November 26, 1912, between the joint adventurers on the one part, and Aldrich and Towers, the owners, on the other, was chiefly due to labor and efforts on the part of the complainant. The details of the plan or scheme were, of course, changed from time to time, at the suggestion or request of other parties to the agreement; but to complainant is due the credit of originating the plan and mode by which the lands were acquired from the owners, without the necessity of any of the parties to the agreement being required to pay out much money or cash,—relatively speaking, of course, considering the value of the lands and the amount involved; the plan being, in short, to form a corporation, to which the owners should convey the lands, in consideration of bonds and stock of the corporation so formed, the chief capital of which was the land so conveyed, the remaining stock to be divided among the five joint adventurers. It is true that a part of the plan, as last amended or changed, required that the joint adventurers should purchase from the owners a certain number of the bonds at certain prices. If the bonds, however, were really worth the agreed price, and there seems to be no doubt that they were, this was in fact not an

outlay of money for any length of time, as the bonds could readily be resold even to some of the joint adventurers. It is certain that the buying of these bonds did not in fact, and at the time of sale was not by the parties thought to involve a loss, but was the mere means of acquiring that much cash, in order to consummate the sale, and to enable the owners to pay an option which they owed for a part of the lands involved in the deal.

The plan by which appellants acquired the lands, as they claim on the 3d day of January, 1913, was but a modified form of the plan devised by complainant, and which was embodied in the written agreement of November 26, 1913. There can be no doubt that Aldrich and Towers breached the contract of November 26th, and that the five joint adventurers had a cause of action against them as for damages, if not for specific performance. It is also quite evident that there was no consideration to support the modification of this agreement which was exacted by Aldrich and Towers for a performance of their contract to convey, as for which they were already paid. It was this first modification which appellants claim complainant breached, and thereby forfeited his further right to participate in the joint adventure. It is likewise evident that the fact that Aldrich and Towers first breached the agreement of November 26th, and the existence of the cause of action against them on account thereof, induced them to agree to the modification thereof, which was finally executed between them and the four appellants. This is shown by the writing itself, in that Aldrich and Towers required appellants to guarantee them against any rights or actions which Saunders might have against them as to any of these agreements and modifications. It is therefore evident that Aldrich and Towers considered that they were under some liability to Saunders by requiring express indemnity against it, and that appellants considered it

probable in that they made the express warranty against the liability as a part of the consideration for the purchase which was ultimately consummated. It is true that the evidence is in conflict as to whether or not complainant consented to the modification of the first agreement, which was demanded by Aldrich and Towers. If they all consented to it, there was no consideration to support the modification; and until the agreement as modified was executed, it was not binding on complainant or appellants. Appellants certainly had the benefit of complainant's interest in this cause of action as a part of the consideration for Aldrich and Towers executing the agreement as last modified. It is impossible to know that this did not operate as an inducement or consideration for Aldrich and Towers to execute the agreement as last modified, and when appellants claim that complainant was eliminated from the enterprise, it would be wholly inequitable for appellants to reap the benefit of complainant's efforts in originating the plan, and promoting the adventure, and to get the benefit of his interest in the right of action against Aldrich and Towers as for a breach of the agreement of November 26th, and then deny him the right to share in the purchase as finally consummated. Of course, the evidence is in great conflict as to what oral agreements occurred between appellants and appellee after November 15th, when his exclusive right to join in the purchase began under the letter agreement of July 5th. It is sufficient here to say that it fails to convince us that there was ever any oral agreement which entirely took the place of or annulled the provisions of the letter agreement, which gave the complainant the right or option to join with appellants in the purchase of this property.

The evidence also fails to satisfy us that complainant ever refused to perform his part of the agreement, so as to forfeit his right to join in the purchase. The most the evi-

dence tends to show is that he failed to get up or secure the necessary amount of money on January 2d with which to pay his pro rata share of the lands which appellants had agreed to buy from Aldrich and Towers, and that on account of such failure the appellants elected to declare the joint adventure with complainant ended, and so notified him, and then on the next day proceeded to purchase the lands on similar terms to those formerly agreed upon, and as to which they concede the complainant theretofore had the right to join with them, provided he paid his pro rata share of the expenses and the purchase price of the lands. This is according to the terms of the letter agreement of July 5th.

While any member of an ordinary partnership may dissolve it at will, and the partnership will exist thereafter only for the purpose of winding up its pending business and affairs, yet in proper cases a court of chancery would restrain or delay the dissolution if it is made to appear that irreparable injury would result from immediate dissolution and sale of the partnership assets. Lindley, Partn. §§ 220 et seq. Such dissolution, however, cannot operate to de-

—accrued
assets—right to
participate.

feat or impair vested or accrued rights. The effect of dissolving a partnership at the will of any one or more of the partners is to throw the winding up of the affairs into a court of equity, unless a different mode of winding up and settlement of the affairs is agreed upon. *Stevens v. Yeatman*, 19 Md. 480; *Lawrence v. Robinson*, 4 Colo. 567, 12 Mor. Min. Rep. 387; *Howell v. Harvey*, 5 Ark. 270, 39 Am. Dec. 376. Of course, notice to the other partners is necessary to a dissolution by one. The renunciation and dissolution must be in good faith, and not at an unreasonable time.

There seems, however, not to have been any desire or attempt on the part of any of the joint adventurers to dissolve this partnership of joint

adventure. The desire and attempt was to continue the joint adventure to consummation, but to exclude complainant from membership in the firm. It is certain that he never attempted to dissolve it or to retire, and the evidence fails to convince us that he was ever guilty of such faults, wrong, or neglect as to forfeit his rights to participate in the joint adventure to the end or consummation thereof. There is, however, no such right in a member, or even a majority of the members, to expel one or more members at will as there is to dissolve the partnership. The two things are entirely different. In the absence of an express agreement to that effect, there exists no right or power of any members, or even a majority of the members, to expel or eliminate all other members from the firm at will. Nor can they at will forfeit the share or interest of a member or members, and compel him or them to quit the firm, even on paying him what is due him. It is not every dereliction of a member, such as a failure to pay his part of the expenses, or to promptly and faithfully perform his part of the services agreed to, which will ipso facto forfeit his right, or even authorize a court of chancery to forfeit his right, to the common property or assets of the partnership. There may be, however, extreme and gross faults which would work a forfeiture, especially where there was an extreme emergency for him to perform his part, and to be prompt and faithful. *Kimball v. Gearhart*, 12 Cal. 27, 1 Mor. Min. Rep. 615; *Piatt v. Oliver*, 3 McLean, 27, Fed. Cas. No. 11,116; *Gorman v. Russell*, 14 Cal. 531.

Courts of equity abhor forfeitures, and will never enforce them unless necessary to enforce the law and to do justice between the parties.

Forfeiture—
when
enforced.

It is not every fault, failure, neglect, or dereliction on the part of a member that will justify a dissolution of the partnership, much less an expulsion of a

member, as was attempted in this case. This court in an early case of *Meaher v. Cox*, 37 Ala. 202, said: "While, therefore, it may be true, as said by the chancellor, that the defendants have not committed such acts of misconduct, or been guilty of such wilful violation of the terms of the contract, as would authorize the court to decree a dissolution for that cause, yet we think that the combination of circumstances above enumerated does justify a dissolution in this particular case."

No such facts are here shown. If, however, it was found in this case that there was such fault or neglect on the part of complainant on the 2d day of January, 1913, in his failure to raise his share of the \$31,000 to be paid to Aldrich, as would justify a dissolution of the partnership, he would nevertheless have been entitled to share in the accrued assets of the partnership or joint adventure, which was in the main, if not in toto, the right of action against Aldrich and Towers as for their breach and refusal to perform the contract of sale of November 26, 1912. This was unquestionably an asset of the firm, and the other partners could not, against his will, deprive him of his interest therein after a dissolution of the firm. Even if complainant agreed to the modification of the contract of sale of November 26, 1912, which was demanded by the vendors, Aldrich and Towers, it was utterly void, a mere nudum pactum, without any consideration. It conclusively appears that the change or alteration of the contract was a mere bonus required or demanded by Aldrich and Towers to perform their valid contract, as to which they were then required by law to perform. No benefit whatever could or was intended to accrue to complainant or his associates by the change, nor any detriment to Aldrich and Towers.

Contract—
agreement to
pay additional
compensation—
validity.

It was purely a bonus to them to perform their part of a valid contract. Such agreements or modifications of

existing contracts are absolutely void. When by an amended or modified contract a party does only that which he was theretofore obligated to do by the original contract, he cannot legally demand additional compensation, or other obligations of the other party, as an inducement or reward for performing his part. If the other party promise to pay him more, or to further obligate himself to induce performance of that only as to which the party was originally bound to perform, the promise is a mere nudum pactum, and courts will not lend their aid to enforce such modifications or promises for additional compensation or further obligations so promised. Such is the well-settled doctrine of this court. *Shriner v. Craft*, 166 Ala. 146, 28 L.R.A. (N.S.) 450, 139 Am. St. Rep. 19, 51 So. 884; *Montgomery County v. New Farley Nat. Bank*, 200 Ala. 170, 75 So. 918. In the case of *Shriner v. Craft*, supra, many, if not all, of the authorities were reviewed on the subject, and the opinion concludes as follows: "Where the parties agree to rescind the contract, each one gives up the provisions for his benefit, the mutual assent is complete, and the parties are then competent to make any new contract that may suit them. Where one piece of work is substituted for another, the contractor is released from doing one, in consideration that he will do the other. But where one party refuses to do the work which his contract requires him to do, or even threatens to abandon the work unless he is paid more, and the other promises to pay more, the original contract still remaining subsisting, we consider it merely a promise to pay for what he was already obliged to do, and a nudum pactum."

The true reason for the doctrine is well stated by the supreme court of Minnesota, as follows: "Where the refusal to perform and the promise to pay extra compensation for performance of the contract are one transaction, and there are no exceptional circumstances making it

equitable that an increased compensation should be demanded and paid, no amount of astute reasoning can change the plain fact that the party who refuses to perform, and thereby coerces a promise from the other party to the contract to pay him an increased compensation for doing that which he is legally bound to do, takes an unjustifiable advantage of the necessities of the other party.

... Surely, it would be a travesty on justice to hold that the party so making the promise for extra pay was estopped from asserting that the promise was without consideration. A party cannot lay the foundation of an estoppel by his own wrong," where the promise is simply a repetition of a subsisting legal promise. "There can be no consideration for the promise of the other party, and there is no warrant for inferring that the parties have voluntarily rescinded or modified their contract. . . . The promise cannot be legally enforced, although the other party has completed his contract in reliance upon it." *King v. Duluth, M. & N. R. Co.* 61 Minn. 482, 63 N. W. 1105; *Scott v. Rawls*, 159 Ala. 399, 48 So. 710; *Alaska Packers' Assn. v. Domenico*, 54 C. C. A. 485, 117 Fed. 99 (C. C. A. 9th C. 1902); *Davis v. Morgan*, 117 Ga. 504, 61 L.R.A. 148, 97 Am. St. Rep. 171, 43 S. E. 732 (1903); *Esterly Harvesting Mach. Co. v. Pringle*, 41 Neb. 265, 59 N. W. 804 (1894).

The evidence conclusively shows that neither the complainant nor his coadventurers were legally bound to perform the contract of November 26, 1912, as modified either by the first or second modification, that is, the one as to which appellants claim appellee breached, or the one which appellants performed on the 3d day of January, 1913. The performance by appellants of the contract, as modified on the day of its performance, was a gratuitous submission on their part to Aldrich's unlawful demand. It was in effect coercion on Aldrich's part. The record clearly shows that it was only submitted to because it was necessary to con-

summate the joint adventure, and the majority of the adventurers preferred to comply with Aldrich's demand, rather than fail to acquire the lands, and be remitted to their action against Aldrich as for a breach of his contract.

We cannot know that complainant would not also have submitted if he had been given the opportunity so to do. The appellants, however, preferred to indemnify Aldrich against any claim that appellee should have, rather than to allow appellee to join with them, as he had a right to do. He had as much right to join in the second modification of the agreement with Aldrich as he did in the first. The fact, if it be a fact, that he failed to perform his part of the modification which was void did not preclude him from the right to join in the second modification, which was executed as modified. If the agreement of the joint adventure between appellants and appellee had been limited solely to the agreement with Aldrich and Towers of November 26th as first modified, if this was all the agreement ever had between appellants and appellee, and his agreement was to pay his pro rata share of the \$31,000 on the 2d day of January in order to share in the purchase or joint adventure, and he had failed to so perform his part, then, of course, the agreement would have been at an end, so far as complainant was concerned, and appellants would have been free to have made another and different or even the same contract with Aldrich on the 3d day of January, or any later date, and appellee would have had no right to join or participate or to complain of their action. We have shown, however, that such was not the fact. The November 26th contract, as first amended or modified, was not the sole agreement of joint adventure between appellants and appellee. In fact, it was not the agreement between the parties at all. It was only an agreement between the joint adventurers, acting jointly on the one part, and Aldrich and Towers on the

other part. It did not purport to be an agreement between appellants and appellee as to any rights or duties of one to the other, but only their rights and duties jointly towards Aldrich and Towers, and the latter's rights and duties toward the joint adventurers. We do not mean to say that this is directly insisted upon by appellants, but they do insist that there was a parol agreement between appellants and appellee which limited complainant's rights exclusively to a prompt and specific performance of his part of this contract with Aldrich and Towers, and that this was the only agreement of joint adventure existing between them, and that it expired by its terms on the 2d day of January, 1913. The evidence fails to satisfy us of any such oral or written agreement between appellants and appellee, or that such contract, if made, was the only and sole agreement of joint adventure between them.

The basic facts of the joint adventure agreement are contained in the letter agreement of July 5th. Of course, it could be, and was in fact changed by subsequent oral agreements in the progress of the joint adventure; but we find no evidence which convinces us that it was ever so changed by a new or oral agreement such as to limit all of complainant's rights to share in the joint adventure to a strict compliance on his part with the November 26th contract with Aldrich and Towers, as first modified, or that all of his rights to join in the purchase with appellants terminated on the 2d day of January. The basic errors or faults we find in appellants' contentions may be briefly stated or summarized as follows: First, in the supposition or conception that all of complainant's rights under the letter agreement of July 5th ended or terminated on November 15, 1912. Second, that there was a valid oral agreement among all the joint adventurers that complainant's right to join in the purchase was limited to January 2,

1913, and that if a purchase was not effected by that date, that all of his rights to join with appellants in the purchase ceased to exist. While we find some parts of the evidence of some of the appellants tend to show the existence of such an oral agreement, considering all of the evidence as a whole, it fails to convince us of the existence of any such oral agreement to that effect. Third, in treating the contract or agreement between all the joint adventurers on the one part, and of Aldrich and Towers on the other part, of November 26th, as first modified, as being the sole agreement of joint adventure between appellants and appellee. This was not the object or purpose of the original agreement of this date, or of the agreement as first amended. The expiration of this agreement did not per se terminate or end the partnership or joint adventure between appellants. The expiration of this agreement or contract may have ended or rendered impracticable the acquisition of the lands or the perfection of the joint adventure by that plan, mode, or scheme, but it did not terminate the partnership between the joint adventurers for acquiring the lands by some other mode, plan, or terms. ~~The rights of none of the joint~~ adventurers as between themselves, as partners of the joint adventure, were by virtue of that agreement between them and Aldrich and Towers ended or terminated. If that plan or mode failed on account of the fault of one of the joint adventurers, the one so failing might be liable to the partnership, or to the other members, as for losses sustained on account of his fault or neglect in failing to consummate the agreement with Aldrich and Towers; but, as we have before said, this alone did not dissolve the partnership or afford ground for the expulsion or exclusion of the member in fault from further participating in the partnership or joint adventure in the absence of any agreement to this effect, and we have found no evidence which satisfies us

that there was such an agreement, either in writing or parol. Thus we held on the former appeal, when it was said: "In this view of the case, the expiry of the Aldrich and Towers contract by express limitation on January 1 or 2, 1913, would not of itself terminate the agreement of joint adventure made between complainant and his associates on October 26, 1912. That agreement was not limited as to its duration. It was, therefore, not terminable at the pleasure of any of the parties, so long as its purpose remained unaccomplished, and had not become impracticable. *Berry v. Colborn*, 17 Ann. Cas. 1022, note; *Jones v. Kinney*, Ann. Cas. 1912C, 202, note; 23 Cyc. 454, E."

While the former appeal was on the pleadings only, and there has been some change in the pleadings, yet neither the changes in the pleading, nor the evidence, alters this rule as before declared. It was further said on the former appeal: "It is, we think, a sound rule of equity, if not law also, that if one of the parties, after the accomplishment of the enterprise, fails or refuses, upon reasonable notice and demand by his associates, to contribute his due proportion to the expenses thereof, he cannot invoke the aid of a court to secure a share of the proceeds. See *Lind v. Webber*, 36 Nev. 623, 50 L.R.A. (N.S.) 1046, 134 Pac. 461, 135 Pac. 139, 141 Pac. 458, Ann. Cas. 1916A, 1202. But the mere fact that some of the parties paid all the expenses, or furnished all the money used, does not exclude non-participating associates from a share of the proceeds. *Botsford v. Van Riper*, 33 Nev. 191, 110 Pac. 705; *Lind v. Webber*, supra."

The amended pleadings and evidence make this principle apt on this appeal: That a party who seeks to enforce a contract or to share in the proceeds of it must aver and prove either that he has performed in full his part of the contract in accordance with the terms of the contract, or else that he stood ready, able, and willing to so perform his part,

and was prevented from so doing by the fault of the other party. This principle is not applicable to obligations or matters arising out of partnership or quasi partnership affairs. It was thus said that, as between the partners as to partnership affairs: "It cannot be justly applied, and we believe it has never been applied, to obligations arising out of partnerships or quasi partnerships, which are founded upon trust and confidence, and which, without some express stipulation, are not presumed to exact, as conditions precedent to the continuance of the relation and the enjoyment of its fruits, the prompt and equal discharge, or readiness to discharge, by each partner or associate, of his various obligations concurrently with the occasion. For his defaults of duty a partner may be taxed with the loss he inflicts upon the business; and in grave cases the partnership may be dissolved by judicial decree; but it is not dissolved ipso facto." 191 Ala. 136, 67 So. 596.

We hold that the evidence in this case fails to show such grave fault on the part of appellee which would authorize a dissolution of the partnership, or the expulsion of the appellee from further membership or participation in the joint adventure, as was attempted by appellants in this case.

It is unnecessary for us to discuss the effect of the note given by appellee to appellants for \$12,500 further than to say that it, in connection with all the oral and written proof, shows that appellee originated the plan of November 26, 1912, by which plan, as subsequently modified, the lands were ultimately acquired. If it was not given for the purpose of taking care of and providing for appellee's share of the expenses in promoting and consummating the joint adventure, it is difficult to ascertain for what purpose it was given. It is true that there is some evidence tending to show that it was given to induce Shannon to abandon the option of November 8th, and join with the other adven-

turers in the plan of November 26th, or to compensate him individually for the losses he would sustain by accepting the plan of November 26th, rather than enforcing or exercising the option of November 8th, to purchase at a given price. The written evidence in the record, the note itself, and the documentary evidence attached thereto, together with much oral testimony, render it impossible for us to find that it was not intended to provide in part at least, if not in whole, for appellee's part of the expense in promoting the joint adventure, under the plan of November 26, 1912. It may be that it was the complaints of Shannon that led to the execution of the note; but the note itself, as well as other evidence, shows that its consideration was not merely to compensate Shannon as for individual losses which he would sustain by accepting the proposed plan of November 26, 1912. We are therefore strongly persuaded that the true consideration of this note was to provide for appellee's part of the expenses in promoting and effectuating the plan

of November 26th, which was evidently originated, by him, and as modified to meet the demands of Aldrich, the vendor, was finally consummated on January 3, 1913.

We would serve no good purpose to further discuss the law or evidence of this case, or treat severally any of the assignments of error on the direct or cross appeal. Suffice it to say, we find no reversible error in the decree of the Chancellor, and it is in all things affirmed.

Anderson, Ch. J., and Somerville and Thomas, JJ., concur.

A petition for rehearing having been granted, Mayfield, J., on February 16, 1918, handed down the following additional opinion:

On a rehearing we have reached the conclusion that complainant, Saunders, is entitled to a decree jointly and severally against each of his coadventurers, and to this extent only is the decree of the Chancellor erroneous; and to this extent it will be here corrected, and, as corrected, affirmed.

Joint
adventure—
joint and several
liability.

ANNOTATION.

Effect of failure of party to joint adventure to contribute his share of expenses.

The rule seems to be that failure of a party to a joint adventure to contribute his share of the expenses is ground for abandonment of the enterprise by his coadventurers, and his exclusion from further operations by them, provided they take definite steps to effect that result. They cannot, however, continue the enterprise, using what he has contributed, or failing to notify him of the dissolution, and then exclude him from a share of the resulting profits. On the other hand, his failure may, in some instances, preclude his securing relief in a court of equity. Thus, in *Stevenson v. Dunlap* (1828) 7 T. B. Mon. (Ky.) 134, where several persons joined in an enterprise to locate government land under warrants, and the heir of one who failed to bear his share of the ex-

penses sought specific performance after the warrants were located, and a large body of land had come into the possession of the adventurers, the court held that generally, where one partner fails to perform precedent conditions, such as contributing money or services to the joint enterprise, equity will not specifically enforce in his favor an agreement for the distribution of the profits. The court said: "To reach a specific performance, the complainant must show that he has performed his part, if precedent, and that he is ready to do so, if his part is to be a subsequent act. At least, he must show a substantial performance, or that he was precluded from performing by the conduct of the defendant, or that there was an incidental failure, which was a proper

subject of compensation; and that, without compensation was admitted, complete justice could not take place; otherwise, if ample justice can be done by compensation to the complainant for his partial performance, he is almost always left to his remedy at law."

So, in *McKenzie v. Castlett* (1904) 28 Nev. 65, 78 Pac. 976, plaintiff and defendant agreed that defendant would prospect for mines, and plaintiff would make him advances for expenses, and that they should divide the profits. Defendant became interested in a lease, with notice of which plaintiff was charged, but furnished no money for its development and took no steps to secure an interest in it until after it had been shown to be a paying proposition, and the court held that he could not then assert a right to an interest in the claim.

So, where hotel keepers agreed to board a mining prospector for a share in any mines discovered by him, and soon afterwards had their hotel closed by creditors so that they could not perform their part of the undertaking, and he, at his own expense, purchased mining properties to which they did not, could not, and never offered to contribute, the court held that they could not establish an interest in the mine purchased, saying certainly they could not allow another to make a purchase with his own funds and at his own risk, and, without being obliged to reimburse him in case of loss, claim the bargain in case of gain. "We think that the fact that the defendant alone provided the funds for the purchase of the properties in controversy, that the plaintiffs not only did not, but could not, and were in no wise bound to contribute any share of the purchase money, is fatal to their claim to an interest in such properties." *Miller v. Butterfield* (1889) 79 Cal. 62, 21 Pac. 543, 17 Mor. Min. Rep. 222.

So, under some circumstances, the one who fails to contribute his share to the expense will be denied an accounting. Thus, where a person refused to furnish his share of the money for the joint purchase of real estate, and the other two parties to the

enterprise raised the necessary amount and took the title to themselves, they were under no obligation to account to the third member for the profits made on a resale of the property. *Yeager's Appeal* (1882) 100 Pa. 88. The court says the appellants were under no obligation to advance the appellee's share of the purchase money and carry the property for his benefit. There was no such agreement.

So in *Goss v. Lanin* (1915) 170 Iowa, 57, 152 N. W. 43, it is stated that it has been held that one who fails or refuses to contribute towards the adventure before any part of the undertaking is accomplished cannot claim any interest in the profits derived therefrom, or in the property subsequently acquired by the association individually and with his own funds.

And in *Miller v. Chambers* (1887) 73 Iowa, 236, 5 Am. St. Rep. 675, 34 N. W. 830, where a member of a joint adventure for the prospecting of coal mines and mining coal undertook to appropriate the assets of the concern and carry them into a corporation to be formed with the aid of a third person, the court held that, by his active repudiation of the partnership contract and opposition of its interests, he had forfeited his right to share in the partnership assets.

Duty of continuing members to terminate enterprise.

Under ordinary circumstances, however, where the enterprise has been launched and some contribution has been made by the parties who subsequently become delinquent, the rule is that active steps must be taken by those not in default to terminate the undertaking and exclude the delinquent from further participation, if they intend to deny his right to share in the profits.

United States. — *McMullen v. Hoffman* (1896) 75 Fed. 547.

Alabama. — *Saunders v. McDonough* (1914) 191 Ala. 119, 67 So. 591.

Illinois. — *Parish v. Bainum* (1916) 202 Ill. App. 563.

Kentucky. — *Stuart v. Harmon* (1903) 24 Ky. L. Rep. 1829, 72 S. W. 365.

Pennsylvania. — *Reiter v. Morton* (1880) 96 Pa. 241.

West Virginia.—*Kaufman v. Catzen* (1917) 81 W. Va. 1, L.R.A.1918B, 672, 94 S. E. 388.

Wisconsin. — *Davidor v. Bradford* (1906) 129 Wis. 524, 109 N. W. 576.

In *McMullen v. Hoffman* (1896) 75 Fed. 547, reversed on other grounds in (1897) 45 L.R.A. 410, 28 C. C. A. 178, 48 U. S. App. 596, 83 Fed. 372, which was affirmed in (1899) 174 U. S. 639, 43 L. ed. 1117, 19 Sup. Ct. Rep. 839, the court said that where one of the parties wholly failed to contribute his share of the money necessary for the enterprise, although repeatedly urged to do so, the other party would have been justified in treating the contract as abrogated, but if he continued to recognize the partnership relation he could not refuse to account for profits.

Although one of the partners to a land-purchase adventure did not carry out his agreement to furnish money to help pay for the land and the necessary expense of holding and selling it, yet, if the other partners continued to recognize him as a partner until the land was sold and the venture in a measure completed, they cannot then deprive him of his right to participate in the profits. *Stuart v. Harmon* (1903) 24 Ky. L. Rep. 1829, 72 S. W. 365, modified as to other matters in (1903) 25 Ky. L. Rep. 469, 75 S. W. 257.

The fact that one who has agreed to furnish the money to purchase and subdivide a tract of land for a share of the profits fails to furnish all that he agreed to, so that it is necessary to secure a portion of it elsewhere, does not deprive him of his share of the profits under the contract, if at the time he failed to meet his engagement no attempt was made to change the share which he should receive in the profits. *Parish v. Bainum* (1916) 202 Ill. App. 563. The court argued that since he had not complied with his contract to furnish the full amount of money needed, so that the parties were compelled to secure it elsewhere, they might well have required him to lessen his interest somewhat in the possible profits, but they did not require him to do so, and, notwithstanding the fact that he furnished

less money than he originally agreed to do, he retained his rights under the contract, and his interest in the profits was not curtailed. The defense was that having failed to comply with his contract, and having been repaid the money advanced, he was excluded from sharing in the profits.

Refusal to comply with the terms of the contract as to paying in capital justifies dissolution of the firm by the other partners. *Reiter v. Morton* (1880) 96 Pa. 241.

A partner or coadventurer does not forfeit his interest in real property or estates acquired in whole or in part with money he has paid or advanced, by his abandonment of the enterprise, failure to contribute to expenses, or opposition to the prosecution of the social purposes. *Kaufman v. Catzen* (1917) 81 W. Va. 1, L.R.A.1918B, 672, 94 S. E. 388. The court says: "Such conduct may have afforded him ample ground for rescission of the contract, but he was bound to elect whether he would rescind and repay the money, thereby putting Kaufman in statu quo, or seek compensation for any damages he may have suffered in consequence of Kaufman's neglect, default, or misconduct in some other way. Such dereliction would have justified his own abandonment of the contract and relieved him of further performance thereof, but that would not have effected a rescission, nor conferred right on him to retain the benefit of the large sum paid. . . . The contract between them was not an entire working contract, made between persons sustaining no fiduciary relation. It was a joint enterprise, to be conducted by both of them, wherefore failure of either fully to perform his part did not forfeit his fully acquired interest. Notwithstanding defaults and omissions, each has an interest in such assets as have been preserved or accumulated."

In *Davidor v. Bradford* (1906) 129 Wis. 524, 109 N. W. 576, where two persons were to purchase stock in a mining corporation and sell the same at a profit, and one of them refused to pay his share of the purchase money or make any effort to dispose of the

stock, the court said even if the full time for him to comply with his part of the contract had not expired, his deliberate declaration that he would not perform constituted such an anticipatory breach as gave the other party a right to treat the contract as terminated, and take measures accordingly.

On the first appeal in the reported case (*MCDONOUGH v. SAUNDERS*, ante, 419), which was a suit for an accounting of profits made in a joint adventure for the purchase of a tract of land in which there was no allegation of performance of obligation on the part of plaintiff, the court said if one of the parties had refused substantially to perform his obligations in the premises, his associates could undoubtedly have terminated their relations with him and themselves carried on the enterprise to his complete exclusion, with an action against him for damages for the breach. But they could terminate the relation only by giving him notice to that effect. A member is entitled to share in the profits until he has abandoned the enterprise, or been legally excluded therefrom, and he may, at any time before notification of termination of his relation with the concern, offer whatever contribution is due from him as a readventurer and preserve his status.

Effect of carrying enterprise to termination.

As a corollary of the above rule, if the undertaking is not terminated, on refusal or neglect of one partner to contribute his share to the expenses of the enterprise, but the undertaking is carried through to a successful termination, he will be entitled to participate in the profits.

One party to a joint adventure cannot, after its successful termination, exclude the other from participation in the profits merely because he has failed to contribute towards the necessary capital, if he avails himself of the benefit of services rendered. *Akin v. Luce* (1892) 45 N. Y. S. R. 692, 18 N. Y. Supp. 392. The court says in case of a copartnership the mere failure to contribute the capital agreed

to be paid in by one of the parties does not deprive him of the right to participate in the profits of the business if it is carried on even by the capital of his copartner. The failure to contribute such capital undoubtedly gives a right to the partner to terminate the copartnership. But he may not carry on the business and avail himself of the services of the partner failing to contribute, and then claim all the profits arising because of failure to contribute.

Failure of a partner to pay in his share of the capital does not authorize his copartner to exclude him from participation of the profits, if he contributed some capital and the business was organized and conducted on the capital contributed. *Hartman v. Woehr* (1867) 18 N. J. Eq. 383. The court says the other members had a remedy if he did not comply with his engagement. They could have asked for a dissolution, and paid him back the amount he put in, and formed a new partnership.

A partner who has not complied with his agreement as to contribution of capital cannot be denied an accounting by his copartner where the business was carried on under the provisions of the partnership agreement, on the ground that retaining of the partnership effects by such copartner will no more than compensate him for the injuries sustained by the complainant's neglect or refusal to comply with his agreement. *Boyd v. Mynatt* (1842) 4 Ala. 79.

The failure of a member of a firm organized to carry out a contract, to contribute his share toward the partnership assets, where it was understood at the time of the organization of the firm that he could not make such contribution, but that another partner was to make the same for him, is no ground for expelling him from the partnership and forfeiting his right in the profits, although such other partner refused to make the contribution for him. *Westwood v. Crissey* (1910) 139 App. Div. 841, 124 N. Y. Supp. 97. The court said it may be that a member of a firm who absolutely refuses to contribute his part of the

necessary capital to carry on the firm business excludes himself from the firm and from any right to participate in its profits, if any there be. The court thereby reversed 66 Misc. 53, where the breach of the agreement to aid plaintiff in obtaining the money is overlooked, and the court puts its ruling on the ground that it is hardly equitable that plaintiff should be permitted to repudiate his obligation to contribute to the capital of the firm, and at the same time to claim a share in the profits earned by his copartners. The judge says that if a party lies by, and by his conduct intimates to the other partners in the concern that he has abandoned his share, they should then be permitted to do with it as they please.

Failure of parties who contract to share in the expenses of prospecting for mines for an interest in the result, to contribute towards the expense of acquiring claims conflicting with those by their representatives, will not bar their right to relief, if the necessary funds were secured by a sale of a portion of the claims to strangers, if they were not notified of the necessity of contribution. *Lind v. Webber* (1913) 36 Nev. 623, 50 L.R.A. (N.S.) 1046, 134 Pac. 461, 135 Pac. 139, 141 Pac. 458, Ann. Cas. 1916A, 1202. The court says that if, with doubtful results, defendant had advanced large sums of money which were not derived from the property, for securing conflicting claims, or for development work, and plaintiffs, after knowledge of the conditions and payments made, had refused to contribute their proportion, a different question would be presented for determination.

In *Botsford v. Van Riper* (1910) 33 Nev. 191, 110 Pac. 705, three persons had undertaken to consolidate two conflicting mining claims to avoid litigation and conserve the property. When the effort was a success and the compensation earned, one sought to exclude the others from sharing in the profits, and one of the reasons advanced was that the two were financially embarrassed, and that the other put up most of the money for expenses, either by advancing it himself

or borrowing it on consideration of a share in the profits. The court held, however, that the mutual promises of the parties furthering and rendering their aid, advices, and suggestions, if agreed to, were a sufficient consideration to support the contract of joint adventure, stating that the law is well established that the furnishing of capital by the parties to the joint adventure is not necessary to the validity of the contract, so long as the original agreement by which the contract was entered into was carried out. The court further says that the plaintiffs stood at all times ready to aid so far as lay in their power, pursuant to their agreement, the consummation of the deal originally agreed upon. That they were not called upon to do so is not a sufficient reason in law or equity to invalidate their right to share in the profits of the deal, because the appellant saw fit to take the reins and do most or all of the work himself after the original agreement was made and entered into. The court further says that money advanced by one party to a joint adventure is held to be a loan to the adventure, for which the party is entitled to be reimbursed out of the proceeds of the adventure, but by reason of the advancing of such money it does not entitle the party so advancing to any superior right as against his coadventurers.

If, however, the undertaking is not actually launched so that the delinquent member has contributed nothing to it, the other member may, upon his refusal to do so, proceed without him. Thus, in a joint adventure for purchase of land, where one is to furnish money and the other handle the property, if the one agreeing to furnish the money fails to do so, the other may treat the contract as abandoned and proceed individually without sharing the profits with him. *First Nat. Bank v. Rush* (1919) — Tex. —, 210 S. W. 521, affirming (1913) — Tex. Civ. App. —, 160 S. W. 609. The court says that where the partnership exists, the mere failure of one of the parties to pay money into the partnership under a partnership agreement will not work a forfeiture of his interest and a dis-

solution of the partnership. A partnership agreement, however, like any other agreement, may be rescinded or abandoned by the parties, and the fact of abandonment or rescission need not be shown by proof of an express agreement, but may be implied from acts and conduct of the parties inconsistent with an intention on their part to continue the contract.

Effect of contract provisions.

Under a joint undertaking to work a mine, each party to contribute certain sums towards expenses, which provided that after the expenditure of the sums so advanced, "should it be necessary to obtain more money for the completion of the works, such money is to be raised by us on our joint note, or otherwise," and providing that any violation of the above stipulation will render this agreement null and void, there can be no forfeiture of interest for refusal to advance money on individual account after the expenditure of the sums so provided for, nor can there be a forfeiture because

it proves impossible to raise the money on joint account. It is also said that failure to make the advances as promptly as required by contract will not justify a forfeiture, if it was not declared until after the whole sum had been advanced. *Patterson v. Silliman* (1857) 28 Pa. 304, 11 Mor. Min. Rep. 327.

Where the extent of the interests of members of a joint adventure was represented by the number of shares they held in the concern, and the managers thereof were authorized to sell the shares of any member for default in making payments as required, such managers might sell the shares of a defaulting member and thereby bar him from further participation in the profits of the concern, but they were not obliged to do so, and they might carry a member in default, and in such case he was not deprived of his interest in the profits, or released from liability for his share in the losses of the concern. *McMillan v. Whitley* (1911) 38 Utah, 452, 113 Pac. 1026.

H. P. F.

PEOPLE OF THE STATE OF ILLINOIS EX REL. JAMES W. McCORMICK et al., Appts.,

v.

WESTERN COLD STORAGE COMPANY et al.

Illinois Supreme Court—April 15, 1910.

(287 Ill. 612, 123 N. E. 43.)

Highway — loading platform over sidewalk — nuisance.

1. A permanent loading platform, built over a sidewalk for the purpose of permitting the loading of goods directly from the adjoining building into wagons, is a nuisance which cannot be authorized by the municipality, although provision is made for its use by pedestrians, by steps at one end and an incline at the other.

[See note on this question beginning on page 442.]

— right to use — correlative rights.

2. Neither pedestrians on a sidewalk nor the owner of the abutting property have the right to exclude the other from the use of the walk.

[See 18 R. C. L. 217, 218.]

Purpresture — platform over sidewalk.

3. A permanent loading platform

built over a sidewalk, passage over which by pedestrians is provided by steps and incline, is a purpresture.

Mandamus — discretion to deny.

4. Although there are special circumstances under which a mandamus may be denied in the discretion of the court where petitioner has a clear legal right, yet ordinarily, where the

right is shown, petitioner is entitled to the writ.

[See 18 R. C. L. 137, 138.]

— effect of custom.

5. A writ of mandamus to compel removal of a loading platform built over a public sidewalk will not be denied, because other warehouses in the vicinity have maintained such platforms for many years.

— effect of ignoring law.

6. Removal of a permanent loading platform built over a public sidewalk will not be defeated by the fact that the city and the owner ignored the

law for years after the court had decided that its maintenance was unlawful.

Estoppel — to require removal of platform from sidewalk.

7. Estoppel upon a city to require the removal of a loading platform built over a public sidewalk is not effected by the facts that the city received money for the privilege, and the licensee expended money on the faith of the license, if his contract expressly provided that the authority may be revoked at any time.

[See 10 R. C. L. 717; 13 R. C. L. 179, 180.]

APPEAL by petitioners from a judgment of the Circuit Court for Cook County (Johnston, Jr., J.) denying a writ of mandamus and dismissing the petition filed to compel defendants to remove a loading platform built over a public sidewalk. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Ogren & Wermuth, for appellants:

A city holds its streets in trust for the benefit of the public, and cannot authorize their use for the sole and exclusive benefit of private individuals or corporations, to the detriment of the superior rights of the public.

People ex rel. Mather v. Marshall Field & Co. 266 Ill. 609, L.R.A.1915F, 937, 107 N. E. 864, Ann. Cas. 1916B, 743.

An ordinance which attempts to authorize or permit, for private uses, an obstruction of a public street is invalid. Diversions to uses of the public streets other than those designed for the primary purpose of passage and travel are illegal.

People ex rel. Faulkner v. Harris, 203 Ill. 272, 96 Am. St. Rep. 304, 67 N. E. 785; Sears v. Chicago, 247 Ill. 204, 139 Am. St. Rep. 319, 93 N. E. 158, 20 Ann. Cas. 539; Chicago, R. I. & P. R. Co. v. People, 222 Ill. 427, 78 N. E. 790; Wiehe v. Pein, 281 Ill. 130, 117 N. E. 849.

A public street is solely for public use, and the public is entitled to use every part of it, from side to side and end to end, including the sidewalk space.

Smith v. McDowell, 148 Ill. 51, 22 L.R.A. 393, 35 N. E. 141; Elliott, Roads & Streets, 3d ed. § 23.

An ordinance is invalid which permits a cold storage company to construct and maintain a loading plat-

form on a public sidewalk abutting its premises.

Chicago Cold Storage Warehouse Co. v. People, 224 Ill. 287, 79 N. E. 692.

A special ordinance which permits one corporation to maintain a loading platform, a privilege forbidden to others by general ordinance, is unconstitutional.

Hibbard, S. B. & Co. v. Chicago, 173 Ill. 91, 40 L.R.A. 621, 50 N. E. 256.

The Public Utility Act does not create, but only regulates, existing public utilities.

State Public Utilities Commission v. Monarch Refrigerating Co. 267 Ill. 528, P.U.R.1915D, 119, 108 N. E. 716, Ann. Cas. 1916A, 528.

The mere fact that a corporation authorized by a city ordinance to obstruct a public street is a public utility does not make the ordinance or the encroachment legal.

Ligare v. Chicago, 139 Ill. 46, 32 Am. St. Rep. 179, 28 N. E. 934; Chicago, R. I. & P. R. Co. v. People, 222 Ill. 427, 78 N. E. 790.

It is *prima facie* the duty of the city, through its officers, to keep the public streets free from encroachments and obstructions.

People ex rel. Faulkner v. Harris, *supra*.

Where the public is involved, and the relators show a clear legal right to the writ of mandamus, the presumption is that the writ should issue.

Illinois C. R. Co. v. People, 143 Ill.

484, 19 L.R.A. 119, 33 N. E. 173; State ex rel. Marshall v. Hackman, 274 Mo. 551, 203 S. W. 960.

Neither the number of pedestrians forced to climb up and down a loading platform, covering a public sidewalk, nor the extent of the obstruction suffered, as compared with other legal methods for transporting merchandise across a public sidewalk, are proper questions for consideration in a mandamus proceeding brought in behalf of the public to remove an unlawful obstruction.

Seacord v. People, 121 Ill. 623, 13 N. E. 194; Hibbard, S. B. & Co. v. Chicago, 173 Ill. 91, 40 L.R.A. 621, 50 N. E. 256.

The presence of other obstructions on the same street is no defense or excuse to the maintenance of the obstruction in the case at bar.

West Chicago Street R. Co. v. People, 214 Ill. 9, 73 N. E. 393.

Messrs. Burry, Johnstone, & Peters, for appellees.

Streets are not exclusively for passage. They also serve adjoining properties. Their use as between various interests must be reasonable. The city council is the primary judge as to what is reasonable and its decision should not be lightly set aside.

Chicago v. Keefe, 114 Ill. 222, 55 Am. Rep. 860, 2 N. E. 267; John A. Tolman & Co. v. Chicago, 240 Ill. 268, 24 L.R.A. (N.S.) 97, 88 N. E. 488, 16 Ann. Cas. 142; People ex rel. Mather v. Marshall Field & Co. 266 Ill. 609, L.R.A.1915F, 937, 107 N. E. 864, Ann. Cas. 1916B, 743; McCormick v. South Park, 150 Ill. 516, 37 N. E. 1075; J. Burton Co. v. Chicago, 236 Ill. 383, 86 N. E. 93, 15 Ann. Cas. 965; Rothschild v. Chicago, 227 Ill. 205, 81 N. E. 407; Sears v. Chicago, 247 Ill. 205, 139 Am. St. Rep. 319, 93 N. E. 158, 20 Ann. Cas. 539.

Granting or refusing a writ of mandamus lies in the sound discretion of the court. A writ of mandamus will not be awarded except in a clear case, and where it will clearly further the interests of justice. All surrounding circumstances and the needs of business must be considered.

High, Extr. Leg. Rem. 2d ed. § 9; People ex rel. Power v. Rose, 219 Ill. 46, 76 N. E. 42; People ex rel. Brownrigg v. Brentano, 259 Ill. 359, 102 N. E. 773; Illinois Watch Case Co. v. Pearson, 140 Ill. 423, 16 L.R.A. 429, 31 N. E. 400; Kenneally v. Chicago, 220 Ill.

485, 77 N. E. 155; People ex rel. Stettaner v. Olsen, 215 Ill. 620, 74 N. E. 785; Preston v. Chicago, 246 Ill. 26, 92 N. E. 591; People ex rel. Waber v. Wells, 255 Ill. 450, 99 N. E. 606; People ex rel. Kocourek v. Chicago, 193 Ill. 507, 58 L.R.A. 833, 62 N. E. 179; Highway Comrs. v. People, 66 Ill. 339; Highway Comrs. v. People, 73 Ill. 203; Brokaw v. Highway Comrs. 130 Ill. 482, 6 L.R.A. 161, 22 N. E. 596; People ex rel. Beardsley v. Rock Island, 215 Ill. 488, 106 Am. St. Rep. 179, 74 N. E. 437; People ex rel. Friend v. Wieboldt, 233 Ill. 572, 84 N. E. 646.

Enacting ordinances for fifteen continuous years permitting the building of the raised sidewalk, accepting compensation therefor, safeguarding the rights of the public by providing that the city may have the sidewalk removed at any time, and acquiescence by the public and the city in what was done constitute an estoppel in pais against relators such as will defeat the present action.

People ex rel. Beardsley v. Rock Island, 215 Ill. 488, 106 Am. St. Rep. 179, 74 N. E. 437; Chicago v. Union Stock Yards & Transit Co. 164 Ill. 224, 35 L.R.A. 281, 45 N. E. 430; People ex rel. Friend v. Wieboldt, supra; Dickerson v. LeRoy, 72 Ill. App. 588; Chicago & N. W. R. Co. v. People, 91 Ill. 251; 3 Dill. Mun. Corp. 5th ed. § 1191.

Dunn, J., delivered the opinion of the court:

Certain persons describing themselves as citizens and residents of the city of Chicago filed a petition in the circuit court of Cook county against the Western Cold Storage Company, the city of Chicago, and its commissioner of public works and superintendent of streets, for a writ of mandamus, requiring the removal of a permanent elevated platform built by the Western Cold Storage Company over the sidewalk in front of its premises on the south side of East Austin avenue. The petition alleges that the Western Cold Storage Company occupies a building at the southeast corner of North State street and East Austin avenue; that the sidewalk space on the south side of East Austin avenue is 14 feet wide, and beginning at the east line of its building and extend-

ing west the Western Cold Storage Company has built and is maintaining upon the sidewalk space a permanent elevated platform 13 feet wide, 106 feet and 1 inch long, and 2 feet above the level of the sidewalk, made of heavy timbers and braces, which unlawfully obstructs the use of the public sidewalk and requires pedestrians to climb four steps from the sidewalk level at its east end and to go down an incline 15 feet long at the west end; that the statutes of this state forbid obstructions to public highways, and a city ordinance forbids loading platforms on public sidewalk spaces; that the platform is being used by the storage company for its own convenience, in defiance of the rights of the public, and it is the duty of the defendants to remove it and restore the use of the sidewalk proper to the public.

Demurrers to the petition were overruled, and all the defendants answered. The Western Cold Storage Company in its answer alleges that it conducts a public warehouse and furnishes facilities to the public for storing food products under refrigeration, and its business is essential to the health and welfare of the public; that food products of the character housed by it are handled and sold in West South Water street, one block south of the Chicago river, and its place of business is two blocks north of that river, and it is essential that it be located in close proximity to West South Water street; that Austin avenue is largely devoted to general and cold storage warehouses, freight depots, wharves, small factories, and machine shops; that other raised sidewalks are being maintained on Austin avenue by other plants under separate licenses, and the defendant acquired its site under encouragement of the city authorities. The answer alleges that the Western News Company is located in the same block as defendant; that the defendant caused a count to be made of the persons passing over its platform, and that the average num-

ber of pedestrians passing over the platform between 7 A. M. and 6 P. M., excepting those who go to or from the plant of the Western News Company, was thirty-six an hour; that a greater number went to or came from the Western News Company, and that the street was practically deserted from 6 P. M. to 7 A. M. The platform was built in 1904 under a license from the city granted by ordinance, which was extended from time to time by the city council, the last extension having been passed on July 17, 1918, after this suit was begun. The license expires April 30, 1923, is subject to revocation at any time at the option of the mayor, and is subject to repeal or modification at any time by the city council. The ordinance requires the platform and the sidewalk surrounding it to be kept in repair, safe for travel, and free from snow and ice, to the satisfaction of the commissioner of public works, who also is required to approve the plans for the structure before any work on it shall be done, and shall have supervision over the completed structure. It also requires the removal of the structure at the termination of the license, either by lapse of time or the revocation of the mayor or city council, and requires a bond in the sum of \$10,000, with sureties approved by the mayor, for the observance of the terms of the license. The license fee is fixed by the ordinance at \$213.20 a year. The answer further alleges that 18,000 teams a year receive and discharge goods at the defendant's warehouse, and the total tonnage so handled exceeds 15,000 tons a year; that many of the packages so handled are of great weight, requiring mechanical means to handle; that the receiving floor is 2 feet 4 inches above the street level, and by means of the platform goods are loaded on trucks and wheeled directly from wagons into the warehouse and from the warehouse to wagons; that the only other method would be the use of skids, trucks, and other devices, which would take longer

and cause vastly more obstruction and inconvenience to the public than the use of the raised platform, would be slower and cause delay of teams and congestion of the street, and would make it expensive and difficult to conduct the defendant's business.

Demurrers to the answers were overruled, and judgment was entered, denying the writ and dismissing the petition. The court having certified that the validity of an ordinance was involved and the public interest so required, an appeal was taken by the petitioners directly to this court.

This case does not differ materially from that of Chicago Cold Storage Warehouse Co. v. People, 224 Ill. 287, 79 N. E. 692. We said there that it could not be successfully contended that "the purpose of the ordinance was for the benefit of the public generally. It was for the convenience of the storage company and those doing business with it at its warehouse. Nor can it be successfully contended that the platform as erected is not a material obstruction to the sidewalk, and does not place the general public to great inconvenience in the use of the same. While the ordinance provides that the sidewalk may be used for public purposes, yet in order to use it those passing over it must go up and down five or six steps at either end. If it is not a nuisance and an obstruction, then the city might authorize private parties to erect and maintain bulkheads on every street in the city, of any height. Public streets and sidewalks cannot be law-

Highway—
loading plat-
form over side-
walk—nuisance.

fully used for any such purpose. We are of the opinion that the platform in question was a nuisance, and such an obstruction to public travel as entitled appellees to have it removed."

Counsel for the appellees say in reference to this case that the bare legal question is discussed of the right of the city to grant a private corporation the right to construct a

sidewalk 3½ feet above grade on a public street, and that the reasons for granting permission, the character of the neighborhood, the previous conduct of the parties, the necessity for the elevated sidewalk, and the circumstances surrounding the case are not shown. The case of John A. Tolman & Co. v. Chicago, 240 Ill. 268, 24 L.R.A. (N.S.) 97, 88 N. E. 488, 16 Ann. Cas. 142, is referred to as indicating facts which would justify granting a license to an individual to take possession of a sidewalk by building a permanent structure on it for the benefit of a private business. This was what the Chicago Cold Storage Warehouse Co. Case held could not be done, when it was said that public streets and sidewalks cannot be used for any such purpose. It is a mistake to suppose that the John A. Tolman & Co. Case modified this statement of the law. That case was a bill for an injunction to restrain the city from preventing the complainant from using skids in receiving and shipping merchandise across the sidewalk, and the opinion recognizes the correlative rights in the streets of the public and abutting owners. Neither has the

right to exclude the other, any more
—right to use—
correlative
rights.

than the traffic along one street at an intersection has the right to exclude the transverse traffic. Each has the right to the use of the street, and each must permit its use by the other. The decree directed to be entered was not one restraining any interference with the use of skids, but was one restraining an interference with the reasonable and necessary use of skids in the delivery of merchandise across the sidewalk. The platform in question is a permanent obstruction of the sidewalk, constituting a purpresture. The distinction between the temporary use of skids and the permanent obstruction by the platform is alluded to in the John A. Tolman & Co. Case, where, referring to the

Purpresture
—platform over
sidewalk.

claim of the appellees, it is said: "It is their position that whatever interferes with the uninterrupted, unimpeded, and unobstructed use by the public of any part of the highway is a nuisance. We have seen that this position is unfounded, and that there are numerous obstructions of the public use which are lawful. The cases cited by appellees in support of this proposition are all cases of permanent obstructions in the street, constituting purprestures therein. If the action of the superintendent of streets and commissioner of public works had been directed against the permanent platforms projecting in front of the shipping doors, these decisions would apply, but they do not apply to the skids."

The appellees argue that the granting or refusing of a writ of mandamus is discretionary, and that the court was justified in exercising its discretion to deny the writ. There may be circumstances under which the writ will not operate fairly, will occasion confusion or disorder, or will not promote substantial justice, and under which the court may therefore deny the writ, though the petitioner has a clear legal right.

Mandamus—
discretion to
deny.

This discretion, however, is not arbitrary, but must be exercised according to legal principles, and ordinarily, where a clear

legal right is shown, petitioner is entitled to the writ.

The fact that all the ^{—effect of custom.} other warehouses

in the vicinity had maintained loading platforms on the sidewalk for many years is not a reason for refusing the writ. The case of *Chicago Cold Storage Warehouse Co. v. Chicago*, supra, was decided in 1906. The storage companies and the city were then informed that the sidewalk could not be lawfully used in this manner. The fact that both the ^{—effect of ignoring law.} city and the storage companies deliberately ignored the law for many years is not a reason why it should not be enforced.

The appellee, the Western Cold Storage Company, also insists upon an estoppel in pais from the fact that the city assumed to grant the right to maintain the platform and collected compensation for it, and the company expended money in building the platform. The ordinance expressly provides that the authority ^{Estoppel—to require removal of platform from sidewalk.} granted by it may be revoked at any time by the mayor or council. There can be no estoppel by such a contract.

The judgment is reversed, and the cause remanded, with directions to sustain the demurrer to the answer.

ANNOTATION.

Power of municipality to permit permanent loading platforms in street.

Ordinarily, a municipality has no power to grant an abutting owner the right to build and maintain a permanent loading platform over the sidewalk. *Chicago Cold Storage Warehouse Co. v. People* (1906) 224 Ill. 287, 79 N. E. 692; *PEOPLE EX REL. MCCORMICK v. WESTERN COLD STORAGE CO.* (reported herewith) ante, 437; *Brauer v. Baltimore Refrigerating & Heating Co.* (1904) 99 Md. 367, 66 L.R.A. 403, 105 Am. St. Rep. 304, 58 Atl. 21; *State ex rel. Ellis v. Mulligan* (1913)

173 Mo. App. 718, 160 S. W. 9; *State, Traphagen, Prosecutor, v. Jersey City* (1889) 52 N. J. L. 65, 18 Atl. 586, 696.

This was held in *Chicago Cold Storage Warehouse Co. v. People* (Ill.) supra, where the platform was 3½ feet high, covering the entire width of the sidewalk, requiring the public to use the platform instead of the sidewalk, and to climb steps to reach it.

So, where pedestrians were required to climb the cleated ends of the plat-

form, or else go out in the street. *State ex rel. Ellis v. Mulligan* (1913) 173 Mo. App. 718, 160 S. W. 9.

It will be seen that in the reported case (*PEOPLE EX REL. MCCORMICK v. WESTERN COLD STORAGE Co.* ante, 437) the platform was raised about 2 feet above the sidewalk, compelling pedestrians to climb steps at one end and to pass over an inclined plane at the other.

Authority to grant permission to erect platforms along the sidewalk, and remove the curbing so as to load wagons from them, is not included in the grant of power to grant the right to use streets for bay windows, areas, steps, or other such temporary or similar uses; and it is immaterial that the permit is made revocable at the discretion of the authorities. *Brauer v. Baltimore Refrigerating & Heating Co.* (1904) 99 Md. 367, 66 L.R.A. 403, 105 Am. St. Rep. 304, 58 Atl. 21.

A charter provision giving a city power to regulate the use of streets for any other purpose than public travel does not empower it to confer the right upon a railroad to erect a freight platform and roof, occupying exclusively 12 or more feet of a sidewalk. *State, Traphagen, Prosecutor, v. Jersey City* (N. J.) supra. The court stated that the result was to exclude public travel from the sidewalk and devote it to the private business of the railroad.

It may be noted that it has been held that city authorities have no power to give the owner of an ice house the right to use an ice chute across the street to his ice house, from the river where he takes the ice. *Young v. Rothrock* (1903) 121 Iowa, 588, 96 N. W. 1105.

In *State ex rel. Ellis v. Mulligan* (1913) 173 Mo. App. 718, 160 S. W. 9, supra, the court said: "It is urged that these loading docks are business necessities. That may be, but that should have been thought of and provided for when the building was erected, by so locating it as to have the docks on defendant's property instead

of attempting to use the public sidewalk. Something is also said about the character of the neighborhood not now being as desirable as it once was, being given over to wholesale and manufacturing houses, interspersed with saloons, foreign grocery stores, and other less respectable places. Because relator's property is located in a neighborhood that is becoming undesirable is no reason why defendants should be permitted to make it still less valuable. Removing this outrageous obstruction from the sidewalk will be at least one step toward rehabilitation of the locality."

In *Flynn v. Taylor* (1891) 127 N. Y. 596, 14 L.R.A. 556, 28 N. E. 418, it was held that the occupation of a sidewalk by a permanent loading platform with the consent of the city authorities was a nuisance.

But in *Murphy v. Leggett* (1900) 164 N. Y. 121, 58 N. E. 42, 8 Am. Neg. Rep. 292, it was held that a platform within the "stoop limit" was not a nuisance.

It may be noted that in *Bagley v. People* (1880) 43 Mich. 355, 38 Am. Rep. 192, 5 N. W. 415, it was held that an alley was not a public highway, and that a platform thereon could not be assumed to be a nuisance.

In *Stratton & T. Co. v. Meriwether* (1912) 150 Ky. 363, 150 S. W. 381, where the defendant, on the complaint of its neighbor, was ordered to remove permanent loading platforms in the street, it was not claimed that the authority from the city, under which the platforms were erected by the defendant, relieved it from liability for damage, but it was unsuccessfully urged that the plaintiff, having brought his suit for an injunction after the platforms were erected, ought to be limited to relief in damages.

It may be said that in *John A. Tolman & Co. v. Chicago* (1909) 240 Ill. 268, 24 L.R.A. (N.S.) 97, 88 N. E. 488, 16 Ann. Cas. 142, referred to in the reported case (*PEOPLE EX REL. MCCORMICK v. WESTERN COLD STORAGE Co.*), the question was as to the use of skids. It was conceded by the owner that on

the showing made on the record the platform was unlawful, and it did not claim any right to maintain it.

For power of city to permit abutting

owners to use street including sidewalk for the deposit, exhibition, or sale of goods, see the annotation in

6 A.L.R. 1317.

B. B. B.

HENRY H. ELLISON et al., Doing Business as John B. Ellison & Sons,
Respts.,
v.

H. S. HENION, Appt.

California Supreme Court (In Banc) — June 16, 1920.

(— Cal. —, 190 Pac. 793.)

Parties — action on open account — transfer of representative note.

1. The transfer of notes given for a debt represented by an open account prevents action upon the account by the original creditor.

[See note on this question beginning on page 449.]

Bills and notes — giving note as satisfaction of debt.

2. Giving of a note for a debt represented by an open account does not extinguish the debt, but if the note is not paid an action can be maintained upon the original indebtedness.

[See 1 R. C. L. 206.]

Guaranty — who may recover upon.

3. One who has parted with his claim against a corporation cannot recover against a stockholder of the corporation, either upon his guaranty of the debt or upon his liability as a stockholder.

[See 12 R. C. L. 1055, 1056.]

APPEAL by defendant from a judgment of the Superior Court for Alameda County (Trabucco, J.) in favor of plaintiffs in an action brought to recover the balance alleged to be due from defendant as guarantor of, and as stockholder in, a certain corporation, for goods sold to it. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Frank J. Gordon, Welles Whitmore, and R. McMurchie for appellant.

Messrs. Rothchild, Golden, & Rothchild and J. A. Pritchard, for respondents:

Parties severally liable upon the same obligation or instrument, and sureties on the same or separate instruments, may all, or any of them, be included in the same action, at the option of the plaintiff.

Hurlbutt v. N. W. Spaulding Saw Co. 93 Cal. 55, 28 Pac. 795; Kreling v. Kreling, 118 Cal. 413, 50 Pac. 546; Melander v. Western Nat. Bank, 21 Cal. App. 462, 132 Pac. 265.

Where several parties who united in a promise receive some benefit from the consideration, their promise is presumed to be joint and several.

Gummer v. Mairs, 140 Cal. 535, 74 Pac. 26; Shelton v. Michael, 31 Cal.

App. 328, 160 Pac. 578; Leonard v. Leonard, 138 Cal. XIX., 70 Pac. 1071; Merchants' Trust Co. v. Bentel, 10 Cal. App. 75, 101 Pac. 31; Doyle v. Nesting, 37 Colo. 522, 88 Pac. 862.

The express consideration of \$1 is sufficient to support a guaranty.

Davis v. Wells, F. & Co. 104 U. S. 167, 168, 26 L. ed. 690.

A judgment shall be a final and complete determination of the rights of the parties.

Hentig v. Johnson, 8 Cal. App. 221, 96 Pac. 390; McGarrahan v. Maxwell, 28 Cal. 75; Dennison v. Chapman, 105 Cal. 447, 39 Pac. 61; Bedolla v. Williams, 15 Cal. App. 738, 115 Pac. 747; Bliss, Pl. § 167, p. 279; Wolfe v. Wilsey, 2 Ind. App. 549, 28 N. E. 1009; Libby v. Rosekrans, 55 Barb. 202; Turner v. Plowden, 5 Gill & J. 52, 23 Am. Dec. 596; Davidson v. Brown, 1 Cranch, C. C. 250, Fed. Cas. No. 3,601.

A guaranty liability is distinct from the liability imposed by a statute upon a stockholder.

Morrow v. Superior Ct. 64 Cal. 383, 1 Pac. 354; Re California Mut. L. Ins. Co. 81 Cal. 364, 22 Pac. 869; Union Trust Co. v. Journeay, 29 Cal. App. 502, 156 Pac. 999; Taugher v. Richmond Dredging Co. 33 Cal. App. 303, 165 Pac. 31.

Once an obligation is shown to exist, the presumption is that it continues to exist until the defendant proves that it has been exonerated.

Melone v. Ruffino, 129 Cal. 514, 79 Am. St. Rep. 127, 62 Pac. 93; Stuart v. Lord, 138 Cal. 674, 72 Pac. 142.

Money, and money only, liquidates an account, and the taking of the evidence of an indebtedness does not liquidate the indebtedness, unless there is an express agreement that such shall be the case.

Clark v. Berlin Realty Co. 33 Cal. App. 50, 164 Pac. 333; Durfee v. Seale, 139 Cal. 606, 73 Pac. 435; Cranston v. West Coast L. Ins. Co. 63 Or. 427, 128 Pac. 427; Menzel v. Primm, 6 Cal. App. 204, 91 Pac. 754; Spitz v. Morse, 104 Me. 447, 72 Atl. 178; Merchants Nat. Bank v. Bentel, 166 Cal. 473, 137 Pac. 25; Exchange Nat. Bank v. Hunt, 75 Wash. 513, 135 Pac. 224.

It is not necessary that proceedings be taken against the principal, or even that securities of the principal should be first exhausted; in fact, the remedies against the principal may even become barred, and still the guarantor be held.

Kinsel v. Ballou, 151 Cal. 754, 91 Pac. 620; Carver v. Steele, 116 Cal. 116, 58 Am. St. Rep. 156, 47 Pac. 1007; Boschetti v. Morton, 23 Cal. App. 325, 137 Pac. 1085.

The creditor may even go so far as to release the principal debtor, and still look to the guarantor for reimbursement.

Bothfeld v. Gordon, 190 Mass. 567, 5 L.R.A.(N.S.) 764, 112 Am. St. Rep. 341, 77 N. E. 639; Loos v. McCormack, 107 App. Div. 8, 95 N. Y. Supp. 1141; Davis v. McEwen Bros. 113 C. C. A. 229, 193 Fed. 305; Bagley v. Cohen, 121 Cal. 604, 58 Pac. 1117; Frost v. Harbert, 20 Idaho, 336, 38 L.R.A.(N.S.) 875, 118 Pac. 1095.

If there is not a present intent to release the prior obligation and parties, there is no novation of contract.

E. Martin & Co. v. Brosnan, 18 Cal. App. 477, 123 Pac. 550; Parkside Real-

ty Co. v. MacDonald, 166 Cal. 426, 137 Pac. 21; United States v. Grover, 227 Fed. 181; Carpy v. Dowdell, 131 Cal. 495, 63 Pac. 778.

The creditor may release the principal debtor and still hold the guarantor, if he makes it apparent at the time of the release that he is reserving his remedy against the guarantor.

Mueller v. Dobschuetz, 89 Ill. 176; Dean v. Rice, 63 Kan. 691, 66 Pac. 992; Tobey v. Ellis, 114 Mass. 120; National Park Bank v. Koehler, 137 App. Div. 785, 122 N. Y. Supp. 490; Rockville Nat. Bank v. Holt, 58 Conn. 526, 18 Am. St. Rep. 293, 20 Atl. 669.

A guarantor who consents to a change in his principal's obligation cannot thereafter claim that he has been discharged by the change in the obligation.

Gnarini v. Swiss-American Bank, 162 Cal. 181, 121 Pac. 726; Pacific Press Pub. Co. v. Loofbourow, 129 Cal. 24, 61 Pac. 944.

A transfer of a note does not release or discharge a guarantor or a codebtor. Such a transfer does not amount to payment.

Black v. Sippy, 15 Or. 574, 16 Pac. 418; Spitz v. Morse, 104 Me. 447, 72 Atl. 178.

Defendant's conduct is such that, in the absence of all other rules, he would now be estopped to claim that he is released on his guaranties.

Knoebel v. Kircher, 33 Ill. 308; Brown v. Abbott, 110 Ill. 162; Bogardus v. Phoenix Mfg. Co. 134 Ill. App. 456.

The guarantor is entitled to the benefit of the partial satisfaction, but is not discharged thereby.

Western Nat. Bank v. Wittman, 31 Cal. App. 615, 161 Pac. 137.

In California, a stockholder is not secondarily liable for the debts of a corporation, but is primarily liable, and occupies the position of a principal debtor to the creditors of the corporation.

Eva v. Andersen, 166 Cal. 420, 137 Pac. 16; Trindade v. Atwater Canning & Packing Co. — Cal. App. —, 128 Pac. 756; Niles State Bank v. Jennings, 22 Cal. App. 66, 133 Pac. 329; Buttner v. Adams, 149 C. C. A. 315, 236 Fed. 105.

The release of one of several joint debtors in no wise discharges the others.

Northern Ins. Co. v. Potter, 63 Cal. 157; French v. McCarthy, 125 Cal. 508,

58 Pac. 154; *Elizalde v. Murphy*, 146 Cal. 168, 79 Pac. 966.

A stockholder's liability is founded upon contract.

Kennedy v. California Sav. Bank, 97 Cal. 93, 33 Am. St. Rep. 163, 31 Pac. 846.

And may be waived or modified by contract.

Wells v. Black, 117 Cal. 160, 37 L.R.A. 619, 59 Am. St. Rep. 162, 48 Pac. 1090; *Kohn v. Sacramento Electric, Gas & R. Co.* 168 Cal. 7, 141 Pac. 626.

A guaranty covering a certain transaction cannot be made to cover other transactions, or persons, than those designated in the guaranty.

Evansville Nat. Bank v. Kaufmann, 93 N. Y. 273, 45 Am. Rep. 204; *Edmondston v. Drake*, 5 Pet. 622, 8 L. ed. 251; *Mason v. Standard Distilling & Distributing Co.* 85 App. Div. 520, 83 N. Y. Supp. 343; *First State Bank v. Boetcher*, 154 Wis. 444, 143 N. W. 172.

No one can take advantage of a guaranty but the person to whom it runs, or his assignee.

Postlethwaite v. Minor, 168 Cal. 227, 142 Pac. 55.

Liability cannot be extended by any contract which a corporation may make after the incurring of a debt. His liability is on the original debt, and any attempt to extend this debt in no wise affects his liability.

Goodall v. Jack, 127 Cal. 258, 59 Pac. 575; *Santa Rosa Nat. Bank v. Barnett*, 125 Cal. 407, 58 Pac. 85; *Winona Wagon Co. v. Bull*, 108 Cal. 1, 40 Pac. 1077; *Clark v. Berlin Realty Co.* 33 Cal. App. 50, 164 Pac. 333.

Defenses based upon releases, discharges, and exoneration must be specially pleaded. If not so pleaded, they are waived and cannot be taken advantage of.

San Pedro Lumber Co. v. Reynolds, 121 Cal. 78, 53 Pac. 410; *Coles v. Soulsby*, 21 Cal. 50; *McGinn v. Willey*, 24 Cal. App. 303, 141 Pac. 49; *Bishop v. Hart*, 114 Iowa, 96, 86 N. W. 218; *Sentinel Co. v. Smith*, 143 Wis. 377, 127 N. W. 943; *National Radiator Co. v. Hull*, 79 App. Div. 109, 79 N. Y. Supp. 519.

Olney, J., delivered the opinion of the court:

This is an appeal by the defendant from a money judgment against him. The following facts appear without dispute: The defendant

and two men by the name of Pike were stockholders and officers of a corporation known as the Pike Woolen Company, and the defendant and one of the Pikes executed to the plaintiffs a joint guaranty of any indebtedness that the Woolen Company might incur to them. The Woolen Company did incur such an indebtedness in the sum of \$4,436.81. Thereafter the Woolen Company became embarrassed financially, and, for the purpose of arranging its indebtedness, executed two notes, one for \$6,000 and one for \$7,000 in favor of a representative of its creditors, including the plaintiffs. These notes represented the aggregate of the debts due the creditors, including the debt to the plaintiffs. The note for \$6,000 was signed by the defendant's coguarantor, Pike, and his wife, as well as by the company, and, as security for its payment, Pike and his wife also executed a deed of trust of certain property of their own. The court finds, and we may assume that the finding is justified by the evidence, that the defendant consented to the plaintiffs taking these notes. Payments were made on the notes from time to time, but finally the Woolen Company defaulted upon them, and the payee of the notes, the representative of the creditors, threatened to sell the property of the Pikes covered by the trust deed. Thereupon the Pikes, or one or the other of them, arranged with the payee of the notes for their purchase or return upon the payment of \$5,000.

The defendant claims that the arrangement was for the purchase of the notes, and the plaintiffs claim that it was for the return of the notes to the Woolen Company. But, whatever may have been the negotiation between the Pikes and the payee, the thing that was finally done was that, in consideration of \$5,000 paid him, the payee of the notes indorsed them to one of the Pikes. The uncontradicted testimony also is that the notes remained outstanding as obligations of the Woolen Company, and that the

\$5,000 which was paid for the notes was obtained by Pike from a third person by a second hypothecation of his property. The \$5,000 was distributed by the payee of the notes among the creditors whom he represented, in proportion to their claims. Including their share of this, the plaintiffs received on account of their claim against the Woolen Company a total of \$2,174.03, leaving a balance of \$2,262.78, on which they received nothing.

Under these circumstances the plaintiffs brought the present action against the defendant; the complaint containing two counts, one on the joint guaranty of the defendant and Pike for the recovery of the unpaid balance mentioned, and the other on the defendant's liability for his proportion of that balance as a stockholder of the Woolen Company. The answer of the defendant pleaded payment of the obligation of the Woolen Company to the plaintiffs, and also set out as a separate defense the facts stated above with reference to the giving of the two notes and their subsequent transfer to Pike. The trial court found that the original indebtedness of the Woolen Company to the plaintiffs had not been paid, and also, in effect, that the facts alleged as a separate defense were not true. This latter finding must have been an inadvertence, for the facts stated appear without conflict, and for the most part in the testimony for the plaintiffs, as well as in that for the defendant. This finding must therefore be considered as not sustained by the evidence. The trial court concluded that the plaintiffs were entitled to recover on both counts, and gave judgment to that effect.

It would seem to be quite evident that the plaintiffs cannot recover against the defendant as the guarantor of a debt of the Woolen Company, or as a stockholder of the company proportionately liable for its debt, if the plaintiffs had, before the commencement of their action, parted with the debt which is the basis of the action. The real ques-

tion in the case is: Had they so parted?

No question is made but that the original debt of the Woolen Company to the plaintiffs was covered into the two notes given the representative of the creditors. There is question made as to whether the two notes were taken in payment. The question, however, would seem to be one largely as to the use of terms, since the fact is clear that the notes were simply taken in ordinary course for what had previously been open accounts. It is well established that in such a case the indebtedness for which the notes are taken is not paid in the sense that it is absolutely discharged. If default be made upon the notes, an action can be maintained upon the original indebtedness, as if the notes had never been given.

Bills and notes—
giving note as
satisfaction of
debt.

But, on the other hand, the notes evidence the debt, and if they are transferred the debt is transferred with them, and the original creditor can thereafter maintain no action upon it. It no longer belongs to him.

Parties—action
on open account
—transfer of
representative
note.

That the original debt for which a note has been taken passes with the transfer of the note was directly decided in *Goldman v. Murray*, 164 Cal. 419, 129 Pac. 462. There the plaintiff brought an action to recover from the defendant, as a stockholder of a certain corporation, his proportion of a certain indebtedness of the corporation. It appeared that the corporation had been originally indebted for money advanced to it, and gave its note to its creditor for the amount. The creditor then transferred the note to the plaintiff. The trial court found the note to be invalid as against the corporation, because of want of authority for its execution, but found that the original indebtedness of the corporation had been assigned by the original creditor to the plaintiff, and granted a recovery upon it. On appeal; this finding of an assignment was at-

tacked as not supported by the evidence. The only evidence on the point was that the note had been transferred to the plaintiff. It was held that this was enough; that the transfer of the note was in fact a transfer of the original debt as between the original creditor and the plaintiff, although the note was void as to the corporation. If the transfer of a void note be in effect an assignment of the indebtedness which it was intended to evidence, much more must the transfer of a valid note be in effect an assignment of the indebtedness which it does in fact evidence. See also 7 Cyc. 816; *Harris v. Johnston*, 3 Cranch, 317, 2 L. ed. 452; *Looney v. District of Columbia*, 113 U. S. 258, 28 L. ed. 974, 5 Sup. Ct. Rep. 463; *Davis v. Reilly* [1898] 1 Q. B. 1, 66 L. J. Q. B. N. S. 844, 77 L. T. N. S. 399, 46 Week. Rep. 96.

In the present case, there is no question as to the fact of the transfer of the notes taken for the indebtedness of the Woolen Company. They were, as we have said, indorsed and delivered to Pike by the payee, the representative of the Woolen Company's creditors, upon the payment to him of \$5,000. The indorsements were special; that is, to the order of Pike. There is no escape from the conclusion that by this transfer the creditors parted, not only with the notes, but with the debts for which the notes were given. In other words, when the plaintiffs brought this action, they were not the owners of or interested in the obligation whose guaranty they seek to enforce in one count, and the stockholder's liability pertaining to which they seek to enforce in the other.

The plaintiffs seek to avoid this conclusion by the claim that the payee did not intend to sell the notes to Pike, but to return them to the Woolen Company, and rely upon testimony of the payee to that effect. But, whatever he intended, the thing which he did was to transfer the notes by indorsement and delivery, and the legal effect of that which he

did cannot be varied in this action, to which Pike is not a party, by evidence that he intended something else. There is, in fact, no evidence here sufficient to warrant a reformation of his transaction with Pike; but, even if there were, it would be immaterial. Until the transaction is reformed, and the transfer in effect canceled, something which can be done only in an action against Pike, the transfer must be given effect. As long as the transfer stands uncanceled, the Woolen Company is liable to Pike upon the notes. To hold that it was also liable to the plaintiffs upon the original indebtedness for which the notes were given would be to subject it to a double liability for the same obligation.

If the plaintiffs are not the owners of the obligation of the Woolen Company, as we believe it is plain they are not, it would seem to follow almost as of course that they cannot recover on a guaranty of that obligation, or upon the defendant's liability as a stockholder for his proportion of it. What-
Guaranty—who may recover upon.
 ever rights may exist in these respects would seem plainly to be in Pike as the owner of the notes which evidence the basic obligation. Plaintiffs' counsel, nevertheless, contend to the contrary in respect to the guaranty, their argument being that the obligation of the guarantor is an independent obligation, which, of course, it is, in a sense, and therefore not transferred by a transfer of the obligation guaranteed, and cite *Black v. Sippy*, 15 Or. 574, 18 Pac. 418, as in point. An examination of this case shows, however, that it is rather an authority for the view we have expressed. A statute of Oregon made both husband and wife liable for supplies furnished the family. The defendant's husband purchased certain family supplies, and gave his note for the purchase price. The firm which furnished the supplies then assigned the note to the plaintiff, and, the note not being paid, the plaintiff brought suit, not against the husband on his

note, but against the wife upon her statutory liability. If, under these circumstances, it had been held that the obligation of the wife had not passed to the assignee of the note, but remained in the assignor, in whose favor the obligation was originally incurred, the case might perhaps be considered as tending to sustain the position of plaintiffs' counsel here. But that is exactly what was not held. On the contrary, it was held that the transfer of the note, evidencing as it did the

debt, transferred the wife's liability for the debt, and the assignee of the note was allowed to recover against her. The decision would seem to be very closely in point here in favor of the view we have expressed. In any case, the correctness of that view seems to us almost self-evident.

Judgment reversed.

We concur: Angellotti, Ch. J., Shaw, J.; Wilbur, J.; Lennon, J.; Lawlor, J.

Petition for rehearing denied July 15, 1920.

ANNOTATION.

Transfer of notes as carrying the original claim for which note was given.

As to indorsement of bank checks as carrying the title or right incident to the original claim for which the check was given, see note in 1 A.L.R. 454.

It is assumed in the present discussion that the note does not amount to payment of the original claim, but that the payee had, at least prior to the transfer, the option of suing either on the original claim or upon the note. In this state of facts the question under annotation presents itself; whether by transferring the note, the payee transfers this right to bring action upon the original consideration.

There is a difference of opinion upon this question. According to some cases, the transfer of a note given for a debt passes to the transferee any right to sue upon the original claim for which the note was given. *Taylor v. Perry* (1872) 48 Ala. 240; *Goldman v. Murray* (1912) 164 Cal. 419, 129 Pac. 462; *ELLISON v. HENION* (reported herewith) ante, 444; *Black v. Sippy* (1888) 15 Or. 574, 16 Pac. 418. The indorsee of a non-negotiable draft, which, it was held, could not be declared on as such, was held entitled to recover on the common money count, against the acceptor, in *Weston v. Penniman* (1817) 1 Mason, 306, Fed. Cas. No. 17,455. The court says that, by his acceptance, the acceptor undertook to hold the proceeds for the account of such person as should, by the indorsement or order of the payee,

entitle himself to the proceeds; that the plaintiff was the regular indorsee or appointee of the payee, and, after notice of this fact, the acceptor must be considered as holding the money for his use, and under such circumstances the law will imply a promise to pay the same over to him.

Accordingly the transferrer can no longer sue on the original claim. *ELLISON v. HENION* (reported herewith) ante, 444; but the transferee can (*Taylor v. Perry* (Ala.); *Goldman v. Murray* (Cal.); and *Black v. Sippy* (Or.) supra). An indorsee of drafts given for the price of a church clock was held entitled to maintain an action of assumpsit for the price of the clock, against those who bought it, in *Davidson v. Bridgeport* (1831) 8 Conn. 472. But in that case the motion stated not only that the drafts were negotiated, but also that all the rights of the vendor of the clock to the sum due from the defendants for the clock were indorsed and delivered to the indorsee of the draft.

These courts proceed upon the theory that the transfer of a note operates to constitute the transferee the party really interested in the debt for the payment of which the note was made. *Taylor v. Perry* (Ala.) supra. In holding that the transfer of corporate notes by the payee thereof to another, for a valuable consideration, passes to the transferee the original

indebtedness for which the notes were given, notwithstanding the notes themselves were invalid, the court in *Goldman v. Murray* (1912) 164 Cal. 419, 129 Pac. 462, says: "The intent of the parties—of Bowen on the one hand to assign, and of the plaintiff on the other to accept, the assignment of the corporation indebtedness—thus clearly evidenced by the transaction between them, is not affected by the fortuitous circumstance that the notes themselves were invalid as corporation obligations. They still had validity, not as negotiable instruments, but as evidencing the contract between Bowen and the plaintiff, and this contract amounted to a valuable equitable assignment. First, since no precise form of words or writing is necessary to the establishment of an equitable assignment, it matters not whether the notes were or were not the valid obligations of the corporation. They still afforded evidence of what, as between themselves, the plaintiff and the witness Bowen proposed to do, and did, with the indebtedness owed to the latter by the corporation. Second, as we have seen, the acknowledgment and acceptance by the corporation of the assignment of the debt of Bowen to plaintiff were not essential to the validity of the assignment; and, third, while authority is divided upon the question of the equitable assignability of a portion of a debt or fund before acceptance, the sounder view, we take it, is that expressed in 1 Daniel on Negotiable Instruments, § 23," to the effect that while the assignment of the note may not be an assignment at law, yet, in equity, it amounts to an assignment of the original claim.

Other cases take the view that the transfer of a bill or a note does not pass to the transferee a right of action on the original consideration for which the note was given. *Battle v. Colt* (1863) 26 N. Y. 404; *Ottenheimer v. Cook* (1872) 10 Heisk. (Tenn.) 309. That no action can be maintained on the original consideration by a second indorsee seems to be the theory of *Cason v. Wallace* (1868) 4 Bush (Ky.) 388, although the opinion indicates that an action on the original con-

sideration might have been brought by a first indorsee. The reason for this is not apparent. The transfer of a note given by a mortgagor, the amount whereof, when paid, to apply on the bond and mortgage, does not operate as an assignment pro tanto of the mortgage. *Fitch v. McDowell* (1895) 145 N. Y. 498, 40 N. E. 205.

The theory of these cases is well expressed by the court in *Battle v. Coit* (N. Y.) supra, as follows: "It is a maxim of the law that the incident shall pass by the grant of the principal, but not the principal by the grant of the incident. The sale by Battle to his copartners of his interest in the partnership property created a debt in his favor, for the price of the property and the drafts which he took were merely the evidences of the debt, and not the debt itself. As between the parties to the sale, the debt was the principal and the drafts the accessory. They were mere securities for the payment of the debt. Had Battle assigned the debt to the bank, such assignment might have operated as an equitable assignment of the drafts, within the principle that whatever transfers a debt carries with it the securities for the debt. But the transfer of an accessory to a debt does not transfer the debt; *accessorium non trahit principale*. Broom, Legal Maxims, 369, fol. 5. When the principal and incident are separable, and the incident is transferred, it becomes the principal as between the parties to the transfer, and the principal to which it was originally an accessory becomes either absolutely extinguished or temporarily suspended. Bills of exchange and promissory notes, payable at a future day, received by a vendor of chattels of his vendee, or by a creditor of his debtor, not as absolute payment, are within this class. . . . No case can be found in our own courts, except *Rose v. Baker* (1852) 13 Barb. (N. Y.) 230, to sustain the claim made by the Canal Bank of Lockport that the suspended right of action upon the original consideration for which Battle took the drafts passed to the bank by the simple transfer to it of the drafts. The decision.

in that case is erroneous, except so far as it is based upon the actual assignment of the original consideration to the plaintiff, and such error was the result of a misapplication of the rule that a purchaser of a debt is entitled to all the additional securities for it, though not expressly named in the transfer. Neither in that case, by the transfer of the notes, nor in the one under consideration by the transfer of the drafts, was the debt transferred for which the notes and drafts were received." The court then refers to the rule that securities for a note pass upon a transfer, and continues: "But Battle's right of action against all the purchasers of his interest in the copartnership property, after the maturity of the drafts, cannot be regarded as a collateral security for the payment of the drafts. At most, it can only be considered as collateral security for the payment of the original debt, for the unpaid purchase money. Conceding that this right of action was assignable, and doubtless it was assignable, it did not pass by the transfer of the drafts, and, not being otherwise assigned, the Canal Bank of Lockport was not the owner of the right of action, or cause of action, in this case, and Battle's release was a perfect bar to the action by the bank in his name. For these reasons the judgment should be affirmed." Some doubt is thrown upon the correctness of the decision in *Battle v. Coit*, in the subsequent case of *Dintruff v. Crittenden* (1873) 1 *Thomp. & C. (N. Y.)* 143. In the *Dintruff Case*, the court refers to the decision in *Bolen v. Crosby* (1872) 49 *N. Y.* 187, to the effect that the assignment of a judgment carries with it the claim upon which it was founded, and all claims collateral or incidental to it, and says that the *Bolen Case* is a strong one "upon the point that the transfer of the obligation given for a debt passes all other liabilities for the collection of such debt, and I think, in principle, overrules the case of *Battle v. Coit*." The actual decision in *Dintruff v. Crittenden*, is based upon the fact that there was an assignment of the right of action on the original claim. See *infra*.

In *Ottenheimer v. Cook* (1872) 10 *Heisk. (Tenn.)* 309, the note transferred was void because of usury, and the court, in holding that the assignment thereof did not pass a right of action on the original claim, says: "If the payee had sued on the original consideration, he could not have used the note to establish the debt; nor could the maker have used it to show that the pre-existing debt was extinguished. It could not, therefore, be used for any purpose to predicate a right upon, it not being voidable merely, but absolutely void. The assignment of the note, then, of itself, did not operate to transfer to the complainant the right of action the assignor may have had upon the original consideration. This could only have been done by a contract between the parties independent of the indorsement of the note, which is neither alleged nor proven to have been made."

In *Bischof v. Coffelt* (1854) 6 *Ind.* 23, an action in assumpsit by the assignee on two promissory notes, the court states that, "had the payee of the notes been the plaintiff, he might have recovered the real value of the cloth [for the purchase price of which the notes were given] under the common count. But *Bischof* is only assignee."

The transferrer of the note may assign the right of action on the original claim in transferring the note, and if he has done so the transferee of the note and claim may maintain an action on the latter. The holder of the note in *Dintruff v. Crittenden* (1873) 1 *Thomp. & C. (N. Y.)* 143, was held entitled to sue on the original claim. The transferee of the note received from the payee, after the dishonor of the note, an explicit parol surrender of all control, or a transfer of all right to enforce the original debt. This was held to amount to a clear equitable assignment or transfer, authorizing the holder to sue upon the original indebtedness in the same manner and to the same extent as the payee might have done originally, or, if he had taken back the note, on the surrender of the note at the trial.

The action in the reported case

(*ELLISON v. HENION*, ante, 444) was by the transferrer of the note. In that case, the right of the transferrer to maintain the action is denied on the ground that the right of action had been transferred to the assignee. In a number of cases the right of the payee who has transferred the note to maintain an action on the original consideration has been denied on other grounds so long as the note is outstanding. *Harris v. Johnston* (1806) 3 Cranch (U. S.) 317, 2 L. ed. 452; *Davidson v. Bridgeport* (1831) 8 Conn. 472; *Salomon v. Pioneer Co-Op. Co.* (1885) 21 Fla. 374, 58 Am. Rep. 667 (draft); *Eckert v. Marhoefer* (1915) 192 Ill. App. 154; *Woolfolk v. Degelos* (1872) 24 La. Ann. 199; *Alcock v. Hopkins* (1850) 6 Cush. (Mass.) 484; *Morton v. Austin* (1853) 12 Cush. (Mass.) 389; *Battle v. Coit* (1863) 26 N. Y. 405 (obiter); *McLean v. Griot* (1907) 118 App. Div. 100, 103 N. Y. Supp. 129 (obiter); *Ex parte Williams* (1882) 17 S. C. 396; *Davis v. Reilly* [1898] 1 Q. B. (Eng.) 1, 66 L. J. Q. B. N. S. 844, 77 L. T. N. S. 399, 46 Week. Rep. 96. But in *Blum v. Jurick* (1913) 83 Misc. 116, 144 N. Y. Supp. 822, an action on an account stated, which also contained counts for money loaned, was sustained, although the defendant pleaded that he had given notes for and on account of the debt, which notes had been discounted by the plaintiff.

In some cases, this holding that the transferrer cannot maintain the action is based on the theory that the taking of the note amounts to a conditional payment of the original consideration, and that where the note is transferred, and so long as it remains in the hands of a transferee, it operates as an absolute payment of the original consideration. *Battle v. Coit* (1863) 26 N. Y. 405 (obiter); *McLean v. Griot* (1907) 118 App. Div. 100, 103 N. Y. Supp. 129 (obiter); *Woolfolk v. Degelos* (1872) 24 La. Ann. 199 (draft); *Ex parte Williams* (1882) 17 S. C. 396. A note taken for a pre-existing indebtedness under an express agreement that it was to be in payment of the debt was held to constitute payment, where the note was subsequently sold

to a third person, in *W. D. Chemical Co. v. Teel* (1916) 200 Ill. App. 118.

The creditor who receives the obligation of his debtor for his debts, and sells such obligation for less than its nominal value, cannot sue on the original debt to recover the difference. *Donnelly v. District of Columbia* (1886) 119 U. S. 339, 30 L. ed. 465, 7 Sup. Ct. Rep. 276. But a creditor who has accepted his debtor's note under the mistaken belief that the note represents the amount due him is held not precluded from recovering an additional amount actually due him, even though he had negotiated the note, in *Distributors Coal Co. v. Race* (1918) 211 Ill. App. 501.

A tenant who has given a note for rent, and thereafter paid the note to an indorsee of his landlord, cannot be held liable for rent to the purchaser of the land upon a foreclosure sale. *Hunter v. Henry* (1916) — Mo. App. —, 181 S. W. 597. The court says that "after the creditor has negotiated the note, he has accepted it as payment of the debt in evidence."

In *Lawrence v. United States* (1896) 71 Fed. 228, a materialman who had furnished materials for use in a building being erected by a government contractor accepted from the contractor a draft on the Treasury Department for the amount of his claim, and afterwards sold the draft, not assuming, as far as the evidence showed, any guaranty, or personal liability, therefor. The draft being valueless, it was held that the transferee of the draft could not resort to the original account, because the materialman could not do so, since he took the draft and used it, selling it for what it would bring.

In other cases the transferrer is denied the right to recover, on the theory that upon the negotiation of the note he received value; that he is thereby paid the original consideration, and cannot recover again. *Harris v. Johnston* (1806) 3 Cranch (U. S.) 317, 2 L. ed. 452.

In other cases, the holding is based on the technical ground that an action will not lie for the price of goods for which a bill of exchange has been

given, while the bill is outstanding in the hands of a third party. *Davis v. Reilly* [1898] 1 Q. B. (Eng.) 1, 66 L. J. Q. B. N. S. 844, 77 L. T. N. S. 399, 46 Week. Rep. 96. The reason for denying recovery upon the original consideration for which a draft afterwards transferred by the payee was given has been stated to be, "not that the debt has been paid, but that a suit may afterwards be brought by the indorsee, and so the party may be compelled to pay the debt a second time." *Davidson v. Bridgeport* (1831) 8 Conn. 472 (obiter).

If the original creditor takes up the paper thus transferred, he is remitted to his original rights, and may bring his action upon the paper or upon the original consideration, at his election. *Harris v. Johnston* (1806) 3 Cranch (U. S.) 317, 2 L. ed. 452 (obiter); *Lyman v. Bank of United States* (1851) 12 How. (U. S.) 225, 13 L. ed. 965; *Looney v. District of Columbia* (1884) 113 U. S. 258, 28 L. ed. 974, 5 Sup. Ct. Rep. 463; *Lawrence v. United States* (1896) 71 Fed. 228; *Davidson v. Bridgeport* (1831) 8 Conn. 472 (obiter); *Salomon v. Pioneer Co-op. Co.* (1885) 21 Fla. 374, 58 Am. Rep. 667 (draft); *Norton v. Paragon Oil Can Co.* (1896) 98 Ga. 468, 25 S. E. 501; *Alcock v. Hopkins* (1850) 6 Cush. (Mass.) 484 (draft); *Lord v. Bigelow* (1878) 124 Mass. 185; *Moore v. Jacobs* (1906) 190 Mass. 424, 76 N. E. 1041; *Battle v. Coit* (1863) 26 N. Y. 405 (obiter); *McLean v. Griot* (1907) 118 App. Div. 100, 108 N. Y. Supp. 129; *Kean v. Dufresne* (1817) 3 Serg. & R. (Pa.) 233; *Burden v. Halton* (1828) 4 Bing. 454, 130 Eng. Reprint, 842, 1 Moore & P. 223, 6 L. J. C. P. 61, 3 Car. & P. 174. The payee may maintain an action on the original consideration where the note has been reassigned to him by separate writing, provided he can show that the note has been lost, or can produce it on trial. *Burdick v. Green* (1818) 15 Johns. (N. Y.) 247. It has been held that the action on the original account may be maintained by the original creditor, even after a suit has been brought on the note by the indorsee, if the creditor is able and offers to bring

the note into court and surrender it to the debtor. *McConnell v. Stettinius* (1845) 7 Ill. 707. The transfer of the paper does not extinguish the original claim. *Norton v. Paragon Oil Can Co.* (1896) 98 Ga. 468, 25 S. E. 501, holding that a partnership debt is not extinguished by the giving of a note by one of the partners upon the date of the dissolution, and the indorsement of such note by the creditor.

That a creditor who received a non-negotiable note or certificate upon his debtor, and sold the same, could not, after the debtor had paid it to the purchaser, maintain any action against the debtor, is held in *Looney v. District of Columbia* (1884) 113 U. S. 258, 28 L. ed. 974, 5 Sup. Ct. Rep. 463.

The receipt by a creditor of his debtor's note payable to the debtor's order, indorsed by the debtor, who forged other indorsements thereon, so as to give it negotiable value, his own signature being of no negotiable value, and the indorsement and negotiation thereof by the creditor, do not constitute a payment of the debt, since the creditor is bound to restore the amount received from the negotiation of the note. *Simpson v. New Orleans* (1903) 109 La. 898, 33 So. 912.

It has been held that the bill must be in the vendor's hands at the commencement of the suit; the fact that he thereafter, and before trial, acquires it so that he is able to surrender it on the trial, is not sufficient to sustain the action. *Davis v. Reilly* [1898] 1 Q. B. (Eng.) 1, 66 L. J. Q. B. N. S. 844, 77 L. T. N. S. 399, 46 Week. Rep. 96. But in *Burden v. Halton* (1828) 4 Bing. 454, 130 Eng. Reprint, 842, an action by a vendor against his purchaser for goods sold and delivered was maintained where bills which had been given to the vendor, and had been transferred by him, had after the commencement of the action, but before trial, been placed again in his hands. The court says: "There is no evidence of these bills having been transferred to the indorsees for con-

sideration, and they were sent back to the plaintiff without any money passing. The authorities show that if the bills had remained in the hands of third persons, that would have been a defense to the action, because the defendant might have been called on to pay them, but as they were in the hands of the plaintiff, and overdue at the time of the trial, that could

never happen." And in *Moore v. Jacobs* (1906) 190 Mass. 424, 76 N. E. 1041, a creditor was held entitled to maintain an action to establish a mechanic's lien, although he had not taken up his notes until after the filing of his petition; but he subsequently took them up, and produced them before the auditor and the court to be canceled. W. A. E.

SCHILLER PIANO COMPANY, Appt.,
v.
ILLINOIS NORTHERN UTILITIES COMPANY.

Illinois Supreme Court — June 18, 1919.

(288 Ill. 580, 123 N. E. 631.)

Public utilities — charges — nullification of contract.

1. A statute forbidding public utilities to furnish service at less than an approved schedule of rates does not nullify a contract by which a power company purchased rights in a power dam, in consideration of furnishing power to the owner free of charge.

[See note on this question beginning on page 460.]

Property — rights in.

2. All property in a state is held on the implied condition or obligation that the owner will so use it as not to interfere with the rights of others, and subject to such reasonable regulations as the legislature may impose upon its use in order to protect the public and others in the use of their property.

[See 22 R. C. L. 40.]

— subject to police power.

3. Property is held subject to the police power of the state so to regulate its use in a proper case as to secure the safety, health, morals, good order, and general welfare of the community.

[See 22 R. C. L. 40, 41.]

Constitutional law — police power — limit.

4. An unreasonable invasion of private rights or impairment of rights of property guaranteed by the Constitution, under the guise of the police power, will not be sustained.

[See 6 R. C. L. 194, 236-239.]

— contract — limitation.

5. The contract clause in the Federal Constitution does not prohibit the state from passing laws for the protection of the public health, safety, or morals.

[See 6 R. C. L. 199.]

— scope of police power.

6. An act which has no tendency to affect or injure the public health, safety, morals, or welfare, and which is entirely innocent in character, is not within the police power.

[See 6 R. C. L. 238, 239.]

— regulation of rates — confiscation.

7. If regulation of the charges and business of a public utility operates as a confiscation of private property, or constitutes an arbitrary or unreasonable infringement of personal or property rights, it violates the constitutional guaranty against deprivation of property without due process of law.

[See 6 R. C. L. 484; 9 R. C. L. 1191.]

Contract — sale of water rights for power — validity.

8. A contract by which one sells his share of the power of a dam in consideration that the grantee shall supply him with power free of charge is not invalid at common law.

Property — duty of government.

9. The right of property is a fundamental right, and its protection is one of the most important objects of government.

[See 6 R. C. L. 261, 262.]

APPEAL by complainant from a decree of the Circuit Court for Ogle County (Heard, J.) dissolving a temporary injunction and dismissing a bill filed to enjoin defendant, cross complainant, from turning off or discontinuing the power to complainant's plant under an alleged contract to supply said power, and for the enforcement of the contract. *Reversed.*

The facts are stated in the opinion of the court.

Mr. J. C. Seyster, for appellant:

The prohibition of the Constitution against the passage of laws impairing the obligations of contracts applies to contracts of the state and those of its agents, as well as those between individuals.

Wolff v. New Orleans, 103 U. S. 358, 20 L. ed. 395; New Jersey v. Wilson, 7 Cranch, 164, 3 L. ed. 303; Providence Bank v. Billings, 4 Pet. 514, 7 L. ed. 939; Davis v. Gray, 16 Wall. 203, 21 L. ed. 447.

Contracts valid when made cannot be made invalid by subsequent statute declaring that they are unenforceable.

3 Page, Contr. § 1761.

Private property cannot be taken or damaged under the police power without making compensation, even though taken or damaged to promote the public morals, health, or safety. Much less can it be taken or damaged to promote the public welfare.

1 Nichols, Em. Dom. ¶¶ 271-284.

The contracts made between the complainant and the Oregon Power Company, assignor to defendant, were, in effect, a reservation to the complainant of 72.4 kilowatts of power or energy, and therefore it should be held still to enjoy it.

Raymond Lumber Co. v. Raymond Light & Water Co. 92 Wash. 330, L.R.A.1917C, 574, P.U.R.1916F, 437, 159 Pac. 137.

The Illinois Utilities Act is not retrospective, and does not apply to contracts made before it went into force.

Louisville & N. R. Co. v. Mottley, 133 Ky. 652, 118 S. W. 982, 150 Fed. 406.

The complainant in the cross bill has not done or offered to do equity in the premises, and, under the maxim that he who seeks equity must do equity, it is not entitled to any relief.

1 Pom. Eq. Jur. § 385; 2 Am. & Eng. Enc. Law, 158.

A restriction of the most general nature, with the public health, safety, or morals most clearly its object, if in effect it deprives the owner of lawfully acquired property, which is not in itself a nuisance, of the opportunity to make any beneficial use thereof,

may be held to be so severe as to amount to a taking, and to be forbidden by the Constitution, unless the property which it affects is paid for.

1 Nichols, Em. Dom. ¶ 99, p. 273; Bent v. Emery, 173 Mass. 495, 53 N. E. 910; Wynehamer v. People, 13 N. Y. 378; People ex rel. McPike v. Van De Carr, 178 N. Y. 425, 66 L.R.A. 189, 102 Am. St. Rep. 516, 70 N. E. 965.

When a statute is not based on public morals, health, or safety, but only on public welfare, the right of the public to take or injure property is much more limited.

Welch v. Swasey, 214 U. S. 91, 53 L. ed. 923, 29 Sup. Ct. Rep. 567; Chicago v. Gunning System, 214 Ill. 628, 70 L.R.A. 230, 73 N. E. 1035, 2 Ann. Cas. 892; People ex rel. Friend v. Chicago, 261 Ill. 16, 49 L.R.A.(N.S.) 438, 103 N. E. 609, Ann. Cas. 1915A, 292.

Under the power to regulate property in behalf of the public welfare, the state may fix rates to be charged by public service corporations, but a statute setting the rates so low that the stockholders of the company cannot get a reasonable return on their investment is a taking of property without compensation.

Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047.

When land or other property is actually taken from the owner and put to use by the public authorities, the constitutional obligation to make just compensation arises, however much the use to which the property is put may enhance the public health, morals, or safety.

Nichols, Em. Dom. ¶ 102, p. 282; Markham v. Brown, 37 Ga. 277, 92 Am. Dec. 73; Manning v. Bruce, 186 Mass. 282, 71 N. E. 537; Allen v. De'roit, 167 Mich. 464, 36 L.R.A.(N.S.) 890, 133 N. W. 317; Chicago v. Le Moyne, 56 C. C. A. 279, 119 Fed. 662; Chicago v. Jackson, 196 Ill. 496, 63 N. E. 1013, 1135; Sweet v. Rechel, 159 U. S. 380, 40 L. ed. 188, 16 Sup. Ct. Rep. 43; Bradbury

v. Vandalia Levee & Drainage Dist. 236 Ill. 36, 19 L.R.A.(N.S.) 991, 86 N. E. 163, 15 Ann. Cas. 904; People ex rel. Peeler v. Chicago & E. I. R. Co. 262 Ill. 496, L.R.A.1915B, 486, 104 N. E. 831; Beidler v. Sanitary Dist. 211 Ill. 628, 67 L.R.A. 820, 71 N. E. 1118; Belleville v. St. Clair County Turnp. Co. 234 Ill. 428, 17 L.R.A.(N.S.) 1071, 84 N. E. 1049; Chicago v. O'Brien, 111 Ill. 532, 53 Am. Rep. 640; Louisville & N. R. Co. v. Mottley, 133 Ky. 652, 118 S. W. 982.

Messrs. Francis Bacon and Ralph D. Stevenson for appellee.

Farmer, J., delivered the opinion of the court:

This appeal is prosecuted by the Schiller Piano Company from a decree of the circuit court of Ogle county denying the relief prayed in a bill filed by the Schiller Piano Company against the Illinois Northern Utilities Company, and dismissing the bill for want of equity.

The bill alleged, in substance, that appellant is, and has been for more than twenty years, engaged in the manufacture of pianos at Oregon, Illinois, at the west end of a dam there located across Rock river for the purpose of furnishing power for carrying on various manufacturing enterprises. The dam was alleged to be 924 feet long, and of sufficient height to create power estimated equal to 1,000 horse power. December 28, 1910, appellant owned 117 horse power created by said dam, and on that day it entered into a contract with the Oregon Power Company whereby appellant sold and transferred its 117 horse power created by the dam to the Oregon Power Company, in consideration of the agreement of that company to furnish the appellant perpetually thereafter, at its factory, with 90 kilowatts of electrical power free of charge, and all power furnished appellant in excess of 90 kilowatts should be paid for. The Oregon Power Company agreed to pay appellant \$25 per day for each day it failed to furnish the power as agreed. The contract was performed until May 2, 1912, when a new contract between the parties

was made, by which the Oregon Power Company was released from its obligations created by the former contract, and by the new contract the Oregon Power Company, for itself, its successors and assigns, agreed to continuously supply appellant with 72.4 kilowatts of electrical power or energy free of charge, unless prevented by act of God or inevitable accident. The contract of May 2, 1912, it is said, was made in lieu of the contract of December 28, 1910, because, while it is undisputed that 117 horse power owned by appellant would create 90 kilowatts of electrical energy, there would be such loss in transmitting it to appellant as would reduce it to 72.4 kilowatts. At the time the contract of May 2 was made, the Oregon Power Company owned a steam plant at the west end of the dam, to be used to supply power when the dam for any reason failed to do so. Shortly after the date of the second contract, the Oregon Power Company sold and transferred its rights and properties in the dam to the Illinois Northern Utilities Company, appellee, which assumed the obligations of the Oregon Power Company, and furnished appellant power according to the contract until October 25, 1913, when it notified appellant in writing that, the dam having been taken out by high water, it would discontinue furnishing appellant power after November 1 following. The bill alleges a break had occurred in the dam, which could have been easily repaired, but appellee neglected and refused to repair it. The bill was filed October 31, alleging all the facts and the injury appellant would suffer if appellee did not furnish it power, and praying appellee be enjoined from turning off or discontinuing the power to appellant's plant under the contract, and that said contract be enforced. A temporary writ of injunction was issued.

Appellee answered the bill and denied appellant was entitled to the relief prayed. The case was referred to the master in chancery to take and report the proofs, together with

his findings thereon. The appellant having closed its proofs, at the January term, 1917, a rule was entered against appellee to close its proofs by the first day of the next term of the court. The record does not show the rule was complied with, but on October 9, 1918, appellee filed its cross bill, alleging it was a corporation organized under the laws of Illinois; that it owned and operated for public use, property for the production, transmission, sale, and delivery of electric light, heat, and power in the vicinity of Oregon and other parts of Illinois; that from the time the cross complainant acquired the property of the Oregon Power Company, to October 31, it had voluntarily supplied appellant with power, and that since that time it had furnished power under compulsion of the injunction granted by the circuit court. The cross bill alleged that January 1, 1914, the Public Utilities Act went into effect; that appellee is a public utility, and the act provides that charges for service made by a public utility shall be reasonable and just, and all unjust and unreasonable charges shall be unlawful; that the act requires a public utility company to file with the state public utilities commission a schedule of its rates and charges, and prohibits charging or receiving any different rate than that provided in the schedule of rates. The substance of some of the provisions of the Public Utilities Act are set out, and the cross bill avers that by virtue of said act the contract to furnish appellant power became unlawful, and it became and is unlawful for appellee to supply appellant with power free of charge. The cross bill prays that the temporary injunction be dissolved and appellant's bill dismissed.

Appellant answered the cross bill, denying appellee had furnished it power free of charge, and averring that it had paid for its power by the consideration expressed in the contract. The answer further denied the performance of the contract was rendered unlawful by the Public

Utilities Act (Hurd's Rev. Stat. 1917, chap. 111a), and denied appellee was entitled to the relief prayed in the cross bill. The motion to dissolve the injunction was heard on the pleadings and affidavits in support of and in opposition to the motion, and a decree entered dissolving the injunction and dismissing the original bill.

Three questions involved are: (1) Whether the Public Utilities Act made the contract unlawful, and to compel its performance by continuing the injunction in force would be requiring appellee to violate the law; (2) whether the original contract was invalid at common law, in that it unfairly discriminated in favor of appellant; (3) whether appellant's bill alleged facts entitling it to the writ of injunction.

All property in a state is held on the implied condition or obligation that the owner will so use it as not to interfere with the rights of others, and subject to such reasonable regulations as the legislature may impose upon its use in order to protect the public and others in the use of their property. It is held subject to the police power of the state to so regulate its use in a proper case as to secure the safety, health, morals, good order, and general welfare of the community. There are limitations, however, to the police power, and an unreasonable invasion of private rights or impairment of the rights of property guaranteed by the Constitution, under the guise of the police power, will not be sustained.

The constitutional prohibition upon a state to pass any law impairing the obligation of contracts does not limit the right of or prohibit the state from passing laws for the protection of the public health, safety, or morals, and rights and privileges arising from contracts are subject to such regula-

Property—
rights in.

—subject to
police power.

Constitutional
law—police
power—limit.

—contract—
limitation.

tions. Instances of these principles frequently cited are that, when entered into, a contract to sell liquor, operate a brewery or distillery, or conduct a lottery may be lawful, but such contracts are subject to impairment by a change of policy on the part of the state. That such change of policy by the state may prevent the enjoyment of individual rights in property, without providing compensation therefor, does not necessarily render such legislation unconstitutional; but such legislation must, to be within the police power, be reasonable in its operation on persons affected by it, and not unduly oppressive. Such statutes are sustained on the theory that they are necessary for the safety, health, morals, or welfare of the public, and a restriction or regulation without reason or necessity cannot be enforced.

The measure of reasonableness of a police regulation is not necessarily what is best, but what is fairly appropriate under all the circumstances. Legislation in the exercise of the police power must have relation to and be appropriate for the protection, preservation, and promotion of the public health, safety, morals, or welfare. An act which has no tendency to affect or endanger the public in any of those particulars, and which is

—scope of police power.

entirely innocent in character, is not within the police power. These general principles are universally recognized, and will be found discussed and numerous authorities referred to in 6 R. C. L. 193 et seq. Under the police power, the state has authority to enact legislation to regulate the charges and business of a public utility corporation; but if such legislation operates as a confiscation of private property, or constitutes an arbitrary or unreasonable infringement on personal or property rights, it will be held void,

—regulation of rates—confiscation.

as in violation of the constitutional guaranty that no person shall be deprived of his property

without due process of law. The Public Utilities Act of this state has no relation to the public health, safety, or morals, but was enacted to protect the public against unreasonable charges and discrimination and to promote the general welfare.

When the contract between the Oregon Power Company and appellant was made, it was a valid and lawful agreement, not contrary to the common law or any statute. Contracts void at common law are contracts against public policy because injurious to the public welfare.

Contract—sale of water rights for power—validity.

This was not such a contract. Appellant, by the contract, sold and transferred to the Oregon Power Company the 117 horse power of which it was then the owner, in consideration of the agreement of the Oregon Power Company that it, its successors and assigns, would furnish appellant the power agreed upon. The contract was performed by that company until it sold the dam and all its rights therein to appellee, the Illinois Northern Utilities Company, and that company continued to furnish the power under the contract until October 25, 1913, when it notified appellant that because the dam, or part of it, had been washed out, it would discontinue supplying power November 1 following. In October, 1918, appellee's cross bill was filed alleging the passage and approval of the Public Utilities Act; that it became effective January 1, 1914, and that said act made it unlawful for appellee to perform the contract. It must be assumed that what appellee's predecessor acquired from appellant under the contract was worth the consideration agreed to be paid. Appellee purchased the property with knowledge of the contract and the consideration for it. It acquired the property and rights of appellant, and became obligated to pay the consideration therefor. It now seeks to avoid that obligation on the ground that the Public Utilities Act was enacted by the legislature in the exercise of the police power and that said act renders the

performance of the contract unlawful.

That the Public Utilities Act was a valid exercise of the police power for the purposes for which it was enacted must be conceded, but it does not necessarily follow that it operated to render the performance of this contract unlawful. The object of the statute was to regulate public service corporations in the interest of the public welfare. Any contract to furnish service in violation of that act would be unlawful, but the situation here presented is not a contract to furnish appellant

**Public utilities—
charges—nulli-
fication of
contract.**

power at a less rate than the approved schedule of charges.

It may be conceded that if appellant, owning no interest in the dam, had, before the passage of the Public Utilities Act, entered into a contract with appellee to purchase power at a certain rate or charge per annum, and the rate fixed was lower than the authorized schedule, the performance of the contract would have been unlawful after the act went into effect. Here, however, appellant conveyed and transferred its property as the consideration for the power, and the effect of holding the performance of the agreement was made unlawful by the legislation referred to takes from appellant its property without compensation and without due process of law. The right of appellant under the contract was property. The right of property is a fundamental right, and its

**Property—duty
of government.**

protection is one of the most important

objects of government. There is nothing in the contract and its performance which is detrimental to the public interest and welfare, for the protection and promotion of which the Public Utilities Act was adopted. It jars unpleasantly on one's sense of justice to say the effect of the statute was to destroy or confiscate appellant's property for the benefit and advantage of appellee.

We are aware courts have gone to

considerable length in holding that legislation enacted in the proper and reasonable exercise of the police power will not be held invalid because it may impair the obligation of contracts, or deprive the owner of property without due process of law, but the qualification that such legislation must be proper and reasonable for the purpose sought to be accomplished is an important one. True, private rights must yield to consideration of the public safety, health, morals, and welfare, and no investment in property, however large, will preclude the exercise of the governmental power of regulation when reasonably necessary for these purposes; but our attention has not been called to any case where the exercise of such power has been sustained when not necessary for these objects. None of the subjects which are the valid basis for the exercise of the police power were involved in the contract. It could in no way affect the public health or safety, and was not contrary to good morals or the public interest and welfare. If the protection of one or more of these things is necessary to a valid exercise of the police power, how can it be said the performance of the contract was made unlawful by the statute? It seems to us it would be pushing the valid exercise of the police power to unreasonable limits to so hold.

It must be admitted the situation here is unusual and could not have been contemplated by the legislature. That body, in enacting the Public Utilities Act, sought only to regulate public service companies. It did not intend to destroy property where such destruction was wholly unnecessary to accomplish the objects and benefits of the legislation. Full effect may be given the statute for the purposes for which it was enacted, and the contract performed at the same time without injury of any character to the public. On the contrary, it would offend against good morals and common honesty, now that appellant has conveyed its property to appellee, to

give the statute the effect of having relieved appellee of the obligation to pay for it. We would only be justified in so construing the statute if such construction were reasonably necessary for the protection of the public. This we have endeavored to show is neither involved nor necessary in sustaining this contract. The contract did not provide for furnishing free service. The equivalent in value for the service agreed to be furnished was paid by appellant by the conveyance of its property.

We have not overlooked *Hite v. Cincinnati, I. & W. R. Co.* 284 Ill. 297, 119 N. E. 904; *Louisville & N. R. Co. v. Mottley*, 219 U. S. 467, 55 L. ed. 297, 34 L.R.A. (N.S.) 671, 31 Sup. Ct. Rep. 265, and other cases relied on by appellee, some of which we think distinguishable and others not controlling.

The decree of the Circuit Court is reversed, and the cause remanded for further proceedings not inconsistent with the views herein expressed.

ANNOTATION.

Service contract by public utility, in consideration of conveyance of property, by individual or private corporation, as affected by public utility acts.

As to the power of public service commissions to increase franchise rates, see annotation appended to *Salt Lake City v. Utah Light & Traction Co.* 3 A.L.R. 730, and *Virginia-Western Power Co. v. Com.* 9 A.L.R. 1165.

The general subject of the power of the state to change private contract rates for public utilities is treated in the annotation appended to *Union Dry Goods Co. v. Georgia Public Service Corp.* 9 A.L.R. 1423. The statement is made in the last-mentioned annotation that it is generally held that rate regulations do not unconstitutionally impair existing contracts between public service corporations and consumers; that this does not mean, necessarily, that the state may not authorize the making of a contract with a public utility for a limited period, with which it could not subsequently interfere without unconstitutional impairment of the contract, but does mean that such authorization has not been generally given, and that private contracts with such utilities are regarded as entered into subject to reserved authority in the state, under the police power, or express statute, or constitutional provision, to modify the contract rates in the interest of the public welfare.

In the reported case (*SCHILLER PIANO CO. v. ILLINOIS NORTHERN UTILITIES Co.*) ante, 454, it was held that a statute forbidding public utilities to

furnish service at less than an approved schedule of rates did not nullify a contract by which a power company purchased rights in a power dam, in consideration of furnishing power to the owners free of charge. The court stated that it might be conceded that if the plaintiff, who was seeking to compel the utility to perform the contract, had owned no interest in the dam, and before the passage of the Public Utilities Act had entered into a contract with the utility to purchase power at a certain rate lower than the authorized schedule, the performance of the contract would have been unlawful after the act took effect; but that in this case the plaintiff had conveyed its property as the consideration for the power, and the effect of holding that the performance of the agreement was made unlawful by the Utilities Act would be to take from it its property without compensation and without due process of law. The court construed the Public Utilities Act as not intended to be applied to the particular circumstances in question so as to nullify the contract, but was also apparently of the opinion that the act could not constitutionally be so applied. The court does not clearly state the grounds on which it distinguishes the case before it from the other decisions which it cites to a contrary effect. If, as it seems, the view was taken that, because the ren-

dering of service by the power company without charge was in return for an executed consideration, the cancellation of the contract would take property without due process of law, the decision seems in conflict with the majority of the cases cited in this note. Whatever interpretation is placed upon the decision in the *SCHILLER PIANO CO. CASE*, it seems clear that if the grantor, in a grant to a public utility of a water right, for example, as a part of the consideration, is to receive service from the utility at a prescribed rate, and this right is abrogated by a subsequent public utility act or commission, the grantor should, in some form of proceeding or by some method, be entitled to compensation, not for the value of the contract right, but for the balance of the consideration which that right was supposed to represent at the time of the conveyance. In the case, for example, of the grant of a railroad right of way in consideration for a pass on the railroad, if the contract for the pass is subsequently rendered illegal, the grantor should receive damages, which would not be, of course, the value of the pass, but the value of the right of way granted. This view does not seem necessarily in conflict with the holding in any of the cases cited in the annotation, and is directly supported by the case of *Louisville & N. R. Co. v. Crowe* (1913) 156 Ky. 27, 49 L.R.A.(N.S.) 848, 160 S. W. 759, which is set out *infra*. In this connection, attention is called also to the statement by the United States Supreme Court, in *Louisville & N. R. Co. v. Mottley* (1911) 219 U. S. 467, 55 L. ed. 297, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 265, *infra*, in holding a contract for a pass, in consideration of a release of a claim for damages, unenforceable after the passage of the Commerce Act of 1906, that "whether, without enforcing the contract in suit, the defendants in error may, by some form of proceeding against the railroad company, recover or restore the rights they had when the railroad collision occurred, is a question not before us, and we express no opinion on it."

In *State ex rel. Raymond Light & Water Co. v. Public Service Commission* (1915) 83 Wash. 130, 145 Pac. 215, as explained in *Raymond Lumber Co. v. Raymond Light & Water Co.* (1916) 92 Wash. 330, L.R.A.1917C, 574, P.U.R. 1916F, 437, 159 Pac. 133, under the Washington Commission Act prohibiting discrimination between patrons of water companies, but providing that nothing therein shall be construed to prevent any company from continuing to furnish its products under any existing contract, though giving the commission power, in its discretion, to direct the termination of such contracts, it was held that prior contracts between a water company and mill companies, purporting to provide for the furnishing of water free to the latter, were not rendered void or voidable by the act, and that the commission might set aside an order rendered by it, directing termination of the contract, where it appeared that the water plant formerly belonged to the mill companies, and the contracts carried out a reservation of water made in connection with the transfer by them of the plant, although the deed contained no express reservation of water rights. The court said: "It was intended, no doubt, that when a contract of the character of these in question is detrimental to the service of the company furnishing water, the public service commission, if it finds this to be a fact, may direct the termination of such contract. It would be for the parties to the contract to terminate it. If it was a void contract, it might be terminated without damages. If it was a valid and binding contract, before it could be terminated, damages would necessarily be assessed. It could not be reasonably contended that if a public service corporation furnishing water to a city had acquired by purchase the right to take a certain portion of a stream for the purpose of furnishing water to its patrons, and it should eventuate that the whole stream was necessary, the public service commission would have the power to require the owner of the stream to deliver it to the public service corporation without compensation."

The public service commission could only direct that the public service corporation should acquire the stream by proper and legal methods. And so, in this case, these were valid contracts when entered into, upon valid and good considerations. The Commission Act, as above stated, exempts these contracts from the operation of the statute, except that the public service commission, in the exercise of its discretion, may require the companies, or the parties to the contracts, to terminate them." This case was explained and distinguished in *Raymond Lumber Co. v. Raymond Light & Water Co.* (Wash.) *supra*, where the court overruled any expressions in the opinion in the former case not in harmony with its decision in the latter that private contract rates for public utilities are made subject to the police power, under which the state may modify the contracts; and explained its former decision on the ground that in that case the consumer had previously owned the water, and conveyed it with a reservation,—in other words, did not convey the entire title; and that the contract was not subject to termination under the Public Service Commission Law without compensation, because the title of the consumer, which had been reserved, was not subject to be divested except by proper legal proceedings.

Generally, even where the free or reduced rate by the utility was given in consideration of a conveyance of property, it has been held that the contract might be rendered unenforceable by subsequent legislation. But it will be observed that in these cases there was a conveyance of the entire property, and apparently no ground for a contention that the grantor had retained an interest in the property itself.

Thus, a contract by which a railway company, as part of the purchase price of a private logging railway owned by a lumber company, agreed to transport the railway company's logs at a specified rate, was held, in *Seaman v. Minneapolis & R. River R. Co.* (1914) 127 Minn. 180, 149 N. W. 134, to be rendered inoperative by subsequent statu-

tory rate regulations, establishing a tariff higher than the contract rate. The action was to recover for unlawful discrimination in freight rates, and the defendant sought to justify the discrimination by reason of the contract above referred to, it being claimed that, as the agreement when made was not contrary to statute or illegal, it continued to be lawful. This contention, the court said, was not sustained, and quoted the doctrine that if one agrees to do a thing which it is lawful for him to do, but which becomes unlawful by statute, the latter avoids the promise. The court referred, as applicable, to the decision of the United States Supreme Court in *Louisville & N. R. Co. v. Mottley* (1911) 219 U. S. 467, 55 L. ed. 297, 34 L.R.A. (N.S.) 671, 31 Sup. Ct. Rep. 265 (set out *infra*); and concluded with the statement that "the proposition that our rate legislation rendered these contracts inoperative we consider too clear to require further discussion or citation of authority."

And a contract for the sale of a municipal lighting plant, by which the purchaser agreed to furnish electricity at specified rates, was held, in *Durant v. Consumers' Light & P. Co.* (1918) — Okla. —, P.U.R.1919C, 46, 177 Pac. 361, to be subject to change, so as to permit an increase in the rates by the corporation commission, under a statute in force at the time the contract was made, giving the commission general supervision over public utilities, with power to establish rates.

But in *Taylor v. Niles* (1913) 35 Ohio C. C. 445, it was held that a right-of-way agreement, valid when made, by which an interurban railroad company stipulated for a 5-cent fare from the owner's property to a near-by city, was not abrogated by the subsequent passage of the Railroad Commission Act, and the adoption and publication by the railway company of a schedule of rates, which was approved by the commission, ignoring the agreement and fixing a 10-cent rate between the points in question. And it was held that the court would decree specific performance of the contract, and enjoin the charging of a higher rate than

that fixed therein, where the agreed statement of facts on which the case was submitted did not show that the rate specified in the contract was unfair or unjust, either to the company or to the public. The statute, it appears, established a railroad commission, provided for the regulation of railway rates, and prohibited unjust and unreasonable charges. And the court does not, apparently, hold that the state, through the commission, could not abolish the contract rate, if unreasonable or discriminatory, but holds merely that the contract should be considered in determining this question of reasonableness, and that the railway company should not be permitted to disregard its contract merely by the filing of a higher rate schedule and obtaining the commission's approval thereof.

The power of the state to modify a contract by which a water utility undertook to furnish water free to a railroad company, at a certain point, in consideration of the right to lay its pipes along the railroad right of way, is recognized in *Southern P. Co. v. Spring Valley Water Co.* (1916) 173 Cal. 291, L.R.A.1917E, 680, 159 Pac. 865, the court stating that the power to revise and reform contracts of public service water companies, in the interest of the public, applies as well to a contract creating, or attempting to create, an easement in the water held for public use, as to any other disposition thereof; and that the agreement was subject to revision in the public interest by the railroad commission. It was held, however, that in the absence of any public regulation the contract was valid, and could be enforced by the railroad company.

Although the case is treated as one in which the utility was voluntarily attempting to increase its rates, rather than as one involving the power of the state to modify the rates, attention is called to *Long Beach v. Long Beach Power Co.* (1918) 104 Misc. 337, P.U.R.1919A, 367, 171 N. Y. Supp. 824, holding that an electric utility, while claiming the benefits, cannot repudiate the obligations, of private rate

contracts made in consideration of the grant to it of certain easements in platted land, subject to which lots were sold and its franchise granted, although higher rates were approved by a public service commission. The court, in holding that a preliminary injunction should be continued, restraining the utility from charging a higher rate than that fixed by the contract, stated that as a general rule contracts which violate the fixed public policy of the state will not be enforced, but that in this case, where there was a grant of an exclusive right or franchise connected with private rights of property, the agreement having been entered into for the benefit of all persons who should purchase land subject to the easement mentioned, the defendant could not be heard to repudiate the contract so entered into as to the rate at which it would supply electric light to consumers, and at the same time be permitted to retain the benefits, property rights, easements, and franchise conferred upon it by the contract; and that the fact that the defendant had filed a new schedule of rates to be charged by it to private consumers, or even that the public service commission had approved of the increase in the rate, did not justify the defendant's action.

In cases involving grants of a railroad right of way in consideration of a pass on the railroad, the courts have held that the contract might be abrogated by appropriate regulatory legislation enacted by Congress or the state legislatures, without unconstitutional impairment of contracts; although there is authority to the effect that in this event the grantor can recover damages. A leading case on this question is *Louisville & N. R. Co. v. Motley* (1911) 219 U. S. 467, 55 L. ed. 297, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 265, reversing (1909) 133 Ky. 652, 118 S. W. 982, in which it was held that Congress, in the exercise of its power over commerce, could enact the Commerce Act of June, 1906, which rendered unenforceable a prior contract, valid when made, by which an interstate carrier agreed to issue annual

passes for life in consideration of a release of a claim for damages, and that the constitutional liberty of citizens to make contracts was not infringed by the enactment of this statute. The court cited various authorities as supporting the view that, as the contract in question would have been illegal if made after the passage of the Commerce Act, it would not be enforced against the railroad company, even though valid when made; and stated that if that principle were not sound, the result would be that individuals and corporations could, by contracts between themselves in anticipation of legislation, render of no avail the exercise by Congress to the full extent authorized by the Constitution of its power of regulation.

The above decision is followed in *Schaper v. Cleveland & E. R. Co.* (1919) 265 Pa. 109, P.U.R.1920B; 406, 108 Atl. 407, holding that a right-of-way agreement by which a railway company bound itself, in consideration for the grant, to furnish round-trip tickets and books at specified rates, although valid when made, was subject to the power of the state to change the rates in the future, in the exercise of its governmental authority.

And following the decision of the United States Supreme Court in the *Mottley Case* (U. S.) supra, the court in *Louisville & N. R. Co. v. Crowe* (1913) 156 Ky. 27, 49 L.R.A.(N.S.) 848, 160 S. W. 759 (an action to enforce specific performance or for damages), held that a contract for an annual pass during the life of the grantor of the right of way, given in consideration of the pass, for use in interstate commerce, could not be enforced in view of the Interstate Commerce Act. But it was also held that the railroad company, which had taken possession of the right of way, was bound to compensate the grantor for the value of the property taken, less the value of the passes already received by him. The court cited but declined to follow the decision of the Washington supreme court in *Cowley v. Northern P. R. Co.* (1912) 68 Wash. 558, 41 L.R.A.(N.S.) 559, 123 Pac. 998, an action to rescind a contract for a

grant of land in consideration of the issuance of passes, and for a reconveyance of the property. The opinion in the latter case appears broad enough to support the general proposition that a carrier which contracts to give annual passes in consideration of a grant of land is not liable in damages for refusal of further passes before the expiration of the contract period, in obedience to a statute making the giving of passes illegal; although it will be observed that the lower court whose judgment was reversed allowed as damages the amount which the court found the plaintiff would be obliged to expend in railway fare to take the trips which he would have taken had the agreed compensation been furnished him. This, it seems, should not, under the decision in the former case, be regarded as the measure of damages.

Among other cases to a similar effect as the *Mottley Case* (U. S.) supra, involving the question of impairment of contracts for passes, but not within the scope of the note, because of the nature of the consideration, it not being a conveyance, attention is called to *State v. Martyn* (1908) 82 Neb. 225, 23 L.R.A.(N.S.) 217, 117 N. W. 719, 17 Ann. Cas. 659; *Gill v. Erie R. Co.* (1912) 151 App. Div. 131, 135 N. Y. Supp. 355; and *Shrader v. Steubenville, E. L. & B. Valley Traction Co.* (1919) — W. Va. —, P.U.R.1919D, 895, 99 S. E. 207.

On the question of the rights of the parties where the agreement with the utility is rendered impossible of performance because of subsequent legislation, attention is called to *New York C. & H. R. R. Co. v. Gray* (1916) 239 U. S. 583, 60 L. ed. 451, 36 Sup. Ct. Rep. 176, where a railroad company, as part consideration for a map which the plaintiff made for it, agreed to furnish transportation for his use. The court held that the carrier was not prevented or relieved by the Hepburn Act of 1906 from making just compensation in money for the unpaid balance of the purchase price because the delivery of the free transportation became unlawful upon the passage of that act. It was said: "In

the present case, therefore, the railroad company acted strictly in accordance with the law when it refused any longer to furnish transportation to defendant in error, in performance of the contract of November, 1900. But from this it by no means follows that it could refuse to make just compensation in money for the unpaid balance of the purchase price of the map. The judgment of the state court proceeded upon the ground that since the contract had been fully performed by Gray, so that the railroad company had received the entire benefit of it, and since the delivery of the particular consideration stipulated for had been prohibited by the act of Congress, the company thereupon became bound, upon general principles of justice, to pay him an equivalent in money for the balance of the consideration. In so holding the court was simply administering the applicable principles of state law, and did not run counter to the act of Congress."

It was held in *Evansville & E. Electric R. Co. v. Vanada* (1914) 57 Ind. App. 415, 106 N. E. 388, that a contract for a pass on a railroad, in consideration of a grant of a right of way therefor, was void, and that a demurrer to the complaint in a suit to enforce the contract should have been sustained, where at the time the contract was made the statute made it unlawful for any carrier to charge, directly or indirectly, for the transportation of passengers, any other or different rate than that fixed in schedules required to be filed with the railroad commission, or that adopted by the commission, or ordered to be observed by any court, and made guilty of unlawful discrimination any railroad which, directly or indirectly, by any special rate, rebate, drawback, or other device, charged or received from any person a greater or less compensation for any service rendered than was charged any other person for rendering a like service.

And under the New Jersey Utilities Act of 1911, providing that no public utility should impose or exact "any unjust or unreasonable, unjustly discriminatory or unduly preferential

. . . rate," or "make or give, directly or indirectly, any undue or unreasonable preference or advantage to any person or corporation or to any locality," it was held in *Perkins v. Public Service R. Co.* (1916) 87 N. J. Eq. 134, 99 Atl. 387, that a contract subsequently made, entitling the grantor of a railroad right of way and his family to an annual pass for life, for use in intrastate commerce, was unenforceable. The court said that, while the state statute was not as precise and exacting as the Federal Interstate Commerce Act, its purpose and spirit of equality were not dissimilar, and in principle forbade any difference in charges not based upon difference in service, and that, viewed in this light, the contract manifestly created an unreasonable difference and advantage within the inhibition of the statute. In reply to the contention that no "undue or unreasonable" preference was shown within the meaning of the statute, since there was no proof that the value of the land was not equal to the services to be rendered, the court supposed a case in which the grantor had bargained with the railroad company to carry him and his family over the road for life for \$1,000, and said: "Could such a contract be successfully defended in the face of the statute? And that is really what we have here. To sustain the contract would open the doors wide to the very evils the statute was intended to suppress, and make impossible the execution of the functions of the Utilities Commission to regulate and fix rates. The commission and the public would again be at the mercy of unscrupulous corporations, and a restoration of old-time methods could be looked for when, for services, or property, or political pull, unrestricted transportation was given."

So, a contract with a railroad company for free transportation in consideration of a grant of a right of way was held unenforceable, in *Kentucky Traction & Terminal Co. v. Murray* (1917) 176 Ky. 593, 195 S. W. 1119, where at the time the contract was made the state Constitution prohibited unjust discrimination, and provided

that no common carrier should give a free pass, and a statute, enacted after the contract was made, defined the term "free pass" as including any ticket, pass, contract, or transportation, issued or given to any person for any other consideration than money paid in the usual way, at the same rates, open to all who desired to purchase. The court overruled the contention that the statute unconstitutionally impaired contract obligations. It was said: "The contention of appellee that the contract was valid when made, and that its performance is enforceable, notwithstanding the subsequent enactment of the Anti-pass Law, therefore disregards the fundamental rule of the interpretation of contracts referred to, viz.: That all laws in existence when the contract is made, or thereafter enacted in pursuance of the police power of the state, necessarily enter into and form a part of it as fully as if they were expressly incorporated into its terms. This principle is supported by a long line of authorities." The decision is followed in *Kentucky Traction & Terminal Co. v. Barrett* (1917) 176 Ky. 605, 195 S. W. 1124.

Although a case involving a lease rather than a conveyance, attention is called to *Emerson v. Boston & M. R. Co.* (1910) 75 N. H. 427, 27 L.R.A. (N.S.) 331, 75 Atl. 529, wherein it was held that the transportation of stockholders of a railroad company to and from their annual meetings, without charge, in accordance with the provisions of a lease of the road, was not free, within the meaning of a statute enacted after the expiration of the lease, forbidding, under penalty, railroad companies to give "free" transportation; and that the statute should not be construed so as to invalidate the provisions of the existing lease.

Before the passage, in 1906, of the amendment to the Interstate Commerce Act, it was held in *Curry v. Kansas & C. P. R. Co.* (1897) 58 Kan. 6, 48 Pac. 579, that a contract, in consideration of a conveyance of land to an interstate railway company, to issue, or procure the issuance of annual passes, to the grantors, was not within the prohibition of the Interstate Commerce Act, since the latter forbade the issuance of passes gratuitously, and not for a money or other valuable consideration.

R. E. H.

MOLINE LUMBER COMPANY, Appt.,

v.

W. E. HARRISON.

Arkansas Supreme Court — March 26, 1917.

(128 Ark. 260, 194 S. W. 25.)

Master and servant — duration of employment.

A hiring for a certain amount per year, payable at a certain rate per month, is a hiring for a year.

[See note on this question beginning on page 469.]

APPEAL by defendant from a judgment of the Circuit Court for Ouachita County (Smith, J.) in favor of plaintiff in an action brought to recover damages for breach of an employment contract. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Gaughan & Sifford, for appellant:

The hiring was for an indefinite period of time, and at a certain rate

per year, and constituted a hiring at will.

St. Louis, I. M. & S. R. Co. v. Matthews, 64 Ark. 398, 39 L.R.A. 467, 42

S. W. 902; *Warden v. Hinds*, 25 L.R.A. (N.S.) 529, 90 C. C. A. 449, 163 Fed. 201; *The Pokanoket*, 84 C. C. A. 49, 156 Fed. 241; *The Pacific*, 18 Fed. 703; *Fuller v. Peninsular White Lead & Color Works*, 111 Mich. 221, 69 N. W. 492; *Minter v. Tootle*, *Campbell Dry Goods Co.* 187 Mo. App. 16, 173 S. W. 4; *Davis v. Pioneer L. Ins. Co.* 181 Mo. App. 353, 172 S. W. 67; *St. Louis Southwestern R. Co. v. Griffin*, 106 Tex. 477, L.R.A.1917B, 1108, 171 S. W. 703; *Haney v. Caldwell*, 35 Ark. 156; *Wright v. Morris*, 15 Ark. 444; 26 Cyc. 974; *State, Stanford, Prosecutor, v. Fisher Varnish Co.* 43 N. J. L. 151; *Tatterson v. Suffolk Mfg. Co.* 106 Mass. 56; *Resener v. Watts, R. & Co.* 73 W. Va. 342, 51 L.R.A. (N.S.) 629, 80 S. E. 839; *Harrod v. Wineman*, 146 Iowa, 718, 125 N. W. 812.

McCulloch, Ch. J., delivered the opinion of the court:

This is an action instituted by the plaintiff Harrison against his employer, to recover wages alleged to be due under a contract which the defendant had broken. The plaintiff alleges that he was employed by defendant, Moline Lumber Company, to work for the latter as woods foreman for a period of one year at a salary of \$1,800 a year, payable monthly, and that after working for the defendant for something over three months he was discharged without cause. Plaintiff further alleges that for the greater portion of the unexpired period of the contract he was unable to secure employment elsewhere, and that by reason of the discharge he sustained damages to the extent of the unpaid wages or salary for the remainder of the period. Plaintiff sued to recover the sum of \$1,240, and on the trial of the case the jury rendered a verdict in favor of the plaintiff for the sum of \$749. The evidence shows that plaintiff was unable to secure employment for the whole of the remaining period of the alleged contract, but that he did secure employment for a portion of the time, and it is manifest that the jury only allowed for the time during which the plaintiff was actually out of employment. The only question involved in this appeal is whether or not the

evidence is sufficient to sustain the finding that there was a contract of employment entered into between plaintiff and defendant to cover a period of one year. There is very little conflict in the testimony on the material points, so far as the case is presented here. Defendant, in dealing with plaintiff, was represented by its manager, Mr. W. R. Day, and on a certain day in June, 1914, plaintiff talked with Mr. Day over the telephone from a lumber camp with regard to employment as woods foreman. Plaintiff's version of the contract was that, after a few preliminary remarks passing between them concerning the matter of the work to be done, he asked Day "how much the job paid," and that Day replied, "The job pays \$1,800 a year." Day testified that during the telephone conversation described plaintiff asked him what the job paid, and he replied as follows: "Well, we paid Mr. Goss \$1,900 a year, and I will pay you \$1,800, at the rate of \$150 per month, and Mr. Harrison said that is satisfactory."

They agree that nothing else was ever said between them concerning the terms of the employment. It was agreed in the conversation referred to that plaintiff was to go to Malvern to see Mr. Day and look over the timberland to ascertain the character of the work, and that he went up there to see Mr. Day about a week later, and that they went out together to look over the ground; that nothing was said about the terms of the employment. Plaintiff went to work on the 8th of June, 1914, and after working until June 17th he received a note from Mr. Day in the following words:

6-17-14.

Mr. Harrison:—You should have Mr. Lee to arrange div. supt. and clerks' salaries so as to include your salary at \$150 per month.

W. R. D.

There is no proof of custom or usage with reference to the period of employment for this character of service, and we are left entirely to

the somewhat indefinite words of the contract to determine whether or not it constituted a contract for a period of service for a year, or whether it was merely an employment at will. The question is by no means free of doubt, and the authorities, though very numerous, are sharply conflicting. In a note to the case of *Warden v. Hinds*, 25 L.R.A. (N.S.) 529, the authorities on the subject are collated, and it is said that the conflict is such as to leave doubt as to which view is better supported. One line of cases holds that "a hiring at so much per year, month, or week is, in the absence of other circumstances controlling its duration, an indefinite hiring only, terminable at the will of either party;" whereas the other line of authorities holds to the view that, where the matter of duration in a contract of employment is not specified in so many words, a hiring being at a specified rate per year, month, or week imports a hiring for the full period named. The cases are carefully reviewed by the supreme court of Massachusetts in *Maynard v. Royal Worcester Corset Co.* 200 Mass. 1, 85 N. E. 877, and the weight of authority is declared to be in favor of the rule that a hiring at so much a year, month, or week is, in the absence of any other consideration impairing the force of the circumstances, sufficient to sustain a

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duration of
employment.

finding that the hiring was for that period. There are many English as well as American cases sustaining that view, among which the following are cited: *Emmens v. Elderton*, 4 H. L. Cas. 624, 10 Eng. Reprint, 606, 13 C. B. 495, 138 Eng. Reprint, 1292, 18 Jur. 21; *Foxall v. International Land Credit Co.* 16 L. T. N. S. 637; *Buckingham v. Surrey & H. Canal Co.* 46 L. T. N. S. 885, 46 J. P. 774; *Horn v. Western Land Asso.* 22 Minn. 233; *Smith v. Theobald*, 86 Ky. 141, 5 S. W. 394; *Moss v. Decatur Land Improv. & Furnace Co.* 93 Ala. 269, 30 Am. St. Rep. 55, 9 So. 188; *Chamberlain v. Detroit*

Stove Works, 103 Mich. 124, 61 N. W. 532; *Kellogg v. Citizens' Ins. Co.* 94 Wis. 554, 69 N. W. 362; *Norton v. Cowell*, 65 Md. 359, 57 Am. Rep. 331, 4 Atl. 408; *Beach v. Mullin*, 34 N. J. L. 344; *Magarahan v. Wright*, 83 Ga. 773, 10 S. E. 584.

That is, we think, the best view of the matter; for, where a unit of time is described in mentioning the compensation, without any other reference to time, it is fairly inferable that the parties intended to contract for that period of time. Of course, the terms thus specified are to some extent indefinite, and may be controlled by the circumstances of any particular case, but in the absence of countervailing circumstances we think that a trial court or jury is warranted in construing the terms of the contract to be for a hiring for the unit of time specified in fixing the wages or salary. The language of the contract now before us is even stronger in that view than that used in some of the cases cited. In fact, we think that the testimony of Mr. Day, the defendant's manager, makes out a stronger case than does the statement of the plaintiff himself; for he states the terms at \$1,800 a year; and follows with the specifications "at the rate of \$150 a month," indicating that the period of hiring was to be for a year, but that the payments were to be made in monthly instalments. It is earnestly insisted by counsel for defendants that two of the early decisions of this court place the court in line with authorities which hold to the view that a specification of the compensation for a certain period is not sufficient evidence of a contract to hire for that period. *Wright v. Morris*, 15 Ark. 444; *Haney v. Caldwell*, 35 Ark. 156. In the case first cited (*Wright v. Morris*) the contract was one for the hire of an overseer "to oversee for Wright that year, at the rate of \$500 per annum; that Trulove was to make a fair average crop, and, if he failed to do this, he was to forfeit his wages." This court said that the language used did not constitute a special con-

tract for a definite time at a fixed price, but that it was a contract to oversee at the rate of \$500, not for \$500. Trulove was discharged before the crop was made and gathered, and the question was whether he was entitled to specified compensation of \$500 for the year, or for the making of the crop, and this court held that there was no agreement as to the length of time Trulove was to serve, as the contract only fixed the rate instead of the period of time, and that "it must necessarily have been intended that the engagement should continue until after the crop was made." That case therefore has no application to the contract involved in the present case, nor is there any analogy between the facts of this case and those in *Haney v. Caldwell*, supra, where the contract of employment was evidenced by a letter in which Caldwell stated to Haney: "You are hereby employed to act as my engineer in connection with

my contract for the completion of the Little Rock & Ft. Smith Railroad, at a salary of \$2,500 per annum."

Haney served for more than a year. The court held that this was not a contract for a definite time at a fixed price. The reason for that ruling is plain; for there was a specification of employment as engineer "in connection with my contract for the completion of the Little Rock & Ft. Smith Railroad," which shows that the employment was not for a year, but merely at the rate per annum mentioned in the letter. We do not regard either of those cases as being against the views which we express in the present case. From this view of the matter the evidence was sufficient to sustain the finding, and, as that is the only ground urged for the reversal, it follows that the judgment must be affirmed; and it is so ordered.

Petition for rehearing denied.

ANNOTATION.

Duration of contract of hiring which specified no term, but fixes compensation at a certain amount per day, week, month, or year.

- I. Introductory, 469.
- II. In England general hiring is for year, 470.
- III. In America an indefinite hiring is at will, 470.
- IV. Hiring at named price for week, month, or year definite, 471.
- V. Hiring at stated salary indefinite, 475.
- VI. Circumstances will control, 479.
- VII. "At rate of," or on basis of, 482.
- VIII. For "first year," or other definite time, 484.
- IX. Effect of statute, 485.
- X. Effect of paying wages in instalments, 486.

I. Introductory.

The question of the duration of a hiring which specifies no duration of time, but merely mentions the rate of compensation to be paid, has caused some conflict in the decisions, and the conclusion has not always been the same when the argument proceeds from the same premises. There is a

proposition which lies at the foundation of the question, upon which the rule in England is different from that in this country. This proposition is not stated in precisely the same terms in the two countries, but, so far as can be determined from the cases, the use of different terms does not account for the difference in conclusions reached. The proposition is that, in England, a general hiring is regarded as one for a year. In this country, an indefinite hiring is regarded as one at will. As already suggested, there seems not to be sufficient distinction between the terms "general" and "indefinite" to account for the difference in conclusions reached. And for the most part the general proposition, as so stated, seldom controls the final determination of the case, because other elements usually enter into the proposition which are sufficient to carry the decision one way or the

other, even though the judges agree as to the general proposition. The difficulty seems to have arisen out of the effort to determine what is a general or indefinite hiring. The English cases, and what have been said to be the majority of those in this country, have held that, if a hiring is for a certain sum per week, month, or year, it is not indefinite, but definite for the time mentioned. Some of the cases, however, followed the unsupported statement of a text-writer, and held that such hirings were indefinite, and therefore, under the American rule, were really at will.

II. In England general hiring is for year.

In England, in the absence of special circumstances to control it, the rule is that a general hiring is a hiring for a year. *Rex v. Dedham* (1769) Burr. Sett. Cas. (Eng.) 653; *Lilley v. Elwin* (1848) 11 Q. B. 742, 116 Eng. Reprint, 652, 17 L. J. Q. B. N. S. 132, 12 Jur. 623. So, wherever the relation of master and servant is to continue for an indefinite time, it cannot be put an end to at the election of either party without notice, and the hiring must be understood to be for a year. *Rex v. Hampreston* (1793) 5 T. R. 207, 101 Eng. Reprint, 116.

In *Beeston v. Collyer* (1827) 4 Bing. 309, 130 Eng. Reprint, 786, it is said that if a master hires a servant without mention of time, that is a general hiring for a year, and the fact that salary is paid monthly or quarterly is immaterial.

In *Fawcett v. Cash* (1834) 5 Barn. & Ad. 904, 110 Eng. Reprint, 1026, 3 Nev. & M. 177, 3 L. J. K. B. N. S. 113, it is said that the general rule is that if a master hire a servant without mentioning the time, that is a general hiring, and, in point of law, a hiring for a year.

So, in *Rex v. Macclesfield* (1789) 3 T. R. 76, 100 Eng. Reprint, 463, after an employment for eleven months, the employee was told he might as well stay on by an expression which meant an indefinite time, and the hiring was held to be for a year, and sufficient to give a settlement.

In *Rex v. St. Andrew* (1828) 8 Barn.

& C. 679, 108 Eng. Reprint, 1195, it was said by Bayley, J.: "If the reservation of weekly wages be the only circumstance from which the duration of the contract can be collected, the presumption is that it is to continue for a week only. In this case the stipulation for a month's wages, or a month's warning, rebuts the presumption of a weekly hiring. It was thence manifest that it was intended that the service should continue for a longer period than a week. It then became a hiring unlimited in duration, in which case the law implies a hiring for a year."

But in *Baxter v. Nurse* (1844) 7 Scott, N. R. 801, 6 Mann. & G. 935, 134 Eng. Reprint, 1170, 1 Car. & K. 10, 13 L. J. C. P. N. S. 82, 8 Jur. 273, Tindal, Ch. J., said that, in a case where the agreement was to act as agent of a publication for a weekly salary, there was no inflexible rule of law that a general hiring was one for a year, but that it was a question of fact depending upon the circumstances of each particular case. The judge assumed that the hiring at a certain amount per week was a general hiring, but held that the question was one for the jury and not for the court. Coltman, J., says that proof of service and payment of weekly wages raises an inference contrary to that of a general hiring. Cresswell, J., said that, in all cases where a hiring for an indefinite period is proved and there is nothing to the contrary, the hiring will be presumed to be a yearly hiring, but that if there are other circumstances, such as the payment of wages weekly, the question becomes one of fact.

III. In America an indefinite hiring is at will.

The rule runs uniformly through the American cases that an indefinite hiring is a hiring at will.

Georgia.—*Bentley v. Smith* (1907) 3 Ga. App. 242, 59 S. E. 720.

Maryland.—*McCullough Iron Co. v. Carpenter* (1887) 67 Md. 554, 11 Atl. 176.

Missouri.—*Davis v. Pioneer L. Ins. Co.* (1914) 181 Mo. App. 353, 172 S. W. 67.

New York.—*Halpern v. Langrock Bros. Co.* (1915) 153 N. Y. Supp. 985.

Oregon. — Christensen v. Pacific Coast Borax Co. (1894) 26 Or. 302, 38 Pac. 127.

Pennsylvania. — Kirk v. Hartman (1869) 63 Pa. 105, 11 Mor. Min. Rep. 450.

Rhode Island. — Booth v. National India Rubber Co. (1897) 19 R. I. 696, 36 Atl. 714.

West Virginia.—Resener v. Watts, R. & Co. (1913) 73 W. Va. 342, 51 L.R.A.(N.S.) 629, 80 S. E. 839.

The scope of this rule carries it outside the limitation of this annotation, so that all the cases in which it is stated are not gathered here. And it is probably true that the question just what is an indefinite hiring is not fully settled. It has been held that a hiring at a specified price per day may be terminated at will. Crotty v. Erie R. Co. (1912) 149 App. Div. 262, 133 N. Y. Supp. 697; The J. P. Schuh (1915) 223 Fed. 455.

So where by the terms of a contract of employment the tenure of service cannot be determined, such contract is one at will, and may be terminated at any time. Speeder Cycle Co. v. Teeter (1897) 18 Ind. App. 476, 48 N. E. 595. So a contract to sell lands on commission is an indefinite hiring, and may be terminated at any time. Coffin v. Landis (1864) 46 Pa. 426.

If a contract to employ one contains the proviso that he does faithful and honest work, it is indefinite, and may be terminated at any time. Louisville & N. R. Co. v. Offitt (1896) 99 Ky. 427, 59 Am. St. Rep. 467, 36 S. W. 181.

The cases have seldom assumed to give any reason for this rule, but in Boogher v. Maryland L. Ins. Co. (1880) 8 Mo. App. 533; the court, in combating the doctrine that an indefinite hiring is one for a year, says: "With us, the employee may, where the period is left open, recover for the service rendered, and is thus relieved from the injustice of the English rule; . . . so, on the other hand, the employer ought not to be forced, by an artificial interpretation, into a contract which he has not made."

Leifer v. Scheinman (1917) 179 App. Div. 665, 167 N. Y. Supp. 105, adheres to the rule in (1916) 159 N. Y. Supp.

40, to the effect that a contract silent as to term is hiring at will.

No case has been found which attempted to state a reason why a hiring at a certain price per week, month, or year was regarded as indefinite. The general rule seems to be, as appears from the next subdivision of this note, that such a hiring is definite, and will continue for the period named.

IV. Hiring at named price for week, month, or year definite.

In the absence of special circumstances which have been deemed sufficient to control the matter, the general rule in England, and in many states in this country, is that a hiring at a named price per week, month, or year is a definite hiring for the period named.

United States.—The Hudson (1846) Olcott, 396, Fed. Cas. No. 6,831; Jones v. Trinity Parish (1883) 19 Fed. 59.

Alabama.—Clark v. Ryan (1891) 95 Ala. 406, 11 So. 22; National L. Ins. Co. v. Ferguson (1915) 194 Ala. 658, 69 So. 823; Moss v. Decatur Land Improv. & Furnace Co. (1890) 93 Ala. 269, 30 Am. St. Rep. 55, 9 So. 188; Liddell v. Chidester (1887) 84 Ala. 508, 5 Am. St. Rep. 387, 4 So. 426.

Arkansas.—*MOLINE LUMBER Co. v. HARRISON* (reported herewith) ante, 466.

California.—Shuler v. Corl (1918) 39 Cal. App. 195, 178 Pac. 535.

Colorado. — Bauer v. Goldman (1909) 45 Colo. 163, 100 Pac. 435.

Georgia. — Magarahan v. Wright (1889) 83 Ga. 773, 10 S. E. 584; Baldwin v. Western U. Teleg. Co. (1894) 93 Ga. 692, 44 Am. St. Rep. 194, 21 S. E. 212; Thompson v. Read Phosphate Co. (1916) 18 Ga. App. 535, 89 S. E. 1048; Odom v. Bush (1906) 125 Ga. 184, 53 S. E. 1013.

Massachusetts. — Tubbs v. Cummings Co. (1900) 200 Mass. 555, 86 N. E. 921; Nichols v. Coolahan (1845) 10 Met. 449; Maynard v. Royal Worcester Corset Co. (1908) 200 Mass. 1, 85 N. E. 877.

Minnesota.—Horn v. Western Land Assn. (1875) 22 Minn. 233.

New Jersey. — Beach v. Mullin (1870) 34 N. J. L. 344.

Texas.—*Young v. Lewis* (1852) 9 Tex. 73; *San Antonio & A. P. R. Co. v. Sale* (1895) — Tex. Civ. App. —, 31 S. W. 325.

West Virginia.—*Alkire v. Orchard Co.* (1917) 79 W. Va. 526, 91 S. E. 384.

Wisconsin.—*Cronemillar v. Duluth-Superior Mill. Co.* (1908) 134 Wis. 248, 114 N. W. 432; *Kellogg v. Citizens Ins. Co.* (1896) 94 Wis. 554, 69 N. W. 362.

England. — *Emmians v. Elderton* (1853) 4 H. L. Cas. 624, 10 Eng. Reprint, 606, 13 C. B. 495, 138 Eng. Reprint, 1292, 18 Jur. 21; *Lowe v. Walter* (1892) 8 Times L. R. 358; *Rex v. Mitcham* (1810) 12 East, 351, 104 Eng. Reprint, 137; *Rex v. Pucklechurch* (1804) 5 East, 382, 102 Eng. Reprint, 1116; *Rex v. Newton Toney* (1788) 2 T. R. 453, 100 Eng. Reprint, 244; *Foxall v. International Land Credit Co.* (1867) 16 L. T. N. S. 637; *Buckingham v. Surrey & H. Canal Co.* (1882) 46 L. T. N. S. 885, 46 J. P. 774; *Rex v. Odiham* (1788) 2 T. R. 622, 100 Eng. Reprint, 334; *Rex v. Lambeth* (1815) 4 Maule & S. 315, 105 Eng. Reprint, 851; *Rex v. Rolvenden* (1828) 1 Mann. & R. 691; *Rex v. Hampreston* (1793) 5 T. R. 208, 101 Eng. Reprint, 117.

In *Rex v. Hampreston* (1793) 5 T. R. 208, 101 Eng. Reprint, 117, Buller, J., said a hiring at so much per week, simply and without any other expression, has been held to be a hiring for a week because that expression, if it be not explained by other words, has been taken to apply to the duration of the contract, and not to the services.

An agreement to serve for a certain sum a week in summer and a less sum per week in winter is a weekly hiring only. *Rex v. Rolvenden* (1828) 1 Mann. & R. (Eng.) 691.

A hiring at so much per week and an extra allowance for the harvest is not a hiring for the year. *Rex v. Lambeth* (1815) 4 Maule & S. 315, 105 Eng. Reprint, 851.

An agreement at a specified sum per week cannot be considered a general hiring, but is one from week to week. *Rex v. Newton Toney* (1788) 2 T. R. 453, 100 Eng. Reprint, 244. Buller, J., said that, if the payment of

weekly wages be the only circumstance from which the duration of the contract can be told, it may be taken to be a weekly hiring.

A hiring by the week is not general so as to give a settlement if continued a year. *Rex v. Odiham* (1788) 2 T. R. 622, 100 Eng. Reprint, 334.

A hiring at a specified amount per week for so long as the parties can agree is a hiring from week to week so as not to give a settlement under the Poor Laws. *Rex v. Mitcham* (1810) 12 East, 351, 104 Eng. Reprint, 137.

In *Rex v. Pucklechurch* (1804) 5 East, 382, 102 Eng. Reprint, 1116, where the contention was that a hiring at weekly wages was general, and therefore for a year, so that the employee gained a settlement, Lord Ellenborough said: "If an indefinite hiring were stated on a record, and nothing shown to control it, it will be deemed a hiring for a year, but that is in the absence of any circumstance from whence a different intent is to be collected; and, here, weekly wages being reserved, and nothing else added to show an intention to extend the contract further, will induce the conclusion in law of a weekly hiring and service intended by the parties. There is a current of authorities to this point."

Employing a salesman for weekly advances, with a provision for commission if he shall complete a whole year's service, is not a contract for a year, but at most one by the week. *Tubbs v. Cummings Co.* (1900) 200 Mass. 555, 86 N. E. 921. A contract at \$75 per week straight salary the year around, with a provision for commissions and return of railroad fare at end of season, is a contract by the week. *Bauer v. Goldman* (1909) 45 Colo. 163, 100 Pac. 435. A hiring at a specified price per month is a hiring by the month. *Young v. Lewis* (1852) 9 Tex. 73.

In the absence of controlling circumstances, the presumption is that a hiring at a specified amount per month is for that period. *Magarahan v. Wright* (1889) 83 Ga. 773, 10 S. E. 584.

An agreement to serve and be

served at so much per month, with no stipulation as to term of service, is terminable at the end of any month at the pleasure of either party to the contract. *Clark v. Ryan* (1891) 95 Ala. 406, 11 So. 22.

A hiring at monthly wages will be regarded as an engagement by the month, thus leaving it optional with either party to terminate the obligation to serve or pay at the end of the month. If the master terminates the contract during the month, he must pay wages for the month, and if the servant does so, he loses his wages accruing for the unfinished term. *The Hudson* (1846) *Olcott*, 396, Fed. Cas. No. 6,831.

Under an employment at monthly wages without stating any definite time for continuance of service, either party may terminate the contract at the end of a current month. *Jones v. Trinity Parish* (1883) 19 Fed. 59.

A contract to pay a certain sum per month for services so long as the employee shall choose to work is a hiring from month to month. *Shuler v. Corl* (1918) 39 Cal. App. 195, 178 Pac. 535.

An agreement to pay a certain sum per month is not a contract for a year, although there is a provision for a bonus if the year's business warrants it. *Thompson v. Read Phosphate Co.* (1916) 18 Ga. App. 535, 89 S. E. 1048.

A contract to pay a certain sum per month and board so long as employee should work for employer is a hiring by the month, "terminable at the pleasure of employer," so as to entitle employee to board during sickness in case the employment is not terminated. *Nichols v. Coolahan* (1845) 10 Met. (Mass.) 449.

In *Beach v. Mullin* (1870) 34 N. J. L. 344, the court said: "The contract of hiring in this case was that the plaintiff should work for the defendant for \$16 a month. Nothing further was said as to the term of service. The reservation of wages, payable monthly or weekly, will not control the contract so as to destroy its entirety, when the parties have expressly agreed for a specified term, as a year. But if the payment of monthly or weekly wages is the only circum-

stance from which the duration of the contract is to be inferred, it will be taken to be a hiring for a month or a week."

Construing a contract of employment indefinite as to the term of service, but providing certain salary per month, *Odom v. Bush* (1906) 125 Ga. 184, 53 S. E. 1013, holds that the employment was for an indefinite time, and that neither party was bound beyond the first month of hiring. The effect of agreeing to make a monthly payment of salary on the duration of the contract is suggested by the court as follows: "And it is only by a fiction that the courts are enabled to hold that an engagement at a fixed salary per month, but with no stipulation as to its duration, is a legally binding contract for one month's employment at the agreed wage, upon the supposition that the contracting parties had in contemplation a definite hiring for one month only; either party to then have the right of regarding the engagement as at an end, or of treating the contract as continuing of force upon the same terms as to wages till notice was received from the other of his election to terminate the relation of master and servant."

Where one contracts to work under a promise of a \$70 job in which he is to be paid \$70 per month, the term of employment cannot be considered less than one month. *San Antonio & A. P. R. Co. v. Sale* (1895) — *Tex. Civ. App.* —, 31 S. W. 325.

Employment of one as manager at a stipulated salary per month is a mere monthly employment, and may be terminated at the end of any month by either party. *Alkire v. Orchard Co.* (1917) 79 W. Va. 526, 91 S. E. 384.

Where wages are payable by the month, such circumstance is evidence of a hiring for that period, and will be sufficient, in the absence of any evidence impairing its weight, to sustain a finding that there was a hiring for that period. *Cronemillar v. Duluth-Superior Mill Co.* (1908) 134 Wis. 248, 114 N. W. 432.

In *Baldwin v. Western U. Teleg. Co.* (1894) 93 Ga. 692, 44 Am. St. Rep. 194, 21 S. E. 212, an action for dam-

ages for the defendant's failure to transmit a message accepting a position which had been offered to plaintiff at a salary of \$45 per month, it was said that an offer of employment at so much per month would, in the absence of anything further indicating the period of employment intended, be treated as meaning employment for a term of one month.

It was held in *Moss v. Decatur Land Improv. & Furnace Co.* (1890) 93 Ala. 269, 30 Am. St. Rep. 55, 9 So. 188, that an employment by the month at \$60 per month is not a hiring at the rate of \$60 per month, but a contract for an entire month.

An employment for a salary of \$1,000 per year, payable quarterly, constitutes an employment for at least a year, which neither party can rescind within the year without the other's consent. *Horn v. Western Land Asso.* (1875) 22 Minn. 233. The court says: "The contract of employment was by the year, at a fixed salary for such period, and not one for an indefinite period, at the rate of so much a year. This construction accords with what must reasonably be supposed to have been the intention of the parties, considering the nature of the employment and the character of the services agreed to be rendered."

An offer by telegraph, "If \$1,000 a year is an inducement, come immediately. Answer," and the answer, "Will accept \$1,000 a year," are communications which, unexplained, show a single contract for a year. *Liddell v. Chidester* (1887) 84 Ala. 508, 5 Am. St. Rep. 387, 4 So. 426.

Employment at a stipulated sum for a year is presumptively a contract for a year. *Lowe v. Walter* (1892) 8 Times L. R. (Eng.) 358.

A hiring at a specified sum per annum is a hiring for a year. *Foxall v. International Land Credit Co.* (1867) 16 L. T. N. S. (Eng.) 637; *Buckingham v. Surrey & H. Canal Co.* (1882) 46 L. T. N. S. (Eng.) 885, 46 J. P. 774.

In *Kellogg v. Citizens' Ins. Co.* (1896) 94 Wis. 554, 69 N. W. 362, the Wisconsin court said that, when wages are payable by the week, month, or

year, such circumstance strongly indicates the period of service contracted for. In this case a salary was fixed by the year, and the plaintiff had been working for the defendant on a yearly salary for several years. "If, from such evidence, even standing alone, without any other evidence impairing its weight, the trial court finds a monthly or yearly hiring, corresponding to the rate of wages, the inference so drawn cannot be disturbed on appeal."

In *Emmens v. Elderton* (1353) 4 H. L. Cas. 624, 10 Eng. Reprint, 606, there was an employment of a solicitor for £100 per annum, in lieu of rendering an annual bill for his various services. As to the continuance of such an employment, *Crompton, J.*, said: "The contract is for the sum of £100 per annum, and not for payment at that rate; and I cannot think that the parties intended merely to substitute one mode or rate of payment for another, leaving it optional to the employers to put an end to the engagement at their pleasure. The plaintiff may have been induced to forego the usual charges of an attorney from considering that he was to be paid for the whole year's work; and that, taking the rough and smooth together, the £100 would satisfy him; and the defendants probably preferred paying the certain sum for a certain time to being subject to the uncertainty of the amount of the charges. It would be quite inconsistent with these views that there should be a power of terminating the engagement, and paying the plaintiff for the services, either according to the scale of attorneys' charges or pro rata in proportion to the work done, or the time during which he continued to serve."

Under an agreement to pay for services at a certain sum per week or month, the contract may be terminated by either party at the end of either unit period, and the beginning of any unit period postpones the right to terminate until the end of that period. *National L. Ins. Co.* (1915) 194 Ala. 658, 69 So. 823.

In *Maynard v. Royal Worcester Cor-*

set Co. (1908) 200 Mass. 1, 85 N. E. 877, the alleged contract was a statement: "Your salary for the ensuing year will be \$5,000." This followed prior engagements by the year. The court says: "Without reviewing the cases or analyzing the principles to determine which is the sounder view, it is enough to say that the use of the sum of money equivalent to a year's pay, in describing the amount which the plaintiff was to receive, was proper for consideration in connection with other incidents." It was also pointed out in this case that the word "salary" is more frequently applied to annual employment than to any other, and its use may import a factor of permanency. The court further says: "The weight of authority is that a hiring at so much a year, in the absence of any other consideration, will sustain a finding that this was a hiring for that period."

Several states which have adopted the rule that a hiring at a certain price per month or year is indefinite, and terminable at will, have, in some cases, taken the position that it was a definite contract for the period named. Thus, where the hiring is from month to month at a certain wage per month, it is not an indefinite employment, but an employment for the month entered upon, so that breach by the employee during that month deprives him of the wages for that month. *Bozzone v. Stafford* (1914) 85 Misc. 53, 146 N. Y. Supp. 1076.

In *Bleeker v. Johnson* (1876) 51 How. Pr. (N. Y.) 380, reversed on another point in (1877) 69 N. Y. 309, it was held that "a general engagement of a servant 'at a salary of \$1,500 a year, payable weekly,' unaffected by any other considerations growing out of the custom of the place, the conduct of the parties, or other extraneous evidence disclosing a contrary intention, constitutes a contract of hiring for the year. If the parties intended the compensation should only be at that rate, and it had been so specified, such express indication of their intention would leave no room for inference that the engagement was

not at the mutual will and pleasure of the parties."

So, in *Douglass v. Merchants' Ins. Co.* (1890) 118 N. Y. 484, 7 L.R.A. 822, 23 N. E. 806, where the question was whether a secretary employed at a yearly salary was bound by the by-laws permitting his discharge at any time, the court said: There does not appear to have been any special contract as to term of service. The compensation was designated as a yearly salary, which the plaintiff in his complaint alleges was payable in monthly or quarterly instalments. This would indicate that his service for a year was contemplated, and the terms would presumptively be the same each subsequent year, except so far as modified by the parties, and, without some reserved right of termination, it may be assumed that his service was not terminable without cause until the end of any current year.

An employment for an indefinite term at an agreed compensation per week is an employment from week to week, and may be terminated by either party at the expiration of any week. *Dunbar v. Cuban Land & S. S. Co.* (1902) 37 Misc. 360, 75 N. Y. Supp. 498.

Where one was employed by resolution of a board of directors for one year at a stated salary with an agreement that his salary should not be less after the first year, and at the beginning of each succeeding year, the employment was for one year, until at the beginning of a certain year, the resolution read that he be engaged at a salary of the same yearly amount, "payable monthly," without naming the duration of the employment. The court held that it was, at best, an employment from month to month, and, not being for a definite period, could be terminated at the expiration of any month. *Rose v. Eclipse Carbonating Co.* (1894) 60 Mo. App. 28.

V. Hiring at stated salary indefinite.

Practically every case which has held that hiring at a certain price per month or year is indefinite, and terminable at will, has, without argument, directly or indirectly, followed a

textbook which lays down that proposition without any authority whatever to support it.

Wood's Mast. & S. § 184, states: "With us the rule is inflexible that a general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. A hiring at so much a day, week, month, or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve."

To support this proposition, Mr. Wood cites six cases, four American and two Scotch, no one of which bears out his statement:

In *De Briar v. Minturn* (1851) 1 Cal. 450, an innkeeper employed a barkeeper, and was to give him \$300 per month for his service, and allow him the privilege of occupying a room, so long as he remained in his employ. The hiring was not for a definite period and the barkeeper was discharged, after which the employer notified him to leave the room which he occupied at the end of the month. This notice not being complied with, he was ejected by force, and brought an action for trespass which the court held could not be maintained. It thus appears that the controversy was not over the amount due, but over the right to occupy the room after the termination of the employment, and the employer assumed that the right continued for a month, the period of hiring. The court adopted this view, so far as the right to eject him was concerned.

In *Tatterson v. Suffolk Mfg. Co.* (1870) 106 Mass. 56, a superintendent was employed for a certain sum per annum, and the payments were made and receipted for quarterly. He was discharged at the end of the third quarter of the second year, and he claimed that the hiring was by the year, and the employers claimed it was by the quarter, but the court held that it depended upon the understanding and intention of the parties, to be gathered from the usages of the busi-

ness, the situation of the parties, and all the circumstances of the case.

In *Franklin Min. Co. v. Harris* (1871) 24 Mich. 115, the jury found a contract for a year, based on evidence that the employee so understood it, that in negotiating he asserted a desire for a definite time, and the salary was fixed at a specified sum per week; and the court affirmed the judgment entered on such verdict.

In *Wilder's Case* (1869) 5 Ct. Cl. (U. S.) 462, it appeared that on May 23, 1861, claimant's assignors contracted with the United States Army to transport rations from St. Paul to Dakota territory at certain prices, varying according to time of year. They acted under this contract until July, 1863, when they refused to be further bound by it, and entered into a new contract with a government quartermaster. The government refused to recognize the compensation provided by this contract, on the ground that the former one had not been terminated by reasonable notice. The court of claims found in favor of the validity of the new contract.

It is not apparent how Scotch decisions are of value in fixing the state of the law in America, but even those decisions do not support the text.

In *Mitchell v. Smith* (1836) 14 S. C. Sess. Cas. 1st series, 358, plaintiff was appointed manager of a bank under a contract that he was to hold only during the pleasure of the directors. Having been dismissed, he brought an action for reinstatement, but it was held that he had been guilty of such mismanagement as justified his dismissal. There is not a word about the term of employment, or the amount of salary which he was to receive, or the times and method of its payment. The whole question was as to whether or not the dismissal was justified under the circumstances.

As stated in 1 Labatt, Mast. & S. § 201, *Fosdick v. North British R. Co.* (1850) 23 Scot. Jur. 118, 13 Sc. Sess. Cas. 2d series, 281, held that "where it was stipulated that a servant might be dismissed at the pleasure of his employer, and without reason assigned, on receiving a fortnight's

warning or a fortnight's wages, and he was dismissed on a charge made against him by a coemployee, which he alleged to be unfounded, it was held that he could not recover damages on the ground of having been dismissed, but was entitled to maintain an action based on the theory that the employer had authorized or adopted the proceedings of the coemployee who had brought the charge against him."

Following the text of Mr. Wood, the following cases have held that a hiring at a specified sum per week, month, or year was an indefinite hiring which was terminable at will:

United States. — The Pokanoket (1907) 84 C. C. A. 49, 156 Fed. 241; Thullen v. Triumph Electric Co. (1915) 142 C. C. A. 361, 227 Fed. 837; Warden v. Hinds (1908) 25 L.R.A. (N.S.) 529, 90 C. C. A. 449, 163 Fed. 201.

Delaware.—Greer v. Arlington Mills Mfg. Co. (1899) 1 Penn. 584, 43 Atl. 609.

Illinois. — Pfund v. Zimmerman (1862) 29 Ill. 269; Odell v. Chicago G. W. R. Co. (1918) 212 Ill. App. 616; Lynch v. Eimer (1887) 24 Ill. App. 185; Chadwick v. Morris & Co. (1912) 170 Ill. App. 569; Marquam v. Domestic Engineering Co. (1918) 210 Ill. App. 337.

Iowa.—Harrod v. Wineman (1910) 146 Iowa, 718, 125 N. W. 812.

Maryland.—McCullough Iron Co. v. Carpenter (1887) 67 Md. 554, 11 Atl. 176.

Missouri.—Evans v. St. Louis, I. M. & S. R. Co. (1886) 24 Mo. App. 114; Brookfield v. Drury College (1909) 139 Mo. App. 339, 123 S. W. 86.

New York.—Martin v. New York L. Ins. Co. (1895) 148 N. Y. 117, 42 N. E. 416; Watson v. Gugino (1912) 204 N. Y. 535, 39 L.R.A. (N.S.) 1090, 98 N. E. 18, Ann. Cas. 1913D, 215; Frankel v. Central R. Co. (1909) 114 N. Y. Supp. 137; Van Der Veer v. Theile (1918) 185 App. Div. 17, 172 N. Y. Supp. 628; Granger v. American Brewing Co. (1899) 25 Misc. 701, 54 N. Y. Supp. 695; Copp v. Colorado Coal & I. Co. (1897) 20 Misc. 702, 46 N. Y. Supp. 542; Frank v. Manhattan Maternity & Dispensary (1907) 107 N. Y. Supp.

404; Tucker v. Philadelphia & R. Coal & I. Co. (1889) 53 Hun, 139, 6 N. Y. Supp. 134; Leifer v. Scheinman (1916) 159 N. Y. Supp. 40; Alger v. New York Post Graduate Medical School & Hospital (1913) 140 N. Y. Supp. 394; Feiber v. Home Silk Mills (1913) 143 N. Y. Supp. 1014; Gibney v. National Jewelers' Bd. of Trade (1913) 144 N. Y. Supp. 321.

North Carolina. — Edwards v. Seaboard & R. R. Co. (1897) 121 N. C. 490, 28 S. E. 137.

Oregon.—Barlow v. Taylor Min. Co. (1896) 29 Or. 132, 44 Pac. 492.

Pennsylvania. — Weidman v. United Cigar Stores Co. (1909) 223 Pa. 160, 132 Am. St. Rep. 727, 72 Atl. 377; Hogle v. DeLong Hook & Eye Co. (1915) 248 Pa. 471, 94 Atl. 190.

West Virginia.—Reasener v. Watts, R. & Co. (1913) 73 W. Va. 342, 51 L.R.A. (N.S.) 629, 80 S. E. 839.

Wisconsin. — Kosloski v. Kelly (1904) 122 Wis. 665, 100 N. W. 1037.

A hiring at a certain sum a year, no time being specified, unaccompanied by any facts or circumstances in proof from which a different intention may be inferred, is an employment for an indefinite time, and not for a year. Greer v. Arlington Mills Mfg. Co. (1899) 1 Penn. (Del.) 581, 43 Atl. 609.

In Pfund v. Zimmerman (1862) 29 Ill. 269, plaintiff was employed as salesman at a specified salary per annum. He left the employment at the beginning of the second year, and sued in indebitatus assumpsit. The defense was that the contract was entire for a year, and, having been breached by plaintiff, there could be no recovery. The court held that there was not a hiring for a specified time, but the yearly salary named was merely a rate of compensation for the time for which plaintiff should serve, and that, therefore, he could recover.

A hiring at a certain sum per month is at will, and the employee may be discharged at any time. Odell v. Chicago G. W. R. Co. (1918) 212 Ill. App. 616.

A contract reciting need of service with agreement to pay a certain sum per week until a certain date, when

we will pay you a certain sum per year, is merely a hiring at will. *Marquam v. Domestic Engineering Co.* (1918) 210 Ill. App. 337.

An instruction to a jury was held erroneous in *Lynch v. Eimer* (1897) 24 Ill. App. 185, because it assumed that an employment for a certain sum per annum constituted a contract for an entire year. It was said that it might have been but a rate of compensation agreed upon for the time served, and not a specification of any particular time agreed upon, and that that evidence, taken in connection with other circumstances connected with the service, might have been proper for the consideration of the jury in determining what the real contract was between the parties, but did not of itself make the contract for a definite time.

Where the testimony of an employee is that "I told him (the employer) that the least I would go for was \$1,500 a year," such evidence can be construed only to establish an employment at will at the specified rate. *Chadwick v. Morris & Co.* (1912) 170 Ill. App. 569.

A contract for service at a weekly salary, with nothing to fix the period of duration, may be terminated at will. *Harrod v. Wineman* (1910) 146 Iowa, 718, 125 N. W. 812.

A hiring at \$1,000 per year, without specifying the term of the employment, is a hiring at will, and may be terminated by either party at any time. *Brookfield v. Drury College* (1909) 139 Mo. App. 339, 123 S. W. 86.

A contract to work for a stipulated amount per month is a general indefinite hiring, subject to termination by either party at pleasure. *Barlow v. Taylor Min. Co.* (1896) 29 Or. 132, 44 Pac. 492.

A contract for personal services at a certain sum per week, with no mention as to its duration, may be terminated by either party at any time without notice. The trial court instructed the jury that the employment was one from year to year. The appellate court said it did not think the contract could be so construed. The court said: "It is our conclusion that the

contract should be construed as a hiring at will, which could be ended at any time by either party without notice." *Warden v. Hinds* (1908) 25 L.R.A.(N.S.) 529, 90 C. C. A. 449, 163 Fed. 201.

In *Martin v. New York L. Ins. Co.* (1895) 148 N. Y. 117, 42 N. E. 516, the report does not show what the actual contract was, but the court says the salary was to be at the rate of a certain amount a year, which was paid monthly. The court, however, unqualifiedly adopts the rule stated by Wood, *Master & Servant*, 2d ed. § 136, that a hiring at so much a day, week, month, or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed and for whatever time the party may serve.

In *Watson v. Gugino* (1912) 204 N. Y. 535, 39 L.R.A.(N.S.) 1090, 98 N. E. 18, Ann. Cas. 1913D, 215, where a promoter of a corporation contracted to devote his whole time and attention to the business at a weekly salary, and left so as to wreck the corporation, the court followed the rule of the *Martin Case*, saying it was deliberately adopted, all the judges concurring to settle the differences of opinion which had prevailed in the lower courts.

A contract employing one for an indefinite term at a monthly salary, with the agreement that the employment shall last at least one year, does not make the employment one from year to year, but the employee may be discharged at will after termination of the year. *Van Der Veer v. Theile* (1918) 185 App. Div. 17, 172 N. Y. Supp. 628.

A resolution of a board of directors, employing a superintendent at a specified salary per year from a specified date, is not an agreement for a year, but is terminable at the election of either party. *Granger v. American Brewing Co.* (1899) 25 Misc. 701, 54 N. Y. Supp. 695.

A contract to serve as counsel at a specified sum per year, payable monthly, is an indefinite one, terminable at will. The court, however, in disposing of the case, says the contract was

simply that the compensation would be paid monthly, at the rate of so much per year. But this injects into the contract an element which was not there, and brings the case within the rule that a contract for compensation at a certain rate per year is indefinite.

In *Tucker v. Philadelphia & R. Coal & I. Co.* (1889) 53 Hun, 139, 6 N. Y. Supp. 134, where the evidence was that the salary was to be a specified sum per year, payable in equal monthly instalments, the court said that the hiring was at the rate of that sum per annum, payable monthly, and that the contract did not import a hiring for a year as a term, but only from month to month at the yearly salary.

An agreement to work at a yearly salary of a specified sum, payable a certain amount each week, is a hiring at will. *Leifer v. Scheinman* (1916) 159 N. Y. Supp. 40.

It is held in *Alger v. New York Post Graduate Medical School & Hospital* (1913) 140 N. Y. Supp. 394, that a stipulation as to a monthly payment, in the absence of the fixing of a definite period of service, constitutes only a hiring at will.

A hiring at the rate of so much per year, no time being specified, is an indefinite hiring; and such a hiring is a hiring at will, and may be terminated at any time by either party. *Feiber v. Home Silk Mills* (1913) 143 N. Y. Supp. 1014.

Where an employee's salary is calculated on a semimonthly basis, the hiring is at will, and he may be discharged at any time. *Gibney v. National Jewelers' Bd. of Trade* (1913) 144 N. Y. Supp. 321.

In *Edwards v. Seaboard & R. R. Co.* (1897) 121 N. C. 490, 28 S. E. 137, the court says of a contract appointing a storekeeper and stating, "Your salary will be a certain sum 'a year,'" that it does not seem reasonable that the parties intended that the service should be performed for a price that should aggregate the sum only, leaving the parties to sever their relations at will for their own convenience.

A mere hiring as manager at a stated price per year is a hiring at will. But where the amount is a part

of a purchase of the manager's business at inventory, with a provision that he should pass into the employ of the purchaser, the court held that the parties intended something wholly different from that which the law will presume from the language used in the hiring clause of the agreement. *Weidman v. United Cigar Stores Co.* (1909) 223 Pa. 160, 132 Am. St. Rep. 727, 72 Atl. 377.

In *Reasener v. Watts, R. & Co.* (1913) 73 W. Va. 342, 51 L.R.A.(N.S.) 629, 80 S. E. 839, which was an action to recover commissions earned in excess of monthly salary stipulated, and commissions were, under the contract, to be ascertained and paid on settlements made at the end of each year, the court follows the rule that an employment upon a weekly, monthly, or yearly salary, if no definite time is otherwise stated for its continuance, is presumed to be a hiring at will.

In *Kosloski v. Kelly* (1904) 122 Wis. 665, 100 N. W. 1037, where the employer defended a claim for wages on the ground that the hiring was for a month, and that no recovery could be had until a full month's wages had been earned, the court said that an agreement to pay for future services at a certain rate per month is not, as matter of law, a hiring for a month.

In *Thullen v. Triumph Electric Co.* (1915) 142 C. C. A. 361, 227 Fed. 837, where the first proposition of the contract was to pay at the rate of a certain amount per year, the second to pay for the year February 1, 1911, to February 1, 1912, after which the salary was to be at the rate of a specified amount per year, payable in equal monthly instalments, the court applied the rule of indefinite hiring to the contract, and held that the contract was merely that payment was to be made at a yearly rate during an unspecified period, and that therefore it is presumptively a hiring at will.

VI. *Circumstances will control.*

It will be noticed by consultation of the above lists of cases that some states appear to be on both sides of the question. The difficulty is that there are so many instances in which

the solution of the problem is not left to rest solely on the terms of the contract, but there are other circumstances which must be taken into consideration. The courts agree that the intention of the parties as ascertained from the terms of the contract, read in the light of surrounding circumstances, will control.

In *Jones v. Manhattan Horse Manure Co.* (1918) 91 N. J. L. 406, 103 Atl. 984, it was held that a stipulation in a written contract for a specified amount of salary per year, payable semimonthly, is not inconsistent with a yearly hiring, and the contract would be deemed a hiring for a year, when, from a consideration of all its terms, such appears to have been the intention of the parties. The provision for the payment of certain bonuses at certain times in the future was held to indicate that the hiring was for a year in that case.

The additional elements which may influence the decision either one way or the other are indicated by the following decisions:

Although the hiring is for weekly wages, it may be found to be for a year if there is a provision for severance on a month's notice. The court said it could not say that that was a weekly hiring which could be terminated only on a month's notice. As no time was limited for the service, the law therefore implied that it was for a year. *Rex v. Gt. Yarmouth* (1816) 5 Maule & S. 114, 105 Eng. Rep. 993.

An agreement to pay a salesman \$3,000 in equal quarterly payments is a hiring for a year. *Kirk v. Hartman* (1869) 63 Pa. 105, 11 Mor. Min. Rep. 450. The court says he was to be paid a fixed sum, and if it was for no fixed time, as, for example, for his entire services until all the stock was sold, how could it possibly be paid in quarterly payments, even supposing that would signify simply a division into four parts?

A contract to take charge of a factory with a guaranty of a certain amount per week, a portion to be paid each pay day and a settlement at the end of each year, is a contract for a

year. *Kelly v. Carthage Wheel Co.* (1900) 62 Ohio St. 598, 57 N. E. 984.

A contract made March 17, to act as salesman in consideration of a certain sum per year, payable in equal weekly instalments, and employer agreeing to pay the above-mentioned sum per year provided sales aggregate a certain amount monthly, commencing February 1, is not at will, but for a year, terminable monthly upon condition subsequent that sales fail to aggregate the required amount. *Heberd v. American Sheet Metal Lath Co.* (1915) 90 Misc. 350, 152 N. Y. Supp. 1083, same case on former appeal (1914) 150 N. Y. Supp. 72.

A memorandum of agreement from July 1, salary a specified amount per month with an extra amount January 1 and July 1, following "making total salary for year" a specified amount, is a hiring for the year. *M. Hemingway & Sons Silk Co. v. Porter* (1900) 94 Ill. App. 609.

In *Babcock & W. Co. v. Moore* (1884) 62 Md. 161, where the contract was to open a sales office, employer to pay expenses and \$25 per week to the agent, and any surplus credits "at end of year" to be paid him, was held to be a contract for a year.

While a mere agreement to pay a salary of a certain sum per annum does not constitute a hiring by the year, it may be converted into such by the addition of agreements for percentage of sales with a guaranty of a minimum net income for the year. *Gressing v. Musical Instrument Sales Co.* (1918) 222 N. Y. 215, 118 N. E. 627, reversing (1915) 169 App. Div. 38, 154 N. Y. Supp. 420. The court says the intention, as evidenced by the writing, governs the interpretation, and where it is apparent from what the parties have said that the employment is to be for a year, the courts will give it that effect. It further says all the negotiations were for the year, by the year, and with reference to the yearly guaranty. Promising that the commissions plus the salary would equal or exceed a named amount carried, by implication, the agreement to give a year within which to earn them.

Where the contract originated under an agreement that the salary should be a specified amount for a certain year, and the employee continued from year to year until he was discharged in the middle of a year, the court held that a contract for a year could not exist unless circumstances warranted the inference that the parties so understood it, and said such agreement or understanding may be inferred from a custom or usage which the parties must be considered as having contemplated. And the question was held to have been properly left to the jury, which found in favor of the contract. *Chamberlain v. Detroit Stove Works* (1894) 103 Mich. 124, 61 N. W. 532.

Under a resolution appointing a staff with salaries at specified amounts per annum until necessity arises for reducing the number or dispensing with the services entirely, the hiring is not for a year. *McGreevy v. Quebec Harbour Comrs.* (1896) Rap. Jud. Quebec 11 C. S. 455.

Where the contract was that the employee could stay a year if he did his work well, the court said that the work was to be to the satisfaction of the employer, and the contract was therefore terminable at his pleasure, but it states that an indefinite hiring at so much per day, per month, or per year is a hiring at will, and may be terminated by either party at any time. *Finger v. Koch & S. Brewing Co.* (1883) 13 Mo. App. 310.

A hiring at so much per week and to part on a week's notice is not a general hiring which will be construed as one for a year to give a settlement under the Poor Law, although the service is continued for a period of six years. *Rex v. Hanbury* (1802) 2 Bott, Poor Law (Eng.) 231, pl. 290.

A hiring at weekly wages, with liberty to part on a month's notice, is a general hiring which the law fixes as a year. *Rex v. Hampreston* (1793) 5 T. R. 205, 101 Eng. Reprint, 116.

If one who has been receiving his compensation semimonthly at a monthly rate secures an agreement for a yearly salary upon his request that his employment be made more per-

manent, the jury may infer a contract for a year, although the payments continue to be made semimonthly. The court says: "The rule that, from the mere fact that a servant has been hired, the law will presume an employment for a year, is by no means inflexible, even in England, and perhaps a hiring for a shorter period will be more readily inferred in this country than in England. There, as well as here, proof of the periods at which payments were to be made, the character of the employment, custom, the course of dealing between the parties, or other fact which may throw light upon the question, is admissible." *Bascom v. Shillito* (1882) 37 Ohio St. 431.

A contract for employment which contained no specific agreement as to duration, but which provided for compensation by the week, together with a certain percentage to be credited to the employee "at the end of the year," was construed to continue for a year, in *Babcock & W. Co. v. Moore* (1884) 62 Md. 161.

In *State, Stanford, Prosecutor, v. Fisher Varnish Co.* (1881) 43 N. J. L. 151, a bookkeeper who had been employed by the week received an increase in salary, evidenced by a resolution that the increase be "\$104 per annum, thus making his salary \$14 instead of \$12 per week." And it was held that the words "increase per annum" were used only as a mode of computation, and not to extend the hiring for a year.

Where plaintiff was to be employed in connection with a construction contract "at a salary of \$2,500 per annum," and defendant claimed that the contract had never been secured so that the proposition to hire plaintiff never became effective, the trial judge instructed the jury that plaintiff could not recover because he had not held himself at any time in readiness to do or perform services as engineer. *Haney v. Caldwell* (1879) 35 Ark. 156. The appellate court said: "The letter referred to was not a special contract for a definite time, and at a fixed price, the complete performance of which was a condition precedent to a right

to compensation. No time is fixed in the letter, or any outside agreement, during which plaintiff was to act as engineer. The letter says the plaintiff was employed to act as engineer at a salary of \$2,500 a year. The \$2,500 was the stipulated rate according to which plaintiff was to be compensated for his services when performed. Plaintiff was not bound by the terms of the letter referred to, to serve, or offer and hold himself in readiness to serve, as engineer, for any definite period as a condition precedent to a right to compensation. If plaintiff was employed by the letter to serve as engineer, and he served as such engineer according to the terms thereof, or offered and held himself in readiness to do so for any period of time, he was entitled to compensation for such period at the rate agreed upon, unless he was dismissed or discharged by act of the defendant, or otherwise, before the expiration of such period, in which event he would be entitled to compensation at the same rate for so much of said period as expired before his dismissal or discharge."

In *Graves v. Lyon Bros. & Co.* (1896) 110 Mich. 670, 68 N. W. 985, there had been an employment by the month extending over two years, and, at the beginning of the next year, the plaintiff was informed by his employer's agent that his "pay would have to be reduced to \$600 for the year." An action to recover for his wrongful discharge before the end of the year resulted in the plaintiff's favor, the court taking the view that it was a fair inference that the contract was for a year.

In *Gabriel v. Opoznauer* (1915) 89 Misc. 611, 153 N. Y. Supp. 990, the contract was, "We herewith engage you at a salary of \$5,200, to be paid in weekly instalments of \$100," and with a provision for discharge in case the employee's representations of ability were unfounded. The court held that this implied fifty-two weeks' duration, else how could \$5,200 be paid in \$100 instalments weekly, in view of the fact that the employer remarked, when handing the contract to employee,

"This is for a year," and that both parties acted on that assumption. The court said: "The facts of the case place it literally on the border line of decision, in a domain which has lately been marked by no little readjustment to the actualities and the integrities of present-day commercial dealing. I have some doubt whether the verdict is sustained by precedents of long standing; I am not certain that the courts of this state . . . have yet gone so far in giving enforcement to the obvious in commercial transactions and preventing the success of artifice and bad faith. . . . If the intention was merely to hire the plaintiff at a salary of \$100 per week for whatever period the defendants chose to keep her, it would have been easy to say so, and nothing would have been said about a salary of \$5,200 to be paid in weekly instalments of \$100, or about the employers' right of discharge should any representations be found false. The agreement, it will be noted, was to pay a salary of \$5,200, not a salary at a rate of \$5,200 per year, as in cases relied on by the defendants, and the plaintiff was discharged before she received the \$5,200 stipulated. If it had been intended to give an absolute right to discharge at any time, Opoznauer could readily have so stated, without leaving it to inference, and would hardly have taken pains to create a tissue of provisions negating the possibility of such an inference."

It was held in *Evans v. Roe* (1872) 26 L. T. N. S. (Eng.) 70, that oral evidence was inadmissible to show a yearly hiring, where a written contract provided for a weekly salary.

VII. "*At rate of,*" or *on basis of.*

If words are used in connection with the statement of salary which indicate that it is to be merely a measure of compensation, and not a measure of duration of the hiring, the contract is regarded as at will, and may be terminated at the pleasure of either party. *Feiber v. Home Silk Mills* (1913) 143 N. Y. Supp. 1014; *The Rescue* (1902) 116 Fed. 380.

A contract making the salary per month, at rate of a specified amount

per year, is a hiring by the month. *Pinckney v. Talmage* (1889) 32 S. C. 364, 10 S. E. 1083.

But a contract of hiring at the rate of \$4,000 per year and a percentage of net profits which may be terminated by a thirty days' notice after January 1, profits to be computed annually, is a hiring for a year.

And in *Turner v. Robinson* (1833) 5 Barn. & Ad. 789, 110 Eng. Reprint, 982, 6 Car. & P. 15, 2 Nev. & M. 829, it is held that an agreement for wages at the rate of a specified amount per year presumptively constitutes a hiring for a year, and therefore, if the servant is rightfully discharged during the year, he cannot recover pro tanto for the service rendered.

In *Great Northern Hotel Co. v. Leopold* (1897) 72 Ill. App. 108, the terms of the contract do not appear, but the controversy was whether the employment was for a month, or by the day at a specified rate per month. Court says "at the rate" of a specified sum per month implies a hiring for one month, at least.

The *Pacific* (1883) 18 Fed. 703, involved a contract with an engineer of a steam tug, who was to be paid by the month. The court says mariners of all classes are usually employed by the voyage, and their terms of service expire with the voyage, although their wages may be at a fixed rate per month, unless there is a special contract fixing it differently. If such a hiring as the present one is to be regarded by analogy to other hirings on shipboard, every day's cruising is a voyage.

A hiring at the rate of a certain sum per annum is not a contract for a year. *Lennan v. St. Lawrence & A. R. Co.* (1853) 4 Lower Can. Rep. (Dec. des Tribunaux) 91.

Where, after the termination of a hiring for one year, the employee continues his employment, with increases of salary from time to time at periods other than anniversaries of the original employment, signing receipts for monthly salary which stated that his compensation was "at the rate of" a specified sum per year, the court held that it constituted merely a hiring at

will, which might be terminated at any time by either party.

Where plaintiff claimed that he was to receive "at the rate of" a certain amount per year for services, and defendant that he was to be paid that amount if he served faithfully and was strictly temperate, the court held that failure to serve a year was no defense to an action for services actually rendered. *Prentiss v. Ledyard* (1871) 28 Wis. 131.

Under a contract to oversee a plantation at the rate of a specified sum per annum, the duration of the contract is indefinite, and complete performance is not necessary to a recovery of compensation for work done. *Wright v. Morrison* (1855) 15 Ark. 444.

An employment permanently at the rate of a specified amount per year is terminable at will. *Minter v. Tootle, Campbell Dry Goods Co.* (1915) 187 Mo. App. 16, 173 S. W. 4.

The acceptance of an offer of service for a retainer at the rate of a certain amount per year creates a contract at will. *Bulkey v. Kaolin Products Co.* (1919) 187 App. Div. 103, 175 N. Y. Supp. 219.

In *Cuppy v. Stollwerck Bros.* (1913) 158 App. Div. 628, 143 N. Y. Supp. 967, the court, in dealing with a proposition to remain "at the rate of" a specified sum per year, said that the acceptance of a proposition for employment at a specified rate per year is not an employment for a year, but merely at will. The final contract, however, did not rest upon this proposition, but there were found negotiations and a resolution of directors, and the court held that acquiescence in the proposition of the directors destroyed all claims to employment for the year. This was reversed, however, by the court of appeals, on the ground that the correspondence between the parties fixed the contract as one for twelve months. (1916) 216 N. Y. 591, 111 N. E. 249.

An employment which provided that the salary would "be per month, at the rate of \$500 a year," was held, in *Pinckney v. Talmage* (1890) 32 S. C.

364, 10 S. E. 1083, to be no more than a hiring by the month.

It was held in *Illinois State Journal Co. v. Green* (1897) 69 Ill. App. 305, that the adoption by the appellant printing company, as employer, of one of the rules of a typographical union, providing that learners upon a type-setting machine should be paid at the rate of a specified amount per week for the first thirty-six days' work, did not have the effect to fix the period or term of employment.

A contract for service, salary to be paid on the basis of a specified amount per year, payable weekly or monthly, is a hiring at will, terminable at the pleasure of either party. *Hirt v. Mayer* (1917) 165 N. Y. Supp. 200.

VIII. For "first year," or other definite time.

If the contract provides for a definite term of service, there can be no question but that it will continue for such term. Therefore, a contract for a specified year will continue through the year, and most of the cases hold that a contract providing for compensation for the "first year," or similar phrase, will continue during such period.

In *Orr v. Ward* (1874) 73 Ill. 318, a contract of employment provided for compensation in a certain amount "for the year 1873," and a slight increase "for the year 1874," to be paid in semi-monthly or monthly instalments, but it was held that, even though the parties may have contracted on the supposition that the business would continue through the two years, yet there was no obligation to continue the employment for that length of time, or any other fixed period.

An agreement to pay for the year 1891 a stated salary and commissions covers the whole year. *Koehler v. Buhl* (1893) 94 Mich. 496, 54 N. W. 157.

A contract to pay a certain sum for one year's service from date, payable in twelve monthly payments at the expiration of each month, is a hiring for a year. *Hotchkiss v. Godkin* (1901) 63 App. Div. 468, 71 N. Y. Supp. 629. The court places its ruling upon the

ground that the intention of the parties is to be effectuated, and that it is clearly within the intent of the parties to the contract that the contract should continue for a definite period of time, and that period was one year.

The court says the contract is different from an agreement to pay a certain sum per year for service.

But an agreement, at the termination of a contract for a year, that "we will employ you and pay you by the year" "so long as you stay here and do what is right by the company," is a contract for an indefinite period, subject to termination at will. *Booth v. National India Rubber Co.* (1897) 19 R. L. 696, 36 Atl. 714.

A contract for monthly wages, and "at the end of the first year" an increase of salary, is a hiring for the year. *Norton v. Cowell* (1886) 65 Md. 359, 57 Am. Rep. 331, 4 Atl. 408.

A contract to pay an employee at the rate of a certain sum per month for the first year, and to advance a certain sum per annum thereafter, is a hiring for a year. *Fawcett v. Cash* (1834) 5 Barn. & Ad. 904, 110 Eng. Reprint, 1026, 3 Nev. & M. 177, 3 L. J. K. B. N. S. 113. The ruling was placed partly upon the ground that a general hiring is for a year, and partly on the wording of the contract.

A contract for a certain amount per month for the first year, and another amount per month for the second year, may be found to be a hiring for two years. *Doolittle v. Pacific Coast Safe & V. Works* (1916) 79 Or. 498, 154 Pac. 753.

In *Giraud v. Richmond* (1846) 2 C. B. 835, 135 Eng. Reprint, 1172, 15 L. J. C. P. N. S. 180, 10 Jur. 360, where the contract was for salary at the following rates: a specified amount for the first year, second year, and so on for five years, it was held that the contract was for five years, salary payable yearly, and that therefore an action could not be maintained for a half year's salary.

A contract to employ at the rate of a certain amount per month for the first year is a contract for the year. *Fawcett v. Cash* (Eng.) supra.

In *Seago v. White* (1907) 45 Tex.

Civ. App. 539, 100 S. W. 1015, the following contract construed as a whole was said to evidence a hiring for one year: "I will work for you the first year for \$1,000; give my undivided time and attention to the advancement and best interest of the enterprise; after that time, provided each of us should live, I will leave it to you to say what I am worth to the business. . . . ' This contemplates continuous and perpetual service."

And so, in *Norton v. Cowell* (1886) 65 Md. 359, 57 Am. Rep. 331, 4 Atl. 408, a contract of hiring was held to have been made for the term of a year, although the salary was fixed at a certain rate per month. It was said that stipulations for the payment of wages quarterly, monthly, or even weekly, were not inconsistent with a yearly hiring, and in this case a clause in the agreement providing for an increase of salary if satisfaction was given "at the end of the first year," furnished a clue to the intention of the parties.

Mason v. New York Produce Exch. (1908) 127 App. Div. 282, 111 N. Y. Supp. 163, affirmed without opinion in (1909) 196 N. Y. 548, 89 N. E. 1104, holds that a contract of employment "at a salary of \$2,500 for the first year, and if your services prove satisfactory . . . your remuneration for the second year and thereafter will be \$3,000 per annum," constituted a hiring from year to year.

So, in *Robertson v. Jenner* (1867) 15 L. T. N. S. (Eng.) 514, a hiring at a certain amount per week for the first year is a hiring by the year. In that case it appeared that the agreement was that the employee should enter into the service for one month at a salary of a specified amount per week for the first year, and was discharged at the end of four months.

But in *Reiss v. Usona Shirt Co.* (1916) 174 App. Div. 181, 159 N. Y. Supp. 1031, it was held that a hiring at a specified amount per week for the first year, and another amount for the next year, is a contract of indefinite hiring which may be terminated at will.

A contract of employment providing

compensation "at the rate of seven hundred and eighty (\$780) dollars for the first six months . . . being thirty (\$30) dollars per week, payable weekly, and at the rate of nine hundred and ten (\$910) dollars for the second six months, being thirty-five (\$35) dollars per week as and for his salary, payable weekly," cannot be construed to be a hiring for a year. *Stein v. Kooperstein* (1907) 52 Misc. 481, 102 N. Y. Supp. 578.

A contract that one is to receive a certain amount per year until further notice, or during the succeeding year, does not prevent discharge at any time after expiration of the year named. *Fuller v. Peninsular White Lead & Color Works* (1896) 111 Mich. 221, 69 N. W. 492. The court said: "We think that the evidence shows conclusively that the plaintiff accepted employment upon the terms stated in the writing, which were that he should be paid a salary of \$1,200 per year until further notice. It might be raised, but could not be reduced during 1893, but might thereafter upon notice. To say that he could only be dismissed at the end of a year would make this provision meaningless, for nobody contends that, without it, the contract might not be changed or even terminated at any yearly period by either party. The only reasonable construction is that, for the year 1893, the plaintiff had a right to a salary of \$1,200. After that his right might be terminated upon notice, which was equivalent to saying that the defendant might terminate the contract, because he could not be compelled to work at a lower price or insist upon receiving any stated amount."

IX. *Effect of statute.*

The statutes in some cases expressly provide that a hiring for a specified sum per week, month, or year, as the case may be, shall be regarded as a hiring for the period named. The California Code provides that in contracts of employment of a servant, the term shall be construed according to the times for which compensation is fixed, and the court held that, even apart from that, the contract for an

actor at a stipulated amount per week is to be construed as a contract from week to week. *Standing v. Morosco* (1919) — Cal. App. —, 184 Pac. 954.

Where there is a statutory provision continuing a hiring for such length of time as the parties adopt for the estimation of wages, viz., a hiring at a yearly rate to continue a year, a hiring at a daily rate to continue a day, etc., and one is hired at so much per year, payment by monthly instalments of the yearly rate does not change the contract to a hiring by the month. *Rosenberger v. Pacific Coast R. Co.* (1896) 111 Cal. 313, 43 Pac. 963.

That wages are payable at a stipulated period raises the presumption that the hiring is for such period, by the terms of a Georgia statute.

Under this statute it was held in *Webb v. McCranie* (1913) 12 Ga. App. 269, 77 S. E. 175, that the fact that wages are payable weekly raises the presumption that the contract of hiring is by the week.

And in *Phillips Lumber Co. v. Smith* (1909) 7 Ga. App. 222, 66 S. E. 623, it is held: "That wages are paid at a stipulated period raises the presumption that the hiring is for such period, if nothing in the contract shows that the hiring was for a longer or shorter period."

X. Effect of paying wages in instalments.

One of the reasons which have been advanced for holding that the hiring is not for a longer period is that, if it shall be held to be such, no compensation could be collected until the term of service had expired, and the corollary of that is that if there is a stipulation for payment in instalments there is a presumption that there was no intention that the hiring should be continued during the longer period. But a majority of the cases which have definitely passed upon the question hold that the mere fact that the compensation is to be paid in instalments at definite periods does not, of itself, prevent the hiring from being an entire one for the period named. Thus, in *Davis v. Marshall* (1861) 4 L. T. N. S. (Eng.) 216, it is held that the

mere fact of receiving compensation monthly is not inconsistent with a yearly hiring.

Where the employment is for the year round, the fact that the wages are to be paid weekly and that the service may be terminated on a fortnight's notice does not change the hiring from a yearly to a weekly one. *Rex v. Birdbrooke* (1791) 4 T. R. 245, 100 Eng. Reprint, 998.

If the hiring is for a year the fact that the wages are payable quarterly is immaterial. *Rex v. Atherton* (1742) Burr. Sett. Cas. (Eng.) 203.

A hiring at a specified price per year is a hiring for a year, although the wages are paid in instalments, and the servant cannot leave the employment within the year without liability to damages. *Huttman v. Boulnois* (1826) 2 Car. & P. (Eng.) 510.

In *Smith v. Theobald* (1887) 86 Ky. 141, 5 S. W. 394, a contract to manage a hotel was construed to have been a hiring for a year, because of surrounding circumstances, although the salary was fixed at so much per month. Upon this point it was said that the circumstances of agreeing on weekly, monthly, quarterly, or half-yearly payment of wages may be sufficient of itself to create the presumption of a hiring for the corresponding periods. But the circumstances of the hiring, though no time is expressly agreed upon, may show that it was to continue for a year, although the payment of the wages was to occur monthly, etc.

But in *Kansas P. R. Co. v. Roberson* (1876) 3 Colo. 142, a contract composed of an answer of a certain sum per annum, to the question, "What salary will you ask?" does not constitute a contract for a year. The court says the practical construction of the parties in paying and receiving the compensation in monthly instalments shows that a gross sum payable at the end of a year was not contemplated. The court held that a general hiring could not be regarded, in this case, as a contract for a year's service. H. P. F.

ARTHUR WALDO PETTIT, by Guardian ad Litem, Appt.,
v.

L. C. LISTON et al., Copartners as Cycle Supply Company, Respts.

Oregon Supreme Court (Dept. No. 2)—July 27, 1920.

(— Or. —, 191 Pac. 660.)

Infant — purchase of motorcycle — recovery of price — allowance for depreciation.

A minor who by a fair contract, without undue influence, has purchased a motorcycle on the instalment plan, cannot return the machine and recover the money paid without making reasonable compensation for depreciation of the machine while in his possession.

[See note on this question beginning on page 491.]

APPEAL by plaintiff from a judgment of the Circuit Court for Lane County (Skipworth, J.) overruling a demurrer to the answer and dismissing an action brought to recover the amount paid by plaintiff upon a motorcycle purchased from defendants on the instalment plan. *Affirmed.*

Statement by Bennett, J.:

Plaintiff, a minor, brings this action by his guardian to recover \$125 paid by him upon the purchase price of a certain motorcycle purchased from the defendants.

The case involves the question of whether or not a minor who has purchased an article of this kind, and taken and used the same, after paying part or all of the purchase price, can return the article and recover the money paid without making good to the vendors the wear and tear and depreciation of the same while in his hands.

The defendants in the case were engaged in the selling of motorcycles and attachments. The plaintiff purchased from them a motorcycle at the agreed price of \$325. He paid \$125 down, and was to pay \$25 per month upon the purchase price until the payments were completed. He took and used the motorcycle for a little over a month, and finally returned the same to the defendants, and demanded the return of his money. The defendants answer and allege that plaintiff used the machine, and in so doing damaged it to the amount of \$156.65.

There was a demurrer to the answer, which was overruled by the

court, and, the plaintiff refusing to reply or plead further and standing upon his demurrer, a judgment and order were entered dismissing the cause, from which the plaintiff appeals.

Mr. Fred E. Smith, for appellant:

The right of disaffirmance of an infant's contract is personal to him, and to him only. It is not a matter of any moment whether the contract is a fair one or not, the infant may rescind it.

Hyer v. Hyatt, 3 Cranch, C. C. 276, Fed. Cas. No. 6,977; Cheshire v. Barrett, 15 S. C. L. (4 M'Cord) 241, 17 Am. Dec. 735; Cole v. Pennoyer, 14 Ill. 158; Cummings v. Powell, 8 Tex. 80; Mustard v. Wohlford, 15 Gratt. 329, 75 Am. Dec. 209; Fetrow v. Wiseman, 40 Ind. 148; Harner v. Dipple, 31 Ohio St. 72, 27 Am. Rep. 496; Ex parte McFerren, 184 Ala. 223, 47 L.R.A. (N.S.) 550, 63 So. 159, Ann. Cas. 1915B, 672; 14 R. C. L. 223.

An infant may rescind a contract of purchase, and recover back the purchase money paid by him, at least where he restores or offers to restore the property which he has received under the contract, to the seller.

Riley v. Mallory, 83 Conn. 201; Robinson v. Weeks, 56 Me. 102; Cooper v. Allport, 10 Daly, 352; House v. Alexander, 105 Ind. 109, 55 Am. Rep. 189, 4 N. E. 891; McCarthy v. Henderson, 138 Mass. 310; 22 Cyc. 618.

And in such action the vendor will not be entitled to recoup for the use of the property while in the possession of the minor.

McCarthy v. Henderson, 138 Mass. 310; 22 Cyc. 561.

And the infant's right of recovery will not be affected by the fact that the property has depreciated in value while in his possession, by reason of use or otherwise.

Whitcomb v. Joslyn, 51 Vt. 79, 31 Am. Rep. 678; Price v. Furman, 27 Vt. 268, 65 Am. Dec. 194; White v. Branch, 51 Ind. 210; Carpenter v. Carpenter, 45 Ind. 142; 22 Cyc. 557.

On disaffirmance of the purchase by the infant, the title reverts in the vendor, who may reclaim the goods from the infant if he still have them.

Badger v. Phinney, 15 Mass. 359, 8 Am. Dec. 105; Boyden v. Boyden, 9 Met. 519; Strain v. Wright, 7 Ga. 568; Heath v. West, 28 N. H. 101; Craig v. Van Bebber, 18 Am. St. Rep. 688, note; Chandler v. Simmons, 97 Mass. 508, 93 Am. Dec. 117.

If the suit is in equity to rescind an executed contract, the court will require a restoration as a condition to granting relief. If the rescission is effected without the aid of equity, the other contracting party has a remedy to recover what he parted with. The infant, in order to rescind, must return what remains in his possession.

Bloomer v. Nolan, 36 Neb. 51, 38 Am. St. Rep. 690, 53 N. W. 1039; Petrie v. Williams, 68 Hun, 589, 23 N. Y. Supp. 237; Jackson v. Brown, 76 Hun, 41, 27 N. Y. Supp. 583; Abernathy v. Phillips, 82 Va. 769, 1 S. E. 113; Jenkins v. Jenkins, 12 Iowa, 195; Brantley v. Wolf, 60 Miss. 420; Green v. Green, 69 N. Y. 553, 25 Am. Rep. 233; Englebert v. Pritchett, 26 L.R.A. 178, note.

He must return the consideration which he still retains in kind, and it is immaterial whether the contract is executory or executed.

Gillespie v. Bailey, 12 W. Va. 70, 29 Am. Rep. 445; Harvey v. Briggs, 68 Miss. 60, 10 L.R.A. 62, 8 So. 274; Bedinger v. Wharton, 27 Gratt. 857.

An infant need not wait until arriving at majority before rescinding a contract of purchase of personal property.

Stoll v. Hawks, 179 Mich. 571, 51 L.R.A. (N.S.) 28, 146 N. W. 229; Ross P. Curtice Co. v. Kent, 52 L.R.A. (N.S.) 724, note; Manning v. Johnson, 62 Am.

Dec. 738, note; Reynolds v. Garber-Buick Co. 183 Mich. 157, L.R.A. 1915C, 362, 149 N. W. 985.

An infant may disaffirm his contract, and recover back, in a court of law, property transferred or money paid in pursuance thereof, without any condition as to restoring the consideration received by him.

Eureka Co. v. Edwards, 71 Ala. 248, 46 Am. Rep. 314; Miles v. Lingerian, 24 Ind. 385; Briggs v. McCabe, 27 Ind. 327, 89 Am. Dec. 503; Carpenter v. Carpenter, 45 Ind. 142; White v. Branch, 51 Ind. 210; Clark v. Van Court, 100 Ind. 113, 50 Am. Rep. 774; Shirk v. Shultz, 113 Ind. 571, 15 N. E. 12; Chandler v. Simmons, 97 Mass. 508, 93 Am. Dec. 117; Walsh v. Young, 110 Mass. 396; Dawson v. Helmes, 30 Minn. 107, 14 N. W. 462; 22 Cyc. 557.

Messrs. Potter & Immel and O. H. Foster for respondents.

Bennett, J., delivered the opinion of the court:

The amount involved in this proceeding is not large, but the question of law presented is a very important one, and one which has been much disputed in the courts, and about which there is a great and irreconcilable conflict in the authorities, and we have therefore given the matter careful attention.

The courts, in an attempt to protect the minor upon the one hand, and to prevent wrong or injustice to persons who have dealt fairly and reasonably with such minor upon the other, have indulged in many fine distinctions and recognized various slight shades of difference.

In dealing with the right of the minor to rescind his contract and the conditions under which he may do so, the decisions of the courts in the different states have not only conflicted upon the main questions involved, but many of the decisions of the same court in the same state seem to be inconsistent with each other; and oftentimes one court has made its decision turn upon a distinction or difference not recognized by the courts of other states as a distinguishing feature.

The result has been that there are not only two general lines of decisions directly upon the question in-

volved, but there are many others, which diverge more or less from the main line, and make particular cases turn upon real or fancied differences and distinctions, depending upon whether the contract was executory or partly or wholly executed, whether it was for necessities, whether it was beneficial to the minor, whether the minor still had the property purchased in his possession, whether he had received any beneficial use of the same, etc.

Many courts have held broadly that a minor may so purchase property and keep it for an indefinite time, if he chooses, until it is worn out and destroyed, and then recover the payments made on the purchase price, without allowing the seller anything whatever for the use and depreciation of the property.

Many other authorities hold that where the transaction is fair and reasonable, and the minor was not overcharged or taken advantage of in any way, and he takes and keeps the property and uses or destroys it, he cannot recover the payments made on the purchase price, without allowing the seller for the wear and tear and depreciation of the article while in his hands.

The plaintiff contends for the former rule, and supports his contention with citations from the courts of last resort of Maine, Connecticut, Indiana, Massachusetts, Vermont, Nebraska, Virginia, Iowa, Mississippi, and West Virginia, most of which (although not all) support his contention. On the contrary, the courts of New York, Maryland, Montana, Illinois, Kentucky, New Hampshire, and Minnesota, with some others, support the latter rule, which seems to be also the English rule.

Some of the cyclopedias and some of the different series of selected cases state the rule contended for by plaintiff, as supported by the strong weight of authority; but we find the decisions rather equally balanced, both in number and respectability.

In *Rice v. Butler*, 160 N. Y. 578,

47 L.R.A. 303, 73 Am. St. Rep. 703, 55 N. E. 275, in an opinion by Mr. Justice Haight, concurred in by the entire court, it is said: "There are numerous authorities bearing upon the question, but they are not in entire harmony. We have examined them with some care, but have found none in this court which appears to settle the question now presented. We, consequently, are left free to adopt such a rule as in our judgment will best promote justice and equity. The contract in this case in its entirety must be held to be executory; for, under its terms, payments were to mature in the future and the title was only to pass to the minor upon making all of the payments stipulated; but in so far as the payments made were concerned, the contract was in a sense executed, for nothing further remained to be done with reference to those payments. Kent, in his Commentaries (vol. 2, p. 240) says: 'If an infant pays money on his contract and enjoys the benefit of it, and then avoids it when he comes of age, he cannot recover back the consideration paid. On the other hand, if he avoids an executed contract when he comes of age on the ground of infancy, he must restore the consideration which he had received. The privilege of infancy is to be used as a shield, and not as a sword. He cannot have the benefit of the contract on one side without returning the equivalent on the other.' "

This ruling is followed in *Wanisch v. Wuertz*, 79 Misc. 610, 140 N. Y. Supp. 573, and *Lown v. Spoon*, 158 App. Div. 900, 143 N. Y. Supp. 275.

In *Adams v. Beall*, 67 Md. 53, 1 Am. St. Rep. 379, 8 Atl. 664, the plaintiff, a minor, had paid a large sum of money into a partnership concern. The business was not successful, and the infant undertook to rescind his contract and recover the money paid. It was held that he could not recover, and the court, citing from an opinion by Lord Justice Turner in the English case of *Corpe v. Overton*, 10 Bing. 252, 131 Eng. Reprint, 901 [Ex parte Taylor, 8 DeG. M. & G. 258, 44 Eng. Reprint,

389], said: "He must have a right upon his attaining his majority to elect whether he will adopt the contract or not. It is, however, a different question whether, if an infant pays money on the footing of a contract, he can afterwards recover it back. If an infant buys an article which is not a necessary, he cannot be compelled to pay for it, but if he does pay for it during his minority he cannot, on attaining his majority, recover the money back."

And the same court, as late as 1910, in the case of *Latrobe v. Dietrich*, 114 Md. 8, 24, 78 Atl. 989, said:

"If the infant have already advanced money upon a contract which is executory upon the part of the adult, he cannot disaffirm it and sue the other party for the advance, whenever it was paid on a valuable consideration which has been partially enjoyed, and especially if he had received the benefit of his contract. . . .

"Where an infant pays money on a voidable contract, and has enjoyed the benefit of it, he cannot avoid it and recover back his money."

In *Clark v. Tate*, 7 Mont. 171, 14 Pac. 761, it is said: "We think that the sound rule is, as laid down by Chancellor Kent, as follows: 'If an infant pays money on his contract, and enjoys the benefit of it, and then avoids it when he comes of age, he cannot recover back the consideration paid. On the other hand, if he avoids an executed contract when he comes of age, on the ground of infancy, he must restore the consideration which he had received. The privilege of infancy is to be used as a shield and not as a sword.'"

To the same effect are: *Chicago Mut. Life Indemnity Asso. v. Hunt*, 127 Ill. 257, 277, 2 L.R.A. 549, 20 N. E. 55; *Bailey v. Barnberger*, 11 B. Mon. 113; *Hall v. Butterfield*, 59 N. H. 354, 47 Am. Rep. 209; *Berglund v. American Multigraph Sales Co.* 135 Minn. 67, 160 N. W. 191.

Our attention has not been called to any Oregon case bearing upon the

question, and as far as our investigation has disclosed there is none.

In this condition of the authorities, we feel that we are in a position to pass upon the question as one of first impression, and announce the rule which seems to us to be the better one, upon considerations of principle and public policy.

We think, where the minor has not been overreached in any way, and there has been no undue influence, and the contract is a fair and reasonable one, and the minor has actually paid money on the purchase price, and taken and used the article, that he ought not to be permitted to recover the amount actually paid, without allowing the vendor of the goods the reasonable compensation for the use and depreciation of the article, while in his hands.

Infant—purchase of motorcycle—recovery of price—allowance for depreciation.

Of course, if there has been any fraud or imposition on the part of the seller, or if the contract is unfair, or any unfair advantage has been taken of the minor in inducing him to make the purchase, then a different rule would apply. And whether there had been such an overreaching on the part of the seller would always, in case of a jury trial, be a question for the jury.

We think this rule will fully and fairly protect the minor against injustice or imposition, and at the same time it will be fair to the business man who has dealt with such minor in good faith. This rule is best adapted to modern conditions, and especially to the conditions in our far western states.

Here, minors are permitted to, and do in fact, transact a great deal of business for themselves, long before they have reached the age of legal majority. Most young men have their own time long before reaching that age. They work and earn money, and collect it, and spend it oftentimes without any oversight or restriction.

No business man questions their right to buy, if they have the money

to pay for their purchases. They not only buy for themselves, but they often are intrusted with the making of purchases for their parents and guardians. It would be intolerably burdensome for everyone concerned if merchants and other business men could not deal with them safely, in a fair and reasonable way, in cash transactions of this kind.

Again, it will not exert any good moral influence upon boys and young men, and will not tend to encourage honesty and integrity, or lead them to a good and useful business future, if they are taught that they can make purchases with their own money, for their own benefit, and after paying for them in this way, and using them until they are worn out and destroyed, go back and compel the business man to return to them what they have paid upon the

purchase price. Such a doctrine, as it seems to us, can only lead to the corruption of young men's principles, and encourage them in habits of trickery and dishonesty.

In view of all these considerations, we think that the rule we have indicated, and which is substantially the rule adopted in New York, is the better rule, and we adopt the same in this state.

We must not be understood as deciding at this time what would be the rule where the vendor is seeking to enforce an executory contract against the minor, which is a different question not necessarily involved in this case.

It follows that the judgment of the court below should be affirmed.

McBride, Ch. J., and Bean and Johns, JJ., concur.

Petition for rehearing denied September 28, 1920.

ANNOTATION.

Right to allowance for use or depreciation of subject-matter, in an action against seller to recover back purchase price upon disaffirmance of infant's contract.

This annotation is limited to purchases of personal property, other than necessities, by an infant, where on disaffirmance the article purchased has been returned or tendered back.

The confusion on the subject of the disaffirmance of an infant's contract, and of its result, extends to the matter of allowance for use or depreciation of articles purchased by him. In some cases on the law of disaffirmance, we find the theory of a distinction between executed and executory contracts, and in others the notion of improvident or provident contracts (aside from contracts for necessities). In the reported case (PETTIT v. LISTON, ante, 487) the court lays stress on the fact that infants in the "far western states" transact a good deal of business for themselves, and seems to assert as a principle of law that infants ought not to be allowed to think that they can act unfairly. The weight of authority, regardless

of such considerations, permits the infant, upon disaffirming his contract, and returning the article purchased, if he has it, to recover back the purchase price without deduction on account of its use or depreciation in value.

Majority rule.

An infant, on disaffirming his purchase of personal property returned or tendered back by him, may recover what he has paid therefor, without deduction for the use or for the depreciation in value of the property.

Illinois.—Hauser v. Marmon Chicago Co. (1917) 208 Ill. App. 171.

Indiana.—Story & C. Piano Co. v. Davy (1918) — Ind. App. —, 119 N. E. 177.

Massachusetts.—McCarthy v. Henderson (1885) 138 Mass. 310; Gillis v. Goodwin (1901) 180 Mass. 140, 91 Am. St. Rep. 265, 61 N. E. 813.

Michigan.—Reynolds v. Garber-Buick Co. (1914) 183 Mich. 157,

L.R.A.1915C, 362, 149 N. W. 985 (disaffirmance after reaching majority).

Utah.—*Blake v. Harding* (1919) — Utah, —, 180 Pac. 172.

Vermont.—*Price v. Furman* (1855) 27 Vt. 268, 65 Am. Dec. 194; *Whitcomb v. Joslyn* (1878) 51 Vt. 79, 31 Am. Rep. 678.

Thus, an infant, upon restoration of an automobile purchased by him to the seller, although it has been used and has deteriorated in value, is entitled to rescind the contract of sale and recover back that part of the purchase price which has been paid. *Hauser v. Marmon Chicago Co.* (Ill.) *supra*.

So, where an infant sued to recover payments made by her on account of the purchase of a piano retaken by the seller, it was held that she was entitled to recover without deduction for the use or depreciation of the piano, although the contract provided that in case the seller retook possession, all moneys paid on the purchase price should belong to him as compensation for the use, rental, and depreciation in value of the piano while remaining in the buyer's possession. *Story & C. Piano Co. v. Davy* (Ind.) *supra*.

In *McCarthy v. Henderson* (Mass.) *supra*, an action in behalf of an infant to recover back what he had paid upon a conditional purchase of a vehicle, it appeared that within less than a month after the sale he notified the sellers of his intention to rescind the contract, and offered to return the vehicle; the defendants refused to receive it, but afterward, at the expiration of four months from the time of sale, took possession. It was held that the defendants could not recoup the value of the use of the vehicle. The court said: "It is clear that, if the plaintiff had made no advance, the defendants could not maintain an action against him for the use of the property. The contract, express or implied, to pay for such use, is one he is incapable of making, and his infancy would be a bar to such suit. We cannot see how the defendants can avail themselves of and enforce, by way of recoupment, a claim which

they could not enforce by a direct suit."

And in *Gillis v. Goodwin* (Mass.) *supra*, an action by an infant to recover sums paid by him on a conditional purchase of a bicycle taken possession of by the defendant, it was held that he was entitled to recover, although the amount paid would be a reasonable sum for the rent and use of the bicycle during the time that he had possession of it.

So, a minor may, upon becoming of age, disaffirm his purchase of an automobile, and upon tendering back the machine recover the money paid for it, regardless of the wear which he has given it. *Reynolds v. Garber-Buick Co.* (Mich.) *supra*.

An infant, suing to recover the value of a pony, harness, and buggy, which was the purchase price of certain stock bought by him and which he tenders back, is entitled to recover notwithstanding the fact that the stock has become worthless. *Blake v. Harding* (Utah) *supra*.

Where an infant bought a mare, the consideration being harness and a \$5 bill, and later returned the mare to the seller, and demanded back the purchase consideration, and brought trover therefor, the trial court excluded evidence of depreciation in value of the mare, and gave the plaintiff judgment for the value of the harness, to which (as is pointed out by the appellate court) the plaintiff made no exception. The appellate court, in affirming the judgment, said, *inter alia*: "The plaintiff can sustain this action to recover the value of this harness, as there was an offer to return the property which was in his possession and under his control; and this right is unaffected by the circumstance that the mare was not in as good condition, or of the value, that it was when received by him. The evidence, therefore, showing that the mare had depreciated in value while in the plaintiff's hands, was inadmissible for the purpose of defeating a recovery in this action, or for the purpose of reducing the damages. The infant is no more liable for the use than he would be for the purchase of the mare.

particularly as there is nothing in the case showing that he was personally benefited by it, or that, in any point of view, it could be deemed necessities for which he would be liable." *Price v. Furman* (Vt.) *supra*.

So, in *Whitcomb v. Joslyn* (Vt.) *supra*, one who sold a wagon to an infant, and afterward took possession of it by virtue of the lien reserved thereon, was held liable to the infant for the amount paid thereon, although the value of its use was the amount he had paid, and the property had depreciated more than that amount. (It was so held notwithstanding that the infant had falsely represented himself as of age.)

Where an infant, having exchanged a gelding for a stallion, disaffirmed the contract, offered to place the stallion in the defendant's stable, and sued for the value of the gelding, the court said, with reference to an alleged injury to the stallion: "We have concluded, upon looking into the question, that the plaintiff was not bound to make any tender of the stallion at all before he could maintain his action. Upon the avoidance of the contract by the plaintiff, the case stood as if none had been made, and his right to the possession of his gelding, or the value of him, became at once complete and perfect. Upon the avoidance of the contract, the plaintiff still having the stallion, the defendant became, without doubt, entitled to him, whatever condition he might be in, but it does not follow that the plaintiff was bound to make a tender of him before bringing his action. If the stallion received injury while in the possession of the plaintiff, the remedy of the defendant therefor, if the law furnishes any remedy, is an action for the tort." *Carpenter v. Carpenter* (1873) 45 Ind. 142.

The *Carpenter Case* was followed, under similar circumstances, in an action of replevin by the infant for the recovery of the horse delivered by him under the contract (there being nothing stated about any tender by the infant). *White v. Branch* (1875) 51 Ind. 210.

(In *Pyne v. Wood* (1888) 145 Mass.

558, 14 N. E. 775, holding on the authority of the *McCarthy Case* (1885) 138 Mass. 310, *supra*, that an infant could recover back the amount he had paid on a bicycle sold to him conditionally, nothing was said about the value of the use or the deterioration of the bicycle.)

It may be noted that where the plaintiffs, disaffirming a contract made by them, when infants, for the purchase of the business and good will of a moving picture theater, sued to recover the amount paid by them on the contract, it was held that "the amount originally paid defendants by plaintiffs could not be reduced by an allowance for rental value of the premises during the period occupied." *Cannon v. Manning* (1914) 42 App. D. C. 206.

Some cases are difficult to classify, such as *Shurtleff v. Millard* (1879) 12 R. I. 272, 34 Am. Rep. 640, where it was held that an infant suing to recover what he had paid down on repudiation of a contract of purchase of goods at auction, from which he received no benefit, may recover without any deduction for expense and trouble to the seller on account of the rescission.

Contrary doctrine.

It has been held in some cases that an infant who rescinds his contract of purchase of an article, and sues to recover the consideration paid, must allow for the use or depreciation of the article. *Rice v. Butler* (1899) 160 N. Y. 578, 47 L.R.A. 303, 73 Am. St. Rep. 303, 55 N. E. 275; *Bartholomew v. Finnemore* (1857) 17 Barb. (N. Y.) 428; *Wanisch v. Wuertz* (1913) 79 Misc. 610, 140 N. Y. Supp. 573; the reported case (*PETTIT v. LISTON*, ante, 487); *Valentini v. Canali* (1889) L. R. 24 Q. B. Div. (Eng.) 166, 59 L. J. Q. B. N. S. 74, 61 L. T. N. S. 731, 38 Week. Rep. 331, 54 J. P. 295.

In *Rice v. Butler* (1899) 160 N. Y. 578, 47 L.R.A. 303, 73 Am. St. Rep. 703, 55 N. E. 275, *supra*, it was held that an infant, rescinding a purchase of a bicycle and claiming the return of instalments paid upon it, must account for the use of the wheel and its deterioration in value while in his possession. The court said: "The

plaintiff, having had the use of the bicycle during the time intervening between her purchase and its return, ought, in justice and in fairness, to account for its reasonable use or deterioration in value. Otherwise, she would be making use of the privilege of infancy as a sword, and not as a shield. In the absence of wanton injury to the property, the value of the use would be deemed to include the deterioration in value, and under the evidence in this case, and as found by the trial court, the use equaled the sum paid."

An infant who purchases a horse and so misuses him as greatly to decrease his value cannot, on tendering back the horse, recover the consideration he gave for him, as he should have offered compensation for the depreciation of the horse. *Bartholomew v. Finnemore* (1854) 17 Barb. (N. Y.) 428, *supra*.

The principle of the foregoing case was followed in allowing for depreciation in an action to rescind, and for the cancellation of a note secured by a chattel mortgage, given for part of the purchase price, in *Gray v. Lessington* (1857) 2 Bosw. (N. Y.) 257.

Upon the authority of the *Rice Case*, it was held in *Wanisch v. Wuertz* (1913) 79 Misc. 610, 140 N. Y. Supp. 573, *supra*, that an infant who repudiates a chattel mortgage given to secure the purchase price of a piano cannot recover the amount paid thereunder if less than the reasonable value of the use of the piano. There was evidence in this case that the piano had depreciated in value, but to what extent does not appear.

It will be seen that it is held in the reported case (*PETTIT v. LISTON*, ante, 487) that an infant, on disaffirming his purchase of a motorcycle and returning it to the seller, cannot recover the money paid thereon without allowance for the use and depreciation of the article while in his hands. The court lays stress on the fact that in the "far western states" minors transact a good deal of business for themselves, and considers the enforcement of a rule contrary to the

decision as not likely to exert a good moral influence upon the young.

In *Valentini v. Canali* (1889) L. R. 24 Q. B. Div. (Eng.) 166, *supra*, an infant demanded that his contract to pay a certain amount for furniture and to become a tenant of a house be declared void, and the money paid on account delivered up. The court declared the contract void, and that it should be canceled, and that a promissory note given for the balance of the amount which the infant was to pay must be delivered up, but declined to restore to the infant what he had paid on account, on the ground that he had had occupation of the house and use of the furniture for several months. The court considered the contract to have been to the infant's advantage, and said as to the Statute of 1874, declaring infants' contracts void, etc., that "the object of the statute would seem to have been to restore the law for the protection of infants, upon which judicial decisions were considered to have imposed qualifications. The legislature never intended, in making provisions for this purpose, to sanction a cruel injustice. The defendant, therefore, could not be called upon to repay the money paid to him by the plaintiff, and the decision appealed against is right."

In *Sturgeon v. Starr* (1911) 17 West. L. R. (Can.) 402, it was held that if an infant buys goods he may recover the money paid therefor, but subject to the condition that he can restore the other person to his former position.

(While without the scope of this note, reference may be here made to a New York case where, on replevin by the seller of a sewing machine sold to an infant on a conditional sale, it was held that the infant might not be allowed the amount paid upon the contract of purchase, as this was agreed to be the value of the use in case of default, and such an agreement was reasonable in view of the probable deterioration in value. *Wheeler & W. Mfg. Co. v. Jacobs* (1893) 2 Misc. 236, 21 N. Y. Supp. 1006. Compare *Story & C. Piano Co. v. Davy* (1918) — *Ind. App.* —, 119 N. E. 177, *supra*.)

The above cases requiring the infant

to allow for use or deterioration rest, to some extent, upon the idea that the infant has had the benefit of the use. They do not seem to assert as a principle that an infant may make a provident contract to purchase what is not a necessary.

Theory of provident contracts.

In some jurisdictions the decision depends upon whether the contract was a reasonable and provident one for the infant to make.

Thus, where the plaintiff, having reached his majority, and having disaffirmed his contract with the defendant, made while he was an infant, for the conditional purchase of a multi-graph, brought an action to recover the payments made, and the jury found the contract a reasonable and provident one, it was held that the plaintiff must deduct the benefits he had received, which were not necessarily the rental value. *Berglund v. American Multigraph Sales Co.* (1916) 135 Minn. 67, 160 N. W. 191.

But in *Klaus v. A. C. Thompson Auto & Buggy Co.* (1915) 131 Minn. 10, 154 N. W. 508, it was held that an infant, on rescinding, after a few days' use of an automobile, his contract to purchase it, will not, on suing for the price paid, be compelled to reduce his recovery by the value of the use of the machine, where the court did not find the contract a reasonable and provident one for the infant to make.

In *Lavoie v. Wooldridge* (1918) — N. H. —, 104 Atl. 346, where a minor brought an action to recover the money paid on the purchase price of an automobile (returned to the purchaser during the trial), it appeared that the plaintiff had paid \$210, of the purchase price of \$275, that the value of the car when returned was \$50, that the depreciation was due in part to natural causes and in part to the plaintiff's improper use of the car, but it did not

appear that this was tortious. It was held that the plaintiff was entitled to recover the \$210 paid by him. The court lays down the rule that the plaintiff could rescind and recover back his payments "by returning the car and accounting for (1) any benefit he had received from its use, and (2) paying any damage to the car that was caused by his tortious acts," and says: "While it is true, as Wooldridge contends, that the pleasure to be derived from the use of a car may be a benefit to a minor within the meaning of this rule, whether Lavoie was benefited by using this car in the way he did depends on whether using it in that way was the reasonable thing for a boy in his station in life to do; and as the facts are understood the court has found that using the car in the way Lavoie did was not the reasonable thing for him to do." It was further stated that the plaintiff was not accountable for damages caused by ignorance or unskilfulness in operating the car.

Where an infant purchaser of a horse found he was unable to drive him, and returned him to the seller the night of the day of purchase, but reduced in value by the plaintiff's inexperience and want of skill in driving, the plaintiff's recovery of the money paid was not diminished by the reduction in value of the horse. The court said: "If the management and driving of the horse by the plaintiff in this case were not of such a character as to give the defendants a right of action, had the plaintiff hired the horse, they cannot make the fact of injury for the same treatment by him as owner of the horse a ground for recoupment of damages." *Stack v. Cavanaugh* (1891) 67 N. H. 149, 30 Atl. 350, where the court said further, on a motion for a rehearing: "He derived no benefit from the contract."

B. B. B.

EUGENE W. MENTE, Plff. in Err.,
v.

MARK EISNER, Internal Revenue Collector.

United States Circuit Court of Appeals, Second Circuit — April 14, 1920.

(266 Fed. 161.)

Internal revenue — income tax — deduction for losses on exchange.

A manufacturer of bags cannot deduct from his income tax returns, as a loss incurred in trade under the Act of Congress of 1913, losses which he sustained trading in cotton on the Cotton Exchange.

[See note on this question beginning on page 500.]

(Manton, Circuit J., dissents.)

ERROR to the District Court of the United States for the Southern District of New York (Grubb, J.) to review a judgment in favor of defendant in an action brought to recover payments made, under protest, to him as collector of internal revenue, together with interest and costs. *Affirmed.*

The facts are stated in the opinion of the court.

Argued before Ward, Rogers, and Manton, Circuit Judges.

Mr. Frederic H. Cowden for plaintiff in error.

Messrs. Francis G. Caffrey and Vincent H. Rothwell for defendant in error.

Ward, Circuit Judge, delivered the opinion of the court:

Section II. subd. 2B, of the Act of October 3, 1913 (38 Stat. at L. 167, chap. 16, 4 Fed. Stat. Anno. 2d ed. p. 239), provides that in computing net income for purposes of normal tax there shall be allowed, as a deduction: ". . . Fourth, losses actually sustained during the year, incurred in trade or arising from fires, storms, or shipwreck, and not compensated for by insurance or otherwise."

Mente, a member of the firm of Mente & Company, engaged in the business of manufacturing jute bags and bagging, cotton bags and materials for covering cotton bales, filed his income returns for the year March 1 to December 31, 1913, and for the whole year of 1914. He had for some three years been buying and selling cotton on the Cotton Exchange for his individual account, in no way con-

nected with the business of Mente & Company, and he deducted from his gross income in each year losses sustained in the year, resulting from these transactions, as "losses incurred in trade."

Eisner, as collector of internal revenue for the third district of the state of New York, assessed an additional tax upon these deductions, which Mente paid under protest, taking an appeal to the Commissioner of Internal Revenue under §§ 3220 & 3228, U. S. Rev. Stat. (Comp. Stat. §§ 5944, 5951, 3 Fed. Stat. Anno. 2d ed. pp. 1028, 1037), and the regulations of the Secretary of the Treasury in pursuance thereof, who rejected his claim. Thereupon Mente began this action against Eisner, as collector, to recover the amounts so paid, with interest and costs.

Treasury Decision 2090, dated October 14, 1914, reads: "Loss, to be deductible, must be an absolute loss, not a speculative or fluctuating valuation of continuing investment, but must be an actual loss, actually sustained and ascertained, during the tax year for which the deduction is sought to be made; it must be incurred in trade, and be

determined and ascertained upon an actual, a completed, a closed transaction. The term "in trade," as used in the law, is held to mean the trade or trades in which the person making the return is engaged; that is, in which he has invested money otherwise than for the purpose of being employed in isolated transactions, and to which he devotes at least a part of his time and attention. A person may engage in more than one trade, and may deduct losses incurred in all of them: Provided, that in each trade the above requirements are met. As to losses on stocks, grain, cotton, etc., if these are incurred by a person engaged in trade, to which the buying and selling of stocks, etc., are incident as a part of the business, as by a member of a stock, grain, or cotton exchange, such losses may be deducted. A person can be engaged in more than one business, but it must be clearly shown in such cases that he is actually a dealer, or trader, or manufacturer, or whatever the occupation may be, and is actually engaged in one or more lines of recognized business, before losses can be claimed with respect to either or more than one line of business, and his status as such dealer must be clearly established."

Both parties having moved for the direction of a verdict, Judge Grubb directed a verdict in favor of the defendant. We think that the language, "losses incurred in trade," is correctly construed by

Internal
revenue—Income
tax—deduction
for losses on
exchange.

the Treasury Department as meaning in the actual business of the taxpayer, as distinguished from isolated transactions.

If it had been intended to permit all losses to be deducted, it would have been easy to say so. Some effect must be given to the words "in trade."

There is an inconsistency in making profits derived from such transactions a part of the taxpayer's gross income, and, on the

other hand, allowing him no deduction for losses; but tax laws are not required to be perfect, or even consistent. It must be determined from the facts in each case whether or not the losses claimed to be deducted have been incurred in a business. In this case the court must be taken to have found, as matter of fact, that these transactions in 1913 and 1914 did not constitute a business. Such a finding is binding upon us.

Judgment affirmed.

Manton, Circuit Judge:

I dissent from the prevailing opinion, and will state my reasons.

The controversy that gives rise to this action brings to this court for construction a provision of the Income Tax Law of October 3, 1913. Section II., subd. 2B, thereof, sets forth deductions allowed in computing net incomes. They are, first, the expenses of carrying on any business; second, interest on indebtedness; third, taxes; and, fourth, "losses actually sustained during the year, incurred in trade, or arising from fires, storms, or shipwreck, and not compensated for by insurance or otherwise." The plaintiff in error made his return for the last ten months of 1913 and the year 1914, and paid his taxes due as shown by these returns. For the period from March to December 31, 1913, he deducted from his gross income the sum of \$31,555, claiming a right so to do because of loss sustained during this period of the year, and claims it occurred as a loss in trade. In his return for 1914, he deducted \$65,245.33 pursuant to the same contention, contending it was a loss sustained in trade. These losses resulted from the purchase of cotton, through brokers, upon the New York Cotton Exchange, and the subsequent sale of such cotton in the same manner at a lower price. The method of doing this business was as follows: The plaintiff in error instructed some person to buy for him a certain number of bales of cotton, and that

person sought a seller, or the agent of a seller, and secured from the seller or agent an agreement to deliver cotton to the plaintiff in error at a future date at a certain price. He delivered to the seller, or his agent, the plaintiff in error's agreement to buy upon the same terms. It was in such transactions that the plaintiff in error met with his losses. This method of trading is a permitted business of the Cotton Exchange.

The question presented is: Does this constitute a transaction "in trade," within the meaning of § II. subd. 2B, of the Income Tax Law? This kind of trade is referred to as dealing in cotton futures. The goods were not yet in existence; but does that alter the nature of the transaction? Does the fact that the goods are to be delivered in the future so distinguish the purchase as to make it something else than a deal "in trade?" In the commercial life of the day perhaps more than one half of the products ultimately sold may be said to be contracted for long before they have come into existence. The test of obligation, either for profit or loss, must necessarily be measured by the contractual relations as expressed by the written agreement. The fact that there may be a transfer of the contract at a lower price or a higher price does not change the nature of the transaction. The contract delivered fixes the obligation of the parties, and denotes a sale and a purchase. A certificate of stock, for example, in itself, merely evidences a fractional undivided interest in real, personal, or corporate property. It passes from one to the other, and is regarded in itself as property. Business transactions in which the title of the property is transferred without delivery are frequent in this day. The word "trade," in its normal and natural meaning, cannot be so restricted as to apply only to transactions where actual merchandise is handled by the tax-

payer, or where the specific merchandise is designated by the contract. The Treasury Department has made a ruling under § 5, known as Decision No. 2005, dated July 8, 1914; which provides as follows:

"Losses may be sustained by individuals or corporations on personal or real property. Only those losses are deductible which are sustained during the tax year 'in trade'—that is, the business which engages the time, attention, and labor of anyone for the purpose of livelihood, profit, or improvement. Loss, to be deductible, must be an absolute loss, not a speculative or fluctuating valuation of continuing investment, but must be an actual loss, actually sustained and ascertained during the tax year for which the deduction is sought to be made; it must be incurred in trade, and be determined and ascertained upon an actual, a completed, a closed transaction.

"Losses sustained by individuals or corporations from the sale of or dealings in personal or real property growing out of ownership or use of or interest in such property will not be deductible at all, unless they are an incident of, connected with, and grow out of the business of the individual or corporation sustaining the loss, and are ascertained, determined, and fixed as absolute in the above sense within the taxable year in which the deduction is sought to be made. . . ."

And Decision No. 2090, dated December 14, 1914, is as follows: "Loss, to be deductible, must be an absolute loss, not a speculative or fluctuating valuation of continuing investment, but must be an actual loss, actually sustained and ascertained, during the tax year for which the deduction is sought to be made; it must be incurred in trade, and be determined and ascertained upon an actual, a completed, a closed transaction. The term 'in trade,' as used in the law, is held to mean the trade or trades

in which the person making the return is engaged; that is, in which he has invested money otherwise than for the purpose of being employed in isolated transactions, and to which he devotes at least a part of his time and attention. A person may engage in more than one trade, and may deduct losses incurred in all of them, provided that in each trade the above requirements are met. As to losses on stocks, grain, cotton, etc., if these are incurred by a person engaged in trade to which the buying and selling of stocks, etc., are incident as a part of the business, as by a member of a stock, grain, or cotton exchange, such losses may be deducted. A person can be engaged in more than one business, but it must be clearly shown in such cases that he is actually a dealer, or trader, or manufacturer, or whatever the occupation may be, and is actually engaged in one or more lines of recognized business, before losses can be claimed with respect to either or more than one line of business, and his status as such dealer must be clearly established."

I do not think that Congress had in mind any such limitations of the words, "losses in trade," when it enacted the income tax. Bouvier's Law Dictionary refers to "trade" as business, or any transaction or dealing by way of sale or exchange. The courts have adopted this view. *May v. Sloan* (May v. Rice) 101 U. S. 231, 25 L. ed. 797; *Re H. R. Leighton & Co.* (D. C.) 147 Fed. 311; *United States v. Douglas*, 36 L.R.A.(N.S.) 1075, 111 C. C. A. 314, 190 Fed. 482. Nowhere has it been so restricted that it has been said that the man engaged in trade must give his habitual or principal attention to the occupation or employment. "Tradesman," or "trader," whether used separately or spoken of in connection with business, indicates one engaged in the barter, sale, or exchange of merchandise or commodities. *Re Surety Guarantee & T. Co.* 56 C. C. A.

654, 121 Fed. 73; *Re Woodward*, 8 Ben. 563, Fed. Cas. No. 18,001.

Webster's dictionary describes "trade" as follows: "To barter, or to buy and sell; to be engaged in the exchange, purchase, or sale of goods, wares, merchandise, or anything else; to traffic; to bargain; to carry on commerce as a business."

"Trade," as used in the act, should be considered synonymous with business. But the defendant in error interprets the words "in trade" as "in his business." A broker, who acts only as a broker, receives his income solely from his commissions. But the decision of the Treasury Department would permit him to deduct losses sustained, if he bought and sold on his own account, "as and if they are incident as a part of the business, as by a member of a stock, grain, or cotton exchange, such losses may be deducted." The Treasury decision insists that, while admitting that a person may be engaged in more than one business, in order that he may deduct his losses, it must clearly be shown that he is actually engaged as a dealer, or trader, or manufacturer, or whatever the occupation may be. His status as such dealer must be clearly established.

But nothing can be found in the act itself to place any such restriction upon the phrase "in trade." The test is not to find out what his habitual business is, or on which he may expend the greater part of his time and effort, or what may be his principal business. The determining factor, as Congress expressed it, is: Was there a loss, and was it sustained in trade? This must be our guide in determining the right to deduct. Undoubtedly, the purpose of the Treasury decision seems to be to forbid deductions of losses which result from a speculative or fluctuating valuation of a continuing investment. But the tax is imposed on the profits so obtained. If Congress intended to make this restriction, it should have guarded

against reduction of such loss in taxation by a phrase which would be clear. There is an element of speculation in every transaction. Such may be the result of the purchase of a house or piece of real estate. So it may be in the purchase of shares of stock. He may buy it in the best of faith for continued investment, and find it necessary to sell in a low market because of his then needs. The tax laws cannot be based upon the intent of the person taxed; they must be based upon the facts as they exist and the results which follow. This court, in *New York L. Ins. Co. v. Anderson*, — C. C. A. —, 263 Fed. 527, decided January 14, 1920, considered the Act of August 5, 1909, which provided, as to net income: "It shall be ascertained by deducting from the gross amount of the income . . . all losses . . . sustained within the year and not compensated by insurance or otherwise, including a reasonable allowance for depreciation of property."

It was held that loss of market value of stocks and bonds is depreciation.

The Act of 1918 (§ 214, subd. 5 [40 Stat. at L. 1067, chap. 18, Comp. Stat. § 6336½g]), now permits the deduction of all losses

occurring in transactions "entered into for profit." These losses may be deducted from profits arising from other transactions. It is inconsistent, in my opinion, to say that a broker, who deals in stocks and bonds, is engaged in trade, and may deduct his losses, and say that the plaintiff in error, who was engaged in the cotton bagging business, may not deduct the loss that he sustained trading in the market as described. His principal business was not dealing in cotton, but in bagging; but his transaction was in trade, and the losses flowing from this effort to make profit from his trade should be allowed him as a deduction. The fact that the law was amended as above indicated, effective in 1918, evinces a dissatisfaction with the interpretation which has been placed upon the previous law.

In my opinion, the plaintiff in error was entitled to deductions which he made, and should have a judgment to recover back payments which he made to the collector under protest.

Petition for a writ of certiorari denied by the Supreme Court of the United States, October 11, 1920 (U. S. Adv. Ops. 1920-21, p. 42) — U. S. —, 65 L. ed. —, 41 Sup. Ct. Rep. 8.

ANNOTATION.

Income tax: deduction for "losses."

- I. Historical review of Federal acts:
 - a. Statutory provisions, 500.
 - b. Summary of changes, 502.
- II. Meaning of "losses" under modern statutes:
 - a. In general, 503.
 - b. Individual taxpayers:
 - 1. Losses generally, and incurred in "trade," 503.
 - 2. Loss on sale of assets, 505.
 - 3. Loss by fire, etc., 506.

I. Historical review of Federal acts.

a. Statutory provisions.

A Federal tax was imposed by the Act of August 5, 1861, upon the annual incomes of every person residing

II. b—continued.

- 4. Removal or demolition of buildings or equipment, 506.
- 5. Loss of useful value, 507.
- 6. Shrinkage in securities, 507.
- 7. Oil and gas losses, 508.
- 8. Losses by farmers, 508.
- c. Corporate taxpayers:
 - 1. Domestic corporations, 509.
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in the United States having an income above a specified amount, but no express reference was made in the act to "losses," and the same may be said of the Act of July 1, 1862, which

repealed the earlier act, and laid a tax upon "annual gains, profits, or income." In fact, the term "losses" seems to have first made its appearance in the Act of June 30, 1864, which, after laying a tax on "gains, profits, or income," added a proviso which expressly permitted "losses on sales of real estate purchased within the year" to be deducted; but by a subsequent amendment the taxpayer was allowed to deduct "all his losses actually sustained during the year, arising from fires, flood, shipwreck, or incurred in trade, and debts ascertained to be worthless, but excluding all estimated depreciation of values," interest, rent of land and of residence, repairs to the same, business expenses, and amounts paid out for new buildings, improvements, etc., made to increase the value of property.

The Acts of 1861 to 1871 were followed by the Income Tax Act of August 27, 1894, 28 Stat. at L. 553, chap. 349, § 28, wherein the provision as to deductible losses was as follows: "Losses actually sustained during the year incurred in trade, or arising from fires, storms, or shipwreck, and not compensated for by insurance or otherwise, and debts ascertained to be worthless, but excluding all estimated depreciation of values and losses within the year on sales of real estate purchased within two years previous to the year for which income is estimated," etc.

Next came the Corporation Excise Tax Act of 1909, 36 Stat. at L. 113, chap. 6, 4 Fed. Stat. Anno. 2d ed. p. 255, which, while not strictly an income tax act, provided in § 38 (2) that, in determining net income of corporations, there shall be deducted "all losses actually sustained within the year and not compensated by insurance or otherwise, including a reasonable allowance for depreciation of property, if any, and in the case of insurance companies the sums other than dividends, paid within the year on policy and annuity contracts and the net addition, if any, required by law to be made within the year to reserve funds."

Coming down to the Federal Income

Tax Act of October 3, 1913, 38 Stat. at L. 167, 172, 173, chap. 16, § II. 4 Fed. Stat. Anno. 2d ed. pp. 240, 246, 247, the provision was that, in computing net income for the purpose of the normal tax, there shall be allowed to individuals, as deductions, "losses actually sustained during the year, incurred in trade or arising from fires, storms, or shipwreck, and not compensated for by insurance or otherwise;" to domestic corporations, joint stock companies, or associations, "all losses actually sustained within the year and not compensated by insurance or otherwise, including a reasonable allowance for depreciation by use, wear and tear of property," etc.; and to foreign corporations, "all losses actually sustained within the year in business conducted by it within the United States and not compensated by insurance or otherwise, including a reasonable allowance for depreciation by use, wear and tear of property, if any," etc.

By the Act of September 8, 1916, 39 Stat. at L. 759, 768, chap. 463, §§ 5, 12, Comp. Stat. § 6386e, Fed. Stat. Anno. Supp. 1918, pp. 316, 329, individuals who were citizens or residents were permitted to deduct "losses actually sustained during the year, incurred in his business or trade, or arising from fires, storms, and shipwreck, or other casualty, and from theft, when such losses are not compensated for by insurance or otherwise," provided, etc.; and "in transactions entered into for profit but not connected with his business or trade, the losses actually sustained therein during the year to an amount not exceeding the profits arising therefrom;" domestic corporations, joint stock companies or associations, or insurance companies were allowed to deduct "all losses actually sustained and charged off within the year and not compensated by insurance or otherwise, including a reasonable allowance for the exhaustion, wear and tear of property arising out of its use or employment in the business or trade," etc.; and foreign corporations, etc., were allowed similar deductions with respect to business or

trade conducted by them within the United States.

In the Revenue Act of 1918, 40 Stat. at L. 1067, chap. 18, § 214, Comp. Stat. § 6336½g, the provisions as to deductions by individuals for losses are as follows: "Losses sustained during the taxable year and not compensated for by insurance or otherwise, if incurred in trade or business;" "losses sustained during the taxable year and not compensated for by insurance or otherwise, if incurred in any transaction entered into for profit, though not connected with the trade or business; but in the case of a nonresident alien individual only as to such transactions within the United States;" and "losses sustained during the taxable year of property not connected with the trade or business (but in the case of a nonresident alien individual only property within the United States) if arising from fires, storms, shipwreck, or other casualty, or from theft, and if not compensated for by insurance or otherwise." With respect to domestic corporations, the 1918 Act allows, as a deduction, "losses sustained during the taxable year and not compensated for by insurance or otherwise;" and in case of foreign corporations, similar deductions, provided they were connected with income arising from a source within the United States.

b. Summary of changes.

Especial interest at the present time attaches to the changes which have taken place in the more recent acts. Summarizing briefly, we find that the Act of 1918 authorized resident individual taxpayers to deduct "losses actually sustained during the year, incurred in trade or arising from fires," etc.; that the Act of 1916 changed the quoted provision so as to make it read "in his trade or business," and added for the first time a clause under which losses not connected with a taxpayer's regular business could be deducted, up to the amount of profits made by him on similar transactions; and that the Act of 1918 eliminated the latter restriction so as to permit deduction of uncompensated losses in trade or busi-

ness, and all uncompensated losses sustained in transactions entered into for profit, though not connected with the taxpayer's business or trade, as well as uncompensated property losses not connected with business, if arising from fires, storms, shipwreck, or other casualty, or from theft. With respect to corporations (domestic), the provisions have always been broader than those dealing with individuals, and there have been but minor changes. The Act of 1913 read, "All losses actually sustained within the year," etc., whereas, under the Act of 1916, this became "all losses actually sustained and charged off within the year," and, in the Revenue Act of 1918, merely "losses sustained during the taxable year and not compensated for," etc.

It also will be noted that many things, which in the earlier statutes were expressly treated as losses, now constitute separate deductions. For instance, depreciation in the value of property, expenses incurred in carrying on a business, and worthless debts, all now constitute separate deductions, so that they cannot be considered as losses within the meaning of the Revenue Act in effect at the present time (1920). And some of these provisions in the earlier acts have been construed. Thus, under the Federal Income Tax Act of June 30, 1864, which permitted deduction of losses actually sustained, including "debts ascertained to be worthless," it has been held that the taxpayer was the judge as to the worthlessness of debts due him, and that if he fairly and honestly exercised the discretion so vested in him, he could not be convicted of an untrue return. *United States v. Frost* (1869) 9 Int. Rev. Rec. 41. Fed. Cas. No. 15,172. And see *United States v. Mayer* (1865) Deady, 127, Fed. Cas. No. 15,753. And under the Act of 1864, it has also been held that a taxpayer may deduct as a loss depreciation of assets, such as book accounts and other choses in action, and tangible property, such as a street connection to a railroad. *Little Miami & C. & X. R. Co. v. United States* (1883) 108 U. S. 277, 27 L. ed. 724, 2

Sup. Ct. Rep. 627, reversing (1880) 1 Fed. 700. So, in *United States v. Central Nat. Bank* (1882) 10 Fed. 612, and again on subsequent appeal in (1883) 15 Fed. 222, in construing the Act of 1864, it was held that a bank could deduct as a loss the amount of embezzlements occurring during the year for which the return was made. But the judgment based upon this conclusion was reversed in (1885) 24 Fed. 577, which was affirmed in (1890) 137 U. S. 355, 34 L. ed. 703, 11 Sup. Ct. Rep. 126, but the reversal was not upon the ground that embezzlements could not be deducted, but rather that, in the case under consideration, the taxpayer was estopped to claim a deduction for the particular embezzlements in question. But that losses could not be deducted which were not incurred in trade, although suffered by an individual taxpayer, such as loss by robbery, see 5 Int. Rev. Rec. 123, as set out in *Foster's Income Tax*, 2d ed. p. 249. However, such a loss would be deductible under either the Act of 1916 or of 1918, losses by "theft" being expressly enumerated as deductible losses.

II. Meaning of "losses" under modern statutes.

a. In general.

No cases have as yet reached the annotator which have passed directly upon the meaning of the provisions of the Revenue Act of 1918 dealing with deductible losses, but the Treasury Department has made a number of rulings which are binding upon taxpayers until superseded by congressional enactment, judicial overthrow, or modification by subsequent ruling, and there are some cases construing other income tax acts which throw some light upon the subject.

b. Individual taxpayers.

1. Losses generally, and incurred in "trade."

Construing the Revenue Act of 1918, it has been ruled, with respect to individual taxpayers, that "losses sustained during the taxable year, and not compensated for by insurance or otherwise, are fully deductible (ex-

cept by nonresident aliens) if (a) incurred in the taxpayer's trade or business, or (b) incurred in any transaction entered into for profit [relates to transactions not connected with trade or business], or (c) arising from fires, storms, shipwreck or other casualty, or from theft." Treasury Regulations 45, art. 141.

But "losses in illegal transactions are not deductible." Treasury Regulations 45, art. 141.

And generally speaking, losses, to be deductible, "must usually be evidenced by closed and completed transactions." Treasury Regulations 45, art. 141.

With reference to the provisions (§ 5 (a) ¶¶ 4 and 5) of the Federal Income Tax Act of September 8, 1916, which relate to losses deductible, the Treasury Department ruled as follows: "The difference between 'losses . . . incurred in his business or trade' (fourth deduction) and losses 'in transactions entered into for profit, but not connected with his business or trade' (fifth deduction), is illustrated by the difference between the definitions of 'avocation,'—that which takes one from his regular calling; a minor occupation,—and 'vocation,'—the occupation or pursuit to which one devotes his time or life; a calling. It is possible for a man to give sufficient time, attention, and capital to the pursuit of different lines of business to constitute more than one avenue of 'business, or trade, or employment,' his business or trade. Paragraph 4 of § 5 (a), Act of September 8, 1916, provides for losses 'actually sustained during the year, incurred in his business or trade,' etc. These would be losses under the head of vocation. Paragraph 5 of § 5 (a), Act of September 8, 1916, provides for losses actually sustained during the year in transactions entered into for profit, but not connected with his business or trade; that is, losses under the head of 'avocation;' that which takes one from his regular calling; a minor occupation. Losses under the head of 'avocation' may be deducted 'to an amount not exceeding the profits arising from transactions under this head.'"

Treasury Regulations 33, Rev. art. 8, §§ 120-122. The limitation referred to in the last sentence of the regulation was, it will be remembered, removed by the Revenue Act of 1918. And that, according to a ruling under an earlier Federal statute, the losses and gains of a firm of which a taxpayer is a member are incidental to the business, see 4 Int. Rev. Rec. 46, as set out in *Foster's Income Tax*, 2d ed. p. 251.

In the reported case (*MENTE v. EISNER*, ante, 496), § II. subd. 2B, of the Federal Income Tax Act of 1913, which provided that in computing net income for the purposes of normal taxes there would be allowed, as a deduction, "losses actually sustained during the year, incurred in trade," etc., was held to limit the deductions to losses incurred in, or incidental to, the actual business of the taxpayer, as distinguished from isolated transactions not made in a regularly carried on business, so that losses incurred in stock-exchange dealing by one engaged in another and entirely independent regular business could not be deducted. In reaching this conclusion, it will be remembered, the majority of the court took the position that if it had been intended to permit all losses to be deducted it would have been easy to say so, which rule renders it necessary to determine in each case, from the particular facts involved, whether or not the losses claimed to be deductible have been incurred in a regular business. However, a strong dissent was entered by Manton, Circuit J., who maintained that nowhere had the term "trade" been so restricted that it has been said that a man, to be engaged in trade, must give his habitual or principal attention to the occupation or employment; that the test is not to find out what a man's habitual business is, or to determine in what endeavor he may expend the greater part of his time and effort, or what may be his principal business, but rather is: Was the loss sustained in trade within the common acceptance of the meaning of that term? Under an early Federal income tax act it was ruled "that

losses in speculation incident to the business, such as speculation by a broker in stocks, by a dry-goods merchant in cotton, by a hardware man in iron, might be set off against the gain in that part of his business which was conducted without speculation (1 Int. Rev. Rec. 154); but that loss in speculation could not be deducted from gains in merchandise of an entirely different character from the subject of the speculation, nor from salaries (1 Int. Rev. Rec. 155); but that losses and gains of speculation of a different character might be deducted from each other (*ibid.*); that losses in one branch of merchandise might be deducted from gains in any other branch (*ibid.*); and that, where stocks were bought as a permanent investment and sold for a change of investment, a loss in such sale might be deducted from the dividends thereon; but that where the purchase and sale were made in speculation, such loss could not be deducted (1 Int. Rev. Rec. 196)." *Foster's Income Tax*, 2d ed. p. 251.

And in *Strong & Co. v. Woodfield* [1906] A. C. (Eng.) 448, 75 L. J. K. B. N. S. 264, 95 L. T. N. S. 241, 22 Times L. R. 754, 5 Tax. Cas. 215, affirming [1905] 2 K. B. 350, 74 L. J. K. B. N. S. 702, 21 Times L. R. 550, 53 Week. Rep. 625, in applying the rule that a loss cannot be deducted unless connected with or arising out of trade, it was held that this meant losses really incidental to the trade itself, so as to prevent deduction of losses mainly incidental to some other vocation, or which fall upon the trader in some character other than that of trader, and that a judgment for damages for personal injuries sustained in an inn conducted by a brewing company through a manager was a loss not really incidental to the company's trade as innkeeper, but rather fell upon it in its character as householder. And in the recent English case of *Inland Revenue Comrs. v. Warnes & Co.* [1919] 2 K. B. (Eng.) 444, 9 B. R. C. 597, 121 L. T. N. S. 125, 35 Times L. R. 436, it was held that a fine or penalty imposed upon a trading company was not a loss connected with or arising out of trade within the meaning of the

English Income Tax Act of 1842, and, therefore, that such an item could not be deducted. And that a loss through a subsidiary company is not a loss sustained in trade within the meaning of the English acts, see *English Crown Spelter Co. v. Baker* (1908) 99 L. T. N. S. (Eng.) 353. And that, under the English Act of 1842, one who carries on a business as a seedsman and also runs a farm cannot set his losses on the farm against his profits on the seed business, see *Brown v. Watt* (1886) 13 Rottie, 590, 23 Scot. L. R. 403, as set out in *Scots' Dig.* (1873-1904) col. 1890. And that, under the early Federal statutes, losses incurred in one branch of a business could not be deducted from the gains of another, see 1 Int. Rev. Rec. 154, as set out in *Foster's Income Tax*, 2d ed. p. 251.

On the other hand, in *Bryce v. Keith* (1919) 257 Fed. 133, construing the Federal Act of 1909, the loss on purchases and sales of corporate stock by an individual having no established business was held deductible as a loss incurred in trade, it appearing that the transactions were carried on over a considerable period, were complicated in character, involved a very large sum of money, and must have required much time and attention. And see *Reid's Brewery Co. v. Male* [1891] 2 Q. B. (Eng.) 1, 60 L. J. Q. B. N. S. 340, 64 L. T. N. S. 294, 55 J. P. 216, 39 Week. Rep. 459, wherein it was held that losses on loans could be deducted in determining the net income of a brewing company, where such loans were incidental to the brewing business. And in *Inland Revenue v. Stewarts & Lloyds* (1906) 8 Fraser, 1129, 43 Scot. L. R. 811, 14 Scot. L. T. 241, where a company of traders, to obtain control of a rival firm, guaranteed dividends on the preferred shares of the latter, it was held that the sums so paid out should be deducted in estimating profits (as set out in *Scots' Dig.* (1904-1914) col. 839, and *Holmes, Fed. Taxes*, 1920 ed. p. 381). And in *British Columbia*, under the Assessment Act of 1903, which permits the deduction from gross income of "loss and bad debts arising out of the business from which an income is derived,

irrevocable and actually written off during the year, but not otherwise," it has been held that sums lost by a smelting company on treating their own ores were losses arising out of business, and as such deductible. Re *British Columbia Copper Co.* (1911) 16 B. C. 184.

In Massachusetts, by express provision of the Income Tax Act (Mass. Stat. 1916, chap. 269, § 5 (c)), "the excess of the gains over the losses received by the taxpayer from the purchases or sales of intangible personal property, whether or not the said taxpayer is engaged in the business of dealing in such property, shall be taxed." See *Tax Comr. v. Putnam* (*Trefry v. Putnam*) (1917) 227 Mass. 522, L.R.A.1917F, 806, 116 N. E. 904, holding that gains over losses on stock speculations could be taxed, although the taxpayer was not engaged in the business of dealing in stocks. Under this provision, of course, losses can be deducted from the gains, at least to the amount of the latter.

2. Loss on sale of assets.

In the case of the sale of assets, the loss, under the Act of 1918, is the difference between the cost thereof less depreciation sustained since acquisition, or the fair market value as of March 1, 1913, if acquired before that date, less depreciation since sustained, and the price at which they are disposed of. Treasury Regulations 45, art. 141. And see, in this connection, § 202 of the 1918 Statute, and Treasury Regulations 45, arts. 39-46. And see also Treasury Regulations 45, art. 1561, which provides that for the purpose of ascertaining the loss from the sale or exchange of property, the basis is (a) its fair market price or value as of March 1, 1913, if acquired prior thereto, or (b) if acquired on or after that date, its cost or improved inventory value; that proper adjustment must be made for any depreciation or depletion sustained; and that what the fair market price or value of property was on March 1, 1913, is a question of fact, to be established by any evidence which will reasonably and adequately make it appear. Un-

der the Act of 1913, the Treasury Department ruled that "loss is the difference between selling price and cost, where the selling price is less than cost." See T. D. July 17, 1914, as set out in Foster's Income Tax, 2d ed. p. 256.

But "a loss in the sale of an individual's residence is not deductible" as a loss under the Act of 1918. Treasury Regulations 45, art. 141.

3. *Loss by fire, etc.*

Where a loss is claimed through the destruction of property by fire, flood, or other casualty, the amount deductible under the provisions of the Act of 1918 is the difference between the cost of the property, or its fair market value as of March 1, 1913, and the salvage value thereof, after deducting from the cost or value, the amount, if any, which has been or should have been set aside and deducted in the current year and previous years, from gross income on account of depreciation, and which has not been paid out in making good the depreciation sustained; but the loss should be reduced by the amount of any insurance or other compensation received. Treasury Regulations 45, art. 141. And see Treasury Regulations 45, arts. 49 and 50.

4. *Removal or demolition of buildings or equipment.*

Under the Act of 1918, losses due to the voluntary removal or demolition of old buildings, the scrapping of old machinery, equipment, etc., incident to renewals and replacements, are deductible from gross income in a sum representing the difference between the cost of such property demolished or scrapped, and the amount of a reasonable allowance for the depreciation which the property had undergone prior to its demolition or scrapping; in other words, the deductible loss is only so much of the original cost of the property, less salvage, as would have remained unextinguished had a reasonable allowance been charged off for depreciation during each year prior to its destruction. Treasury Regulations 45, art. 142. In this connection, see Hawaiian Commercial &

Sugar Co. v. Tax Assessor (1903) 14 Haw. 601, Ann. Cas. 1913C, 980, rehearing denied in (1903) 14 Haw. 687, Ann. Cas. 1913C, 983, wherein, in holding that the value of mills, etc., abandoned by the taxpayer corporation on account of the erection of new mills, etc., on another location, was not a deductible loss under the provision (Act 20, Session Laws 1901, § 4) of the Hawaiian Income Tax Law, allowing the deduction of "all losses actually sustained during the year incurred in trade, or arising from losses by fire not covered by insurance, or losses otherwise actually incurred," the court said: "The word 'loss,' and its plural 'losses,' used in the statute, is not a technical term of art or trade, but a simple word in common use. There is nothing to indicate that these words are used in the statute to express any other than their ordinary meaning. The dictionary definition of the noun, 'loss,' is 'failure to hold, keep, or preserve what one has had in possession; deprivation of that which one has had; as the loss of money by gaming; loss of health or reputation; loss of children; opposed to gain.' Century Dict. The central idea in each of these definitions is involuntary parting with a thing. If property is lost it has passed from the control and out of the possession of the loser. No one can lose property and still have it in his possession and be conscious of the fact that he has it. There is a difference between 'lost' and 'abandoned' property; still the actual loss to the owner may be the same in each case. It cannot be seriously contended that if a person voluntarily abandons property, the value or original cost of such property is a loss within the intention of the Income Statute. . . . When the new mill and railroad came into use, the old mill, building, and railroad did not part company with the taxpayer, but were still in its possession and control. This property had not been consumed 'by fire; or lost 'as a ship at sea.' If it did not possess the same value to the company as before, it was for the reason that it had become useless, since better appli-

ances had taken its place. If the Hawaiian Commercial & Sugar Company, Limited, had used the property, or had needed its use and been able to make the same use of it as formerly, the property would have been of the same value after, as before, the substitution of the new appliances; but since the company no longer needed the use of the property, from its viewpoint, there was depreciation in its value and great 'loss.' This was not a loss, however, 'actually sustained during the year, incurred in trade,' or by fire, or 'otherwise actually incurred,' within the meaning and intent of the statute." And that, in Scotland, the expenses of a company in changing its plant, etc., to new premises, is not deductible in estimating yearly profit, *see Granite Supply Asso. v. Inland Revenue* (1905) 8 Fraser, 55, 43 Scot. L. R. 65, 13 Scot. L. T. 514, as set out in Scots' Dig. (1904-1914) col. 838.

When a taxpayer buys real estate upon which is located a building which he proceeds to raze with a view to erecting thereon another building, it will be considered, in determining net income under the Tax Act of 1918, that he has sustained no deductible loss by reason of the demolition of the old building, and no deductible expense on account of the cost of such removal, the value of the real estate, exclusive of old improvements, being presumably equal to the purchase price of the land and buildings, plus the cost of removing the useless building. Treasury Regulations 45, art. 142.

5. Loss of useful value.

When, through some change in business conditions, the usefulness in the business of some or all of the capital assets is suddenly terminated, so that the taxpayer discontinues the business, or discards such assets permanently from use in the business, he may, under the Act of 1918, claim as a loss for the year in which he takes such action, the difference between the cost, or the fair market value as of March 1, 1913, of any asset so discarded (less any depreciation allow-

ances), and its salvage value remaining. Treasury Regulations 45, art. 143. The ruling adds that this is an exception to the rule requiring a sale or other disposition of property in order to establish a loss, and that it requires proof of some unforeseen cause by reason of which the property must be permanently discarded, as, for example, where machinery or other property must be replaced by a new invention, or where an increase in the cost of, or other change in manufacture of, any product, makes it necessary to abandon such manufacture, to which special machinery is exclusively devoted, or where new legislation directly or indirectly makes the continued profitable use of the property impossible. The ruling also adds that this exception does not extend to a case where the useful life of property terminates solely as a result of those gradual processes for which depreciation allowances are authorized; that it does not apply to inventories or to other than capital assets; that the exception applies to buildings only when they are permanently abandoned or permanently devoted to a radically different use, and to machinery only when its use as such is permanently abandoned; and that any loss, to be deductible under this exception, must be charged off on the books and fully explained in returns of income. But see, in this connection, Treasury Regulations 45, arts. 181-188, which relate to amortization.

6. Shrinkage in securities.

A taxpayer who is merely an owner or investor, and not a dealer in securities, possessing securities such as stocks and bonds, cannot deduct from gross income any amount claimed as a loss on account of the shrinkage in value of such securities through fluctuation of the market or otherwise, the loss allowable in such cases being that actually suffered where the securities mature or are disposed of. Treasury Regulations 45, art. 143, relating to the Act of 1918. However, in certain cases, worthless securities may be treated as bad debts and charged off under § 214

(a) (7) of the Act of 1918, which allows debts ascertained to be worthless to be charged off. See Treasury Regulations 45, art. 154. In the case of banks, or other corporations which are not classed as dealers in securities which are subject to supervision by state or Federal authorities, and which, in obedience to the orders of such superior officers, charge off as losses amounts representing an alleged shrinkage in the value of property, the amounts so charged off do not constitute allowable deductions. But taxpayers who own stock of a corporation which becomes worthless may, upon a satisfactory showing of worthlessness being made, as in the case of bad debts, deduct its cost or fair market value as of March 1, 1913, if it was acquired prior thereto, under Treasury Regulations 45, art. 151. Treasury Regulations 45, art. 144.

In Wisconsin, under a statute providing that in computing the amount of taxable income "losses during the year not compensated for by insurance or otherwise" may be deducted, it has been held that depreciation in the value of stock caused by a distribution of dividends is not a loss. *Van Dyke v. Milwaukee* (1914) 159 Wis. 460, 146 N. W. 812, rehearing denied in (1915) 159 Wis. 469, 150 N. W. 509.

7. Oil and gas losses.

As regards losses of oil and gas, it has been said that they are of two kinds: (a) Those which are unforeseen or unavoidable, such as losses sustained through fire or accident; and (b) losses that are anticipated and recognized as unavoidable under operating conditions, such as evaporation, leakage, refinery losses, etc. Usually the latter class are indeterminate as to amount, and are taken care of in cost or operating expenses. See *Holmes*, Fed. Taxes, 1920 ed. p. 383, citing *Manual for Oil & Gas Industry*, p. 18, to the effect that indeterminate losses of oil and gas may not be deducted from gross income.

8. Losses by farmers.

A rather comprehensive ruling has been made for the guidance of farmers in determining their deductible

losses under the Revenue Act of 1918. Thus, in Treasury Regulations 45, art. 145, the Department has ruled as follows: "Losses incurred in the operation of farms as business enterprises are deductible from gross income. If farm products are held for favorable markets, no deduction on account of shrinkage in weight or physical value, or by reason of deterioration in storage, shall be allowed. The total loss by frost, storm, flood, or fire of a prospective crop, or of a crop which has not been sold, is not a deductible loss in computing net income. A farmer engaged in raising and selling stock, cattle, sheep, horses, etc., is not entitled to claim as a loss the value of animals that perish from among those animals that were raised on the farm. If live stock has been purchased for any purpose, and afterwards dies from disease, exposure, or injury, or is killed by order of the authorities of a state or the United States, the actual purchase price of such stock, less any depreciation which may have been previously claimed with respect to such perished live stock, and less, also, any insurance or indemnity recovered, may be deducted as a loss. The actual cost of other property, less depreciation already allowed, destroyed by order of the authorities of a state or of the United States, may in like manner be claimed as a loss; but if reimbursement is made by a state or the United States, in whole or in part, on account of stock killed or property destroyed, the amount received shall be reported as income for the year in which reimbursement is made. In determining the cost of stock for the purpose of ascertaining the deductible loss, there shall be taken into account only the purchase price, and not the cost of any feed, pasturage, or care which has been deducted as an expense of operation. If gross income is ascertained by inventories, no deduction can be made for live stock or products lost during the year, whether purchased for resale or produced on the farm, as such losses will be reflected in the inventory by reducing the amount of live stock or products on

hand at the close of the year. If an individual owns and operates a farm, in addition to being engaged in another trade, business, or calling, and sustains a loss from such operation of the farm, then the amount of loss sustained may be deducted from gross income received from all sources, provided the farm is not operated for recreation or pleasure."

And see also Treasury Regulations 45, art. 38, which deals generally with the subject of gross income of farmers; Treasury Regulations 45, art. 110, which relates to expenses of farmers; and Treasury Regulations 45, art. 171, which treats the question of depreciation as applied to farmers.

c. Corporate taxpayers.

1. Domestic corporations.

As to corporations, the Revenue Act of 1918 broadly provides that "losses sustained during the taxable year, and not compensated for by insurance or otherwise," may be deducted from gross income. In this connection, the Treasury Department has ruled that in general the deductions from gross income allowed corporations for losses are the same as allowed individuals, and have merely referred to the regulations for individuals for guidance. Treasury Regulations 45, art. 561.

However, some specific points have been ruled upon.

Thus, it has been ruled that a corporation sustains no deductible loss from the sale of its corporate stock below par. Treasury Regulations 45, arts. 542, 563. Nor does a corporation realize any deductible loss from the purchase of its own stock. Treasury Regulations 45, art. 542. If a corporation sells its bonds at a discount, the amount of such discount is treated as interest paid, and if it retires its bonds at a price in excess of the issuing price, such excess may usually be deducted as expense. Treasury Regulations 45, art. 563. And see Treasury Regulations 45, arts. 544 and 848. By an earlier regulation (Treasury Regulations 33, Rev. art. 152), it was ruled that, in case a corporation under the terms of its indenture securing an issue of bonds is required at

certain specified intervals to retire a certain number of bonds, the loss sustained is an allowable deduction for the year in which the purchase was made. The conditions determining the amount of loss in such a case are also stated in the ruling. And construing § 38 (2) of Corporation Excise Tax Act of 1909, which provided that in ascertaining net income losses actually sustained during the year, including a reasonable allowance for depreciation of property, might be deducted from the gross income, it has been held that a sum set aside annually by a corporation as the pro rata amount for that year of the discount at which it had previously sold an issue of its bonds was not a "loss actually sustained" during the year, within the meaning of that term as used in the act. *Southern P. R. Co. v. Muentner* (1919) 171 C. C. A. 563, 260 Fed. 837. And a similar conclusion as to a book charge resulting from a sale of corporate bonds at less than par was reached in *Baldwin Locomotive Works v. McCoach* (1914) 215 Fed. 967, affirmed in (1915) 136 C. C. A. 660, 221 Fed. 59. But that under the Act of 1909, upon the theory that depreciation of property is a "loss," the depreciation during a tax year in market value of the securities which constituted the major portion of a corporation's assets was a deductible loss, see *New York L. Ins. Co. v. Anderson* (1920) — C. C. A. —, 263 Fed. 527.

It has also been ruled, under the Revenue Act of 1918, that if a corporation sells its corporate assets for less than their cost, or fair market value as of March 1, 1913, the loss sustained is deductible. Treasury Regulations 45, art. 563. And see Treasury Regulations 45, art. 545. And in *Connecticut Mut. L. Ins. Co. v. Eaton* (1914) 218 Fed. 206, the phrase, "all losses actually sustained within the year," as used in the Excise Act of 1909, was held to include the loss to an insurance company caused by selling parcels of real estate at prices below what it had been compelled to pay for the same, on the foreclosure of mortgages taken by it

to secure loans, it having been its practice to carry such property on its books at its original cost to the company.

If an amount recovered by a corporation as damages is less than the damage sustained, or less than an amount necessary to make good the damage, the difference between the actual amount of damage sustained and the amount recovered may be deducted as a loss. Treasury Regulations 33, Rev. art. 94.

As to deductions allowed insurance companies under the Act of 1918, see Treasury Regulations 45, arts. 568-572. In *McCoach v. Insurance Co. of N. A.* (1917) 244 U. S. 586, 61 L. ed. 1334, 37 Sup. Ct. Rep. 710, reversing (1915) 140 C. C. A. 167, 224 Fed. 657, in construing the provision: "All losses actually sustained within the year . . . including . . . in the case of insurance companies the sums other than dividends paid within the year on policy and annuity contracts and the net addition, if any, required by law to be made within the year to reserve funds," of the Excise Act of 1909,—it was held that the amounts of accrued unpaid losses which fire and marine insurance companies are required, in Pennsylvania, to schedule each year as items of liability, are not "reserve funds" required by law within the meaning of that phrase as used in the act. And in *National Life & Acci. Ins. Co. v. Craig* (1918) 163 C. C. A. 518, 251 Fed. 524, a similar conclusion was reached as to amounts reserved by a Tennessee insurance company to satisfy unpaid losses and liabilities accrued or prospective, notwithstanding the fact that the Ten-

nessee insurance commission required the keeping of such funds, the Tennessee statutes themselves not requiring "reserve funds" of such a character. And that, under the English Income Tax Act of 1842, etc., reserves from annual premiums for future losses may be deducted as a loss of the current year, where the amount necessary for that purpose is definitely determined, see *Sun Ins. Office v. Clark* [1912] A. C. (Eng.) 443, 81 L. J. K. B. N. S. 488, 106 L. T. N. S. 438, 28 Times L. R. 303, 56 Sol. Jo. 378, 49 Scot. L. R. 1038, reversing (1911) 104 L. T. N. S. 520, 27 Times L. R. 392, which reversed (1910) 102 L. T. N. S. 336, 26 Times L. R. 341. This decision expressly distinguished *General Acci. Fire & Life Assur. Corp. v. McGowan* [1908] A. C. (Eng.) 207, [1908] S. C. 24, 45 Scot. L. R. 681, 77 L. J. P. C. N. S. 38, 98 L. T. N. S. 734, 24 Times L. R. 533, 52 Sol. Jo. 455, which followed *Imperial Fire Ins. Co. v. Wilson* (1876) 35 L. T. N. S. (Eng.) 271, and *Scottish Union & Nat. Ins. Co. v. Inland Revenue* (1889) 16 Rettie, 461, 26 Scot. L. R. 330, all of which arrived at contrary conclusions which were seemingly based upon the theory that the actual value of the reserve necessary had not been determined as a matter of fact.

2. Foreign corporations.

Generally speaking, it seems that foreign corporations are allowed the same deductions from their gross income, for losses arising from sources within the United States, as are allowed to domestic corporations. See Treasury Regulations 45, art. 573,

G. J. C.

CHARLES F. SMITH, Appt.,
v.

CLEM A. DIRCKX, County Clerk of Cole County, Missouri, Respt.

Missouri Supreme Court (In Banc)—May 31, 1920.

(— Mo. —, 223 S. W. 104.)

Constitutional law — retrospective laws — income tax.

1. An income tax law cannot include in its operation income received

prior to its passage, under a constitutional provision that no law retrospective in its operation shall be passed.

[See note on this question beginning on page 518.]

Tax — construction of statute — income for year.

2. A tax upon the net income received during the entire calendar year is assessed by a statute passed some months after the beginning of the year, and providing that there shall be collected upon the entire net income received in any year a tax of a specified per cent, and that the foregoing tax shall apply to the entire net income received in said year.

— income — unconstitutional amendment — effect on existing rights.

3. The unconstitutionality of the

(Graves, J., dissents.)

provisions of a statute increasing the rate of income tax which is intended to apply to the portion of the calendar year before its enactment does not prevent the collection of the rates provided by the old law.

[See 25 R. C. L. 906.]

Constitutional law — retrospective laws — power to pass.

4. Express constitutional prohibition is necessary to prevent the passage of retrospective laws.

[See 6 R. C. L. 304, 305.]

APPEAL by plaintiff from a judgment of the Circuit Court for Cole County (Slate, J.) sustaining a demurrer to the petition in a suit brought to contest the validity of the Income Tax Law. *Reversed.*

Statement by Williams, J.:

This is an appeal from the judgment of the circuit court of Cole county, sustaining a demurrer to the plaintiff's petition.

The suit involves the construction and validity of a portion of an amendment to the Income Tax Law of this state, approved May 6, 1919. See Laws of Missouri 1919, pp. 718 et seq. The petition, omitting caption and signature, is as follows:

"Comes now the plaintiff herein for himself and in behalf of all other persons similarly situated, and files this, his bill in equity, alleging:

"First. That he is now, and at all times herein mentioned was, a citizen and resident and taxpayer of the city of Jefferson, county of Cole, and state of Missouri.

"Second. That defendant, Clem A. Dirckx, is the duly elected, constituted, and acting county clerk of said Cole county, Missouri.

"Third. That plaintiff is now, and was at all times hereinafter mentioned, engaged in the real estate business in said city of Jefferson, in Cole county, Missouri; that he is now, and was at all times herein mentioned, the owner of real and personal property in said city of Jefferson; that during the calendar

year 1919 he earned and received a net income from his said property and business in the amount of \$3,000, and that one half thereof, to wit, the sum of \$1,500, was earned and received on and prior to the 7th day of August, 1919; that after deducting the amounts permitted by law there remained of said net income of \$3,000 a balance of \$800 upon which an income tax was due the state for the year 1919, to be assessed and paid during the year 1920; that on the — day of February, 1920, plaintiff made out and filed with the assessor of Cole county, Missouri, a return of the total net income of plaintiff for the year 1919 in pursuance of the requirements of the act of the general assembly of the state of Missouri, approved April 19, 1917 (Mo. Laws 1917, pp. 524 to 538, inclusive), entitled, 'An Act Providing for the Assessment, Levying, Collecting and Paying of Income Tax,' and amendment thereto approved May 6, 1919 (Mo. Laws 1919, pp. 718 to 721, inclusive); that said assessor duly entered said return upon his income tax book as provided by law, and has certified the result to the defendant for the purpose of computation of the income tax thereon and

the entry thereof upon the tax books for collection from plaintiff herein; that defendant is threatening and has declared his intention, to compute the taxes thereon at the rate of $1\frac{1}{2}$ per centum upon the entire taxable income for the year 1919, and deliver the same to the county collector for collection against this plaintiff, and is threatening to expend funds of the state of Missouri derived from taxpayers, of whom plaintiff is one, in the enforcement of such unlawful and unauthorized rate.

"Fourth. Plaintiff says that the declared intention and threats of defendant to tax his entire taxable income for the year of 1919 at the rate of $1\frac{1}{2}$ per centum of said income is based upon defendant's interpretation of § 1, Laws 1919, pp. 718, 719; that said interpretation so placed by defendant upon said law is unauthorized by, and in violation of, said law; and that said section as so construed by defendant would be unconstitutional, null, and void, in that said section, so construed, would be in direct violation of §§ 15 and 30 of article 2, and § 19 of article 12, of the Constitution of Missouri, and the 5th Amendment of the Constitution of the United States, because, so construed, it is retrospective and retroactive in its operation, and imposes upon plaintiff and the people of each county of this state a new liability in respect to transactions or considerations already past, and takes the property of plaintiff, and those similarly situated, without due process of law.

"Fifth. That, notwithstanding said interpretation so placed upon said law by defendant is unauthorized by and in violation of said law, and notwithstanding the unconstitutionality of said section of said Income Tax Law as construed by defendant, he has declared his intention and is now threatening to proceed under such construction to compute and enter income taxes thereunder against many and divers and numerous individuals and corporations in said Cole county, Mis-

souri, at the rate of $1\frac{1}{2}$ per centum upon the entire net income for the year 1919, and that, unless this court interferes by injunctive process, a multiplicity of suits to collect taxes so computed and certified for collection will of necessity result.

"Sixth. Plaintiff further states that defendant's threatened unlawful, wrongful, and unauthorized action is the result of misinterpretation of said § 1 of the Laws of 1919, pages 718 and 719; that said amendment of the Income Tax Law of 1917 (Laws 1919, pp. 718, 721), of which said § 1 is a part, was approved May 6, 1919, and became effective August 7, 1919; that said section of said law, when properly and rightfully construed, causes said rate of $1\frac{1}{2}$ per centum to be applied only to that part of the income of 1919 earned and received on and subsequent to August 7, 1919, and that the balance of said income, to wit, that earned and received on and prior to August 6, 1919, is taxable at the rate prescribed by the original Act of 1917, to wit, the rate of $\frac{1}{2}$ of 1 per centum; that for defendant to compute and certify to the collector for collection the entire net taxable income of plaintiff for the year 1919 at the rate of $1\frac{1}{2}$ per centum, as defendant has declared his intention, and is now threatening to do, is in violation and unauthorized by said law, and is an impairment of plaintiff's vested right, an imposition upon him of a new liability in respect to transactions and considerations already past, and the taking of his property without due process of law.

"Seventh. Plaintiff has no adequate redress or remedy by suit at law, and is without adequate remedy except by writ of injunction in a court of equity.

"Wherefore, by reason of such wrongful, unauthorized, and unlawful interpretation of said law so construed by defendant in violation of said law, and by reason of the unconstitutionality of said Income Tax Law as construed by defendant, and by reason of his declared intention

and threat to unlawfully, wrongfully, and without authority of law, compute and extend the tax upon plaintiff's entire income for the year 1919, at the rate of $1\frac{1}{2}$ per centum, and by reason of each and every of the facts hereinbefore set out, plaintiff prays the court to permanently enjoin and restrain defendant from computing and entering upon his income tax book, for delivery to the collector of Cole county, for enforcement against plaintiff, a tax upon his entire net income for the year 1919 at the rate of $1\frac{1}{2}$ per centum, and to limit and restrain the computation and entering of said income tax at the rate of $1\frac{1}{2}$ per centum to that part of plaintiff's taxable income for the year 1919, earned and received on and subsequent to the date of the taking effect of said amendment, to wit, August 7, 1919, and to permanently enjoin and restrain said defendant from computing and entering upon his income tax book that part of plaintiff's income earned and received, to wit, the sum of \$400, prior to the date of the taking effect of said amendment, at a greater rate than $\frac{1}{2}$ of 1 per centum thereon, and for such other and further relief as may be just and equitable, and for his costs in this behalf expended."

The Income Tax Act as originally passed in this state (Laws 1917, p. 524) provided the rate of taxation upon net income for the last half of the calendar year of 1917, and each calendar year thereafter at $\frac{1}{2}$ of 1 per centum.

This law was amended by an act approved May 6, 1919 (Laws 1919, p. 718), providing that the rate of taxation upon net incomes for the calendar year of 1919, and in each calendar year thereafter, should be $1\frac{1}{2}$ per centum.

Messrs. A. L. McCawley and Adolph McGee, for appellant:

The legislature has no power to make an income tax rate retrospective in its operation.

Gladney v. Sydnor, 172 Mo. 318, 60 L.R.A. 880, 95 Am. St. Rep. 517, 72 S. W. 554; Reed v. Swan, 183 Mo. 100, 34 S. W. 488; St. Louis use of Creamer v.

Clemens, 52 Mo. 143; Towle v. Eastern R. Co. 18 N. H. 547, 47 Am. Dec. 153; McCowan v. Davidson, 43 Ga. 480; Hamilton County v. Rosche Bros. 50 Ohio St. 103, 19 L.R.A. 584, 40 Am. St. Rep. 653, 83 N. E. 408; Young v. Henderson, 76 N. C. 420; Grand Rapids v. Lake Shore & M. S. R. Co. 130 Mich. 238, 97 Am. St. Rep. 473, 89 N. W. 932.

If the legislature has the power to make an income tax rate retrospective in its application, it did not, in the passage of the Act of 1919 amendatory of the Income Tax Law of 1917, intend to exercise that power.

Walton v. Fudge, 63 Mo. App. 52; Reed v. Swan, 183 Mo. 100, 34 S. W. 483; Leete v. State Bank, 115 Mo. 184, 21 S. W. 788.

Messrs. Frank W. McAllister, Attorney General, and John T. Gose, Assistant Attorney General, for respondent:

When a statute treats the year's income as one entire thing, it is not retrospective in the constitutional sense because in that entirety there is included some portion of the year's income which was earned or received prior to the date of the law.

State ex rel. Bolens v. Frear, 148 Wis. 456, L.R.A. 1915B, 569, 134 N. W. 673, 135 N. W. 164, Ann. Cas. 1913A, 1147; Black, Income Taxes, 4th ed. § 22, p. 28; Glasgow v. Rowse, 43 Mo. 479; Endlich, Interpretation of Statutes, § 280, p. 377; Moore v. Miller, 5 App. D. C. 413; Murchison v. McNeill, 60 N. C. (1 Winst. L.) 220; People v. Spring Valley Hydraulic Gold Co. 92 N. Y. 383; Drexel v. Com. 46 Pa. 31; Schuykill Nav. Co. v. Elliott, 1 N. Y. Week. Dig. 282, Fed. Cas. No. 12,497; Edwards v. Keith, 224 Fed. 585; Stockdale v. Atlantic Ins. Co. 20 Wall. 323, 22 L. ed. 348; Reg. v. St. Mary, 12 Q. B. 127, 116 Eng. Reprint, 814; Reg. v. Christchurch, 12 Q. B. 149, 116 Eng. Reprint, 823.

The legislature is no more restricted in taxing incomes than it is in laying occupation and other taxes relating to the activities of the individual taxed. Under this construction of the income tax, the income of any year is but the measure of the tax. The objection of retrospectivity, therefore, being merely to the measure of the tax, is obviously without merit.

Ludlow-Saylor Wire Co. v. Wollbrinck, 275 Mo. 339, 205 S. W. 196; Glasgow v. Rowse, 43 Mo. 479; Richmond v. Creel, 253 Mo. 257, 161 S. W.

794; *St. Louis v. McCann*, 157 Mo. 301, 57 S. W. 1016; *Aurora v. McGannon*, 138 Mo. 38, 39 S. W. 469; *St. Louis v. Sternberg*, 69 Mo. 301; *American Union Exp. Co. v. St. Joseph*, 66 Mo. 675, 27 Am. Rep. 382; *Brushaber v. Union P. R. Co.* 240 U. S. 1, 60 L. ed. 493, L.R.A.1917D, 414, 36 Sup. Ct. Rep. 236, Ann. Cas. 1917B, 713; *People v. Spring Valley Hydraulic Gold Co.* 92 N. Y. 383.

Messrs. Jamison & Thomas, amici curiæ:

The Income Tax Law of 1919, pp. 718-721, which went into effect on August 7th, 1919, and which assessed a tax upon income accruing prior to said date, is retrospective, and imposes a new liability in respect to transactions or considerations already passed, and is, therefore, in violation of art. 2, § 15, and art. 12, § 19, of the Constitution.

Hope Mut. Ins. Co. v. Flynn, 38 Mo. 483, 90 Am. Dec. 438; *State use of Rosenblatt v. Heman*, 70 Mo. 441; *Barton County v. Walser*, 47 Mo. 200; *Leete v. State Bank*, 115 Mo. 198, 21 S. W. 788; *Gladney v. Sydnor*, 172 Mo. 318, 60 L.R.A. 880, 95 Am. St. Rep. 517, 72 S. W. 554; *State v. Galveston, H. & S. A. R. Co.* 100 Tex. 153, 97 S. W. 71; *Young v. Henderson*, 76 N. C. 420; *Cooley, Taxn.* 3d ed. 492; *Society for Propagation of the Gospel v. Wheeler*, 2 Gall. 105, Fed. Cas. No. 13,156; *Sedgw. Stat. & Const. Law*, 2d ed. p. 160.

Where the language of an act plainly makes it applicable to past acts and transactions, it must be given a retrospective operation—even though it thereby becomes invalid because it conflicts with the constitutional prohibitions of retrospective legislation, the impairment of contracts, or the disturbing of vested rights.

25 R. C. L. p. 790; *Cooley, Taxn.* 3d ed. 494.

Prior statutes, being expressly repealed by an act, are no longer in force, even though such act, by reason of some provision, be unconstitutional.

State ex rel. Moody v. Wardell, 153 Mo. 319, 54 S. W. 574; *Blankenship v. St. Louis & S. F. R. Co.* 160 Mo. App. 631, 142 S. W. 571.

Williams, J., delivered the opinion of the court:

I. There are but two questions presented upon this appeal. They

are purely legal ones. and may be stated as follows:

First. Did the general assembly, by the amendment of 1919 (Laws 1919, p. 718), undertake to apply the increased rate to the net income received during the entire calendar year of 1919?

Second. If the above amendment did so provide, does that portion of the amended rate which was an increase over the old rate operate retrospectively, in violation of article 2, § 15, of the Missouri Constitution, as to that portion of the net income received by appellant during the calendar year 1919, and prior to August 7, 1919, the date upon which the amendment became effective? These questions will be treated in their order.

II. We are of the opinion that the general assembly intended that the amendment of 1919

should apply to the net incomes for the entire year of 1919. Section 1 of the amendment reads as follows: "There shall be levied, assessed, collected, and paid annually upon the entire net income received in the calendar year nineteen hundred nineteen from all sources by every individual a citizen or resident of this state, a tax of one and one half per centum upon such income; and a like tax shall be levied, assessed, collected, and paid annually upon the entire net income received in the year nineteen hundred nineteen from all sources within this state by every individual, a nonresident, including interest on bonds, notes or other interest-bearing obligations of residents, corporate or otherwise. The foregoing tax shall apply the entire net income, except as hereinafter provided, received by every taxable person in the year nineteen hundred and nineteen and in each calendar year thereafter."

It will thus be seen that the amendment specifically provides that the tax shall apply to the entire net income received by every taxable person in the calendar year 1919. We therefore have no hesita-

Tax—construction of statute—
income for year.

tion in saying that income received in 1919, and prior to the taking effect of the amendment, was intended to be included.

III. Does the additional 1 per cent operate retrospectively upon that portion of the net income for the year 1919 which was received by appellant prior to the going into effect of the amendment, and thereby violate article 2, § 15, of our state Constitution?

After very careful consideration of this point we reach the conclusion that the same must be answered in the affirmative.

Section 15 of article 2 of our Constitution provides: "That no ex post facto law, nor law impairing the obligation of contracts, or *retrospective in its operation*, or making any irrevocable grant of special privileges or immunities, can be passed by the general assembly." (Italics ours.)

It will thus be seen that our Constitution contains an express inhibition against the passage of a "law retrospective in its operation."

In the case of *Reed v. Swan*, 133 Mo. 100, loc. cit. 108, 34 S. W. 484, Gantt, P. J., speaking for the court, quoted with approval Mr. Justice Story's definition of a retrospective law as follows: "Every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective." (Italics ours.)

To the same effect are the following decisions: *Leete v. State Bank*, 115 Mo. 184, loc. cit. 198, 21 S. W. 788; *Bartlett v. Ball*, 142 Mo. 28, loc. cit. 36, 43 S. W. 783; *Bartlett v. Tinsley*, 175 Mo. 319, loc. cit. 332, 75 S. W. 143; *Ruecking Constr. Co. v. Withnell*, 269 Mo. 546, loc. cit. 558, — A.L.R. —, 191 S. W. 685.

Applying the above definition to so much of the amendment of 1919 as undertook to assess an additional

1 per cent upon that portion of the net income for the calendar year of 1919 which was received by appellant prior to the going into effect of said amendment, we are clearly of the opinion that it "did create a new obligation or impose a new duty" in regard thereto, and that the amendment does to that extent operate retrospectively, and is in violation of the above-mentioned constitutional inhibition against retrospective laws. It would be difficult to reach any other conclusion while looking the Constitution squarely in the face.

However, this should not operate to prevent the collection of a tax not exceeding $\frac{1}{2}$ of 1 per cent for the period above mentioned. This for the reason that, since the old law imposed a tax of $\frac{1}{2}$ of 1 per cent upon that portion of his income which appellant received prior to the taking effect of the 1919 amendment, that portion of the amended rate which did not exceed the old rate did not create a new obligation or impose a new duty. It, therefore, follows that a tax not to exceed $\frac{1}{2}$ of 1 per cent may be collected under the amendment, with reference to the net income received by appellant prior to the going into effect of the amendment, without violating the Constitution.

Tax—Income
—unconstitu-
tional amend-
ment—effect on
existing rights.

We have been unable to find any decision which may be considered as exactly in point on the retrospective feature of the statute under review. The nearest to it, and one which in principle may be said to be in point, is the case of *State v. Galveston, H. & S. A. R. Co.* 100 Tex. 153, 97 S. W. 71. In that case the supreme court of Texas had under consideration the Texas Act of July 15, 1905 (Acts 29th Leg. chap. 141), which undertook to impose a tax on the gross receipts of all railways in that state for the entire year of 1905. The Constitution of Texas provided that "no bill of attainder, ex post facto laws, retroactive laws, or any law

impairing the obligations of contracts shall be made."

In passing upon the question as to whether the act was retroactive with reference to that portion of the gross income received prior to the passage of the act, the court said: "If the act in question be construed to embrace the whole of the year 1905, and entitles the state to collect the full annual tax for that year, it would confer upon the state a right against the railroads which did not exist before the law took effect, and it would impose upon each railroad a burden to which it was not liable before the law became effective. It is quite plain that the act comes within the provision of the section of the Constitution above quoted, and is retroactive in its effect. *Sutherland v. De Leon*, 1 Tex. 250, 46 Am. Dec. 100. The defendants in error claim that, because the legislature could not impose the tax for the portion of the year which expired before the law became effective, it cannot be enforced for any portion of the taxes for the year 1905. The fact that the legislature had no power to levy the tax for the time anterior to that at which the law took effect does not render it void as a whole, but the court will give effect to it for that proportion of the time which expired after it became effective; that is, the court will sustain the tax so far as the legislature had authority to impose it."

The learned attorney general cites many authorities in support of his contention that the act in question does not in any sense violate the constitutional provisions against retrospective laws. The most important cases and authorities cited by him are: *State ex rel. Bolens v. Frear*, 148 Wis. 456, loc. cit. 514, L.R.A.1915B, 569, 134 N. W. 673, 135 N. W. 164, Ann. Cas. 1913A, 1147; *Black, Income Taxes*, 4th ed. § 22, p. 28; *People v. Spring Valley Hydraulic Gold Co.* 92 N. Y. 383, loc. cit. 390; *Drexel v. Com.* 46 Pa. loc. cit. 40; *Stockdale v. Atlantic Ins. Co.* 20 Wall. 323, loc. cit. 331, 22 L. ed. 348, 351.

A careful investigation of the above authorities discloses that in none of them was the court or author dealing with a constitution which contained an express provision against retrospective laws, as is the case with our Constitution.

It is a well-settled rule of law that, absent an express constitutional inhibition to the contrary, the general assembly of a state or the Congress of the United States may pass a retrospective law, provided the law so passed does not violate some other constitutional provision. *Cooley*, Const. Lim. 7th ed. 529; 12 C. J. 1085. But when the Constitution expressly prohibits such a law, as is the situation with which we are now dealing, quite a different situation is presented, and those authorities dealing with legislative action passed by legislative bodies not thus limited serve no useful purpose in the solution of the problem now presented.

In the case of *Leete v. State Bank*, 115 Mo. 184, loc. cit. 198, 21 S. W. 791, *Sherwood, J.*, in discussing this question, said: "But few states have organic laws like our own on the point now being considered, and this will account, for the most part, for an apparent divergence of adjudication in regard to it. Touching this subject, Judge *Cooley* [Const. Lim. 6th ed. 454, 455] observes: ' . . . There are numerous cases which hold that retrospective laws are not obnoxious to constitutional objection, while in others they have been held to be void. The different decisions have been based upon diversities in the facts which make different principles applicable. There is no doubt of the right of the legislature to pass statutes which reach back to and change or modify the effect of prior transactions, *provided retrospective laws are not forbidden, eo nomine, by the state Constitution*, and provided, further, that no other objection exists to them than their retrospective character.' " (Italics ours.)

From the foregoing it follows

Constitutional
law—retro-
spective laws—
power to pass.

that the trial court erred in sustaining the demurrer to plaintiff's petition, and that the judgment should be reversed, and the cause remanded for further proceedings not inconsistent with the views herein expressed.

All concur, except Graves, J., who dissents in separate opinion, and Woodson, J., absent.

Goode, J., concurs in result.

Graves, J., dissenting:

I cannot agree to the opinion of my learned brother in this case. The Act of 1919, in effect, was a repeal of the Act of 1917, and the enactment of a new law. It clearly repealed the substantial parts of the Act of 1917, and enacted new sections. It repealed the section as to the rate of taxation, and other important sections.

That the legislature could have repealed the Income Tax Law of 1917 without affecting the rights of plaintiff, there can be no question. In effect, this is what was done. That it could have immediately thereafter passed a new income tax law there can be no question. This, in effect, is just what was done by the Act of 1919. To my mind the question of retrospective action of the Act of 1919 is not an element in the case, further than determining the fact whether the legislature can, in the middle of the year, pass a law providing for an income tax on the income of the whole year. Suppose the legislature of 1919, in the early portion of the session, had passed an act repealing outright the Act of 1917. Suppose, further, that before the close of the session the present amended act had been passed as new income tax law, where could plaintiff find room for complaint? His only complaint would be that the legislature passed a law in May, effective in August, which levied an income tax upon the net income for the whole year of 1919. To my mind this is the only question in this case. I do not agree to the idea that $\frac{1}{2}$ of 1 per cent can be collected on income prior to August, and $1\frac{1}{2}$ per

cent on income thereafter. This, because the basis of the tax, by the very act itself, is the income for the year, and not a part of the year. There is no authority in either act (1917 or 1919) for fixing a tax upon income for portions of the year.

II. As suggested above, the only question is whether or not, by an act passed in May and effective in August, an income tax can be levied upon the net income for the entire year of 1919, and, if so, the law is valid. The usual basis for an income tax is the income for a year's time. This cannot be fixed and determined until the end of the year, the income of which is to be taken as the basis for the tax. So that a law passed in May and effective in August does not reach backward, or act retrospectively, because the thing upon which it acts does not come into existence until December 31st of the year in which the law became effective. The law operates upon the income of the year, as such income is determined on the last day of the year. The law imposes no new liability upon transactions already passed, but it only imposes a liability upon a transaction which closed on December 31, 1919. The law of 1919 was in force long before the transaction here involved was completed, or even came into existence. The individual income of 1919 might be made up of items, but the income for the year did not come into existence until December 31, 1919. In *Black on Income Taxes*, § 22, p. 28, it is said: "On general principles, and irrespective of explicit constitutional limitations, a statute imposing an income tax may subject to taxation the income of the citizen for the whole of the current year in which the statute is passed; that is, not only so much of the income as accrued from the date of the enactment of the law to the end of the year, but also that portion which accrued or was earned from the beginning of the year to the date of the law. For the year's income is treated and considered

as one entire thing, not as made up of several portions or items. And hence, although the statute might be called retrospective in its operation upon a part of the first year's income, it is not retrospective in such a sense as to render it unconstitutional."

To similar effect is Endlich on Interpretation of Statutes, § 280, p. 377, thus: "But a statute is not retrospective in the sense under consideration because a part of the requisites for its action is drawn

from a time antecedent to its passing."

But to my mind the real answer to all contentions is that the income of the year does not and cannot come into, or have an existence, until the end of the year, and the law, being in force prior to that time, is in no sense retrospective in action. For these reasons, hurriedly expressed, I dissent.

Petition for rehearing denied June 19, 1920.

ANNOTATION.

Retroactive effect of income tax.

There seems to be no question that, at least, in the absence of an express constitutional provision inhibiting the enactment of retrospective laws, income taxes having a retroactive effect may be lawfully enacted. In the following cases from jurisdictions in which, so far as the cases under consideration show, retrospective laws were not expressly prohibited, income tax laws were upheld notwithstanding the fact that they operated retroactively: *Stockdale v. Atlantic Ins. Co.* (1874) 20 Wall (U. S.) 323, 22 L. ed. 348; *Brushaber v. Union P. R. Co.* (1916) 240 U. S. 1, 60 L. ed. 493, L.R.A. 1917D, 414, 36 Sup. Ct. Rep. 236, Ann. Cas. 1917B, 713; *Tyee Realty Co. v. Anderson* (1916) 240 U. S. 115, 60 L. ed. 554, 36 Sup. Ct. Rep. 281; *Southern P. Co. v. Lowe* (1918) 247 U. S. 330, 62 L. ed. 1142, 38 Sup. Ct. Rep. 540; *Lynch v. Hornby* (1918) 247 U. S. 339, 62 L. ed. 1149, 38 Sup. Ct. Rep. 543; *Edwards v. Keith* (1915) 224 Fed. 585, affirmed in (1916) L.R.A.1918A, 498, 145 C. C. A. 298, 231 Fed. 110; *Woods v. Lewellyn* (1918) 164 C. C. A. 218, 252 Fed. 106; *Schuylkill Nav. Co. v. Elliott* (1875) 1 N. Y. Week. Dig. 282, Fed. Cas. No. 12,497; *Moore v. Miller* (1895) 5 App. D. C. 413; *Drexel v. Com.* (1863) 46 Pa. 31; *State ex rel. Bolens v. Frear* (1912) 148 Wis. 456, L.R.A.1915B, 569, 134 N. W. 673, 135 N. W. 164, Ann. Cas. 1913A, 1147, error dismissed for want of jurisdiction in

(1914) 231 U. S. 616, 58 L. ed. 400, 34 Sup. Ct. Rep. 272.

And it has been expressly held that an income tax may be predicated upon the income of a past year, or upon the income of a current year part of which had elapsed when the statute was passed. *Stockdale v. Atlantic Ins. Co.* (U. S.) supra; *Brushaber v. Union P. R. Co.* (1916) 240 U. S. 1, 60 L. ed. 493, L.R.A.1917D, 414, 36 Sup. Ct. Rep. 236, Ann. Cas. 1917B, 713; *Tyee Realty Co. v. Anderson* (1916) 240 U. S. 115, 60 L. ed. 554, 36 Sup. Ct. Rep. 281; *Lynch v. Hornby* (1918) 247 U. S. 339, 62 L. ed. 1149, 38 Sup. Ct. Rep. 543; *Edwards v. Keith* (1915) 224 Fed. 585, affirmed in (1916) L.R.A.1918A, 498, 145 C. C. A. 298, 231 Fed. 110; *Woods v. Lewellyn* (1918) 164 C. C. A. 218, 252 Fed. 106; *Schuylkill Nav. Co. v. Elliott* (1875) 1 N. Y. Week. Dig. 282, Fed. Cas. No. 12,497; *Moore v. Miller* (1895) 5 App. D. C. 413; *State ex rel. Bolens v. Frear* (Wis.) supra.

But under the Federal Constitution and the 16th Amendment, it seems that the date of the retroactivity should not extend beyond the time when the Amendment became effective. *Brushaber v. Union P. R. Co.* (U. S.) supra (holding that the retroactive effect of the Federal Income Tax Act of 1913 was not unconstitutional, since the date of retroactivity did not extend beyond the time when the 16th Amendment to the Federal Constitution became effective); *Tyee Realty Co. v.*

Anderson (1916) 240 U. S. 115, 60 L. ed. 554, 36 Sup. Ct. Rep. 281 (holding same as preceding case); Lynch v. Hornby (1918) 247 U. S. 339, 62 L. ed. 1149, 38 Sup. Ct. Rep. 543 (citing the Brushaber Case with approval); Woods v. Lewellyn (1918) 164 C. C. A. 218, 252 Fed. 106 (following the Brushaber Case).

Whatever the law may be where there is no express constitutional prohibition against the passage of retrospective laws, it seems that, under a constitutional provision that no law retrospective in its operation shall be passed, an income tax law cannot include in its operation income received prior to its passage. This rule was laid down in the reported case (SMITH v. DIRCKX, ante, 510), which distinguished the cases which arrive at a contrary conclusion on the ground that they all arose in jurisdictions where laws having a retroactive effect were not prohibited by express constitutional provision. The case of State v. Galveston, H. & S. A. R. Co. (1906) 100 Tex. 153, 97 S. W. 71, which is set

out and quoted with approval in the reported case (SMITH v. DIRCKX), was reversed on another point in (1908) 210 U. S. 217, 52 L. ed. 1031, 28 Sup. Ct. Rep. 638.

In the reported case (SMITH v. DIRCKX) it was also held that the unconstitutionality of the provisions of a statute increasing the tax rate upon income earned prior to the Amendment did not prevent the collection of the tax provided for by the original law, on income earned during that part of the year which had passed at the time of the enactment of the unconstitutional amendment.

In Murchison v. McNeill (1864) 60 N. C. (1 Winst. L.) 220, it was held that a statute effective February 11, 1863, which imposed a net profits tax, payable annually, upon certain corporations carrying on their business from and after January 1, 1863, did not apply to profits made between January 1 and February 11, and therefore that it was not unconstitutional.

G. J. C.

WALTER EVANS, Plff. in Err.,

v.

J. ROGERS GORE, Acting Collector, etc.

United States Supreme Court—June 1, 1920.

(253 U. S. 245, 64 L. ed. 887, 40 Sup. Ct. Rep. 550.)

Internal revenue — salaries of Federal judges.

1. A Federal district judge could not, consistently with the provision of U. S. Const. art. 3, that all Federal judges shall, at stated times, receive for their services a compensation "which shall not be diminished during their continuance in office," be subjected to an income tax imposed under the 16th Amendment in respect of his salary as such judge.

[See note on this question beginning on page 532.]

Judges — compensation — diminution during continuance in office.

2. The constitutional prohibition against the diminution of salaries of Federal judges during continuance in office is to be construed not as a private

grant, but as a limitation imposed in the public interest.

Internal revenue — income tax — purpose of constitutional Amendment.

3. The Income Tax Amendment to

the Federal Constitution does not extend the taxing power to new or excepted subjects, but merely removes all occasion otherwise existing for an ap-

portionment among the states of taxes laid on income, from whatever source derived.

[See 26 R. C. L. 146.]

(Holmes and Brandeis, JJ., dissent.)

ERROR to the District Court of the United States for the Western District of Kentucky to review a judgment in favor of defendant in a suit to recover back a portion of the income tax paid by the plaintiff Federal district judge. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. William Marshall Bullitt, Edmund F. Trabue, Frank P. Straus, Howard B. Lee, Helm Bruce, and Mr. Walter Evans in propria persona, for plaintiff in error:

The taxation imposed on judicial salaries diminishes the compensation of the judges.

Atty. Gen. Hoar's Opinion, 13 Ops. Atty. Gen. 161; *Re Taxation of Salaries of Judges*, 131 N. C. 693, 42 S. E. 970; Taney's Letter, 157 U. S. 701, 39 L. ed. 1155, 15 Sup. Ct. Rep. ix.; *Pollock v. Farmers' Loan & T. Co.* 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673; *New Orleans v. Lea*, 14 La. Ann. 194; *Com. ex rel. Hepburn v. Mann*, 5 Watts & S. 403; *Com. ex rel. Atty. Gen. v. Mathues*, 210 Pa. 394, 59 Atl. 961; *Federalist*, No. 79; *Story, Const.* §§ 1629-1631; *Kent, Com.* pp. 293-295.

The power to tax implies the power to destroy.

M'Culloch v. Maryland, 4 Wheat. 316, 431, 4 L. ed. 579, 607; *Collector v. Day* (*Buffington v. Day*) 11 Wall. 113, 127, 20 L. ed. 122, 126.

The 16th Amendment can in no way justify or support that provision of the Revenue Act the constitutionality of which is now in question.

Brushaber v. Union P. R. Co. 240 U. S. 1, 60 L. ed. 493, L.R.A.1917D, 414, 36 Sup. Ct. Rep. 236, Ann. Cas. 1917B, 713; *William E. Peck & Co. v. Lowe*, 247 U. S. 165, 62 L. ed. 1049, 38 Sup. Ct. Rep. 432; *Pollock v. Farmers' Loan & T. Co.* 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673; *Re Debs*, 158 U. S. 594, 39 L. ed. 1106, 15 Sup. Ct. Rep. 900; *Prout v. Starr*, 188 U. S. 543, 47 L. ed. 587, 23 Sup. Ct. Rep. 398; *Knowlton v. Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747.

Article 3, § 1, of the Constitution must control.

Weston v. Charleston, 2 Pet. 466, 7 L. ed. 487; *Pollock v. Farmers' Loan & T. Co.* 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673; *Minnesota v. Bar-*

ber, 136 U. S. 319, 320, 34 L. ed. 457, 458, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Dobbins v. Erie County*, 16 Pet. 435, 10 L. ed. 1022; *Collector v. Day* (*Buffington v. Day*) 11 Wall. 113, 20 L. ed. 122.

United States Const. art. 3, § 1, forbids diminution of a judge's salary during his term of office, and the law forbids a thing done indirectly which is forbidden to be done directly.

Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678; *Weston v. Charleston*, 2 Pet. 449, 7 L. ed. 481; *Cummings v. Missouri*, 4 Wall. 288, 18 L. ed. 356; 2 Co. Inst. 48, 202; *Broom, Legal Maxims*, 367; *Burrill, Law Dict.* 202; *Fairbank v. United States*, 181 U. S. 283, 45 L. ed. 862, 21 Sup. Ct. Rep. 648, 15 Am. Crim. Rep. 135.

The test of the constitutionality of a statute is not what has been done, but what, by its authority, may be done under it.

Ames v. People, 26 Colo. 109, 56 Pac. 656; *Eubank v. Richmond*, 226 U. S. 137, 144, 57 L. ed. 156, 159, 42 L.R.A. (N.S.) 1123, 33 Sup. Ct. Rep. 76, Ann. Cas. 1914B, 192.

The power to tax is the power to destroy.

Brown v. Maryland, 12 Wheat. 419, 445, 6 L. ed. 678, 687; *Austin v. Boston*, 7 Wall. 694, 19 L. ed. 224; *Veazie Bank v. Fenno*, 8 Wall. 533, 19 L. ed. 482; *McCray v. United States*, 195 U. S. 27, 49 L. ed. 78, 24 Sup. Ct. Rep. 769, 1 Ann. Cas. 561.

It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.

Fairbank v. United States, 181 U. S. 283, 291, 45 L. ed. 862, 866, 21 Sup. Ct. Rep. 648, 15 Am. Crim. Rep. 135; *Boyd v. United States*, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; *Re Debs*, 158 U. S. 594, 39 L. ed. 1106, 15 Sup. Ct. Rep. 900.

Messrs. A. Mitchell Palmer, Attorney General, and William L. Frierson, Assistant Attorney General, for defendant in error:

The principle controlling this case has been clearly settled by decisions of this court in cases involving similar questions.

Postal Tele. Cable Co. v. Adams, 155 U. S. 688, 695, 696, 39 L. ed. 311, 315, 316, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360; Atlantic & P. Tele. Co. v. Philadelphia, 190 U. S. 160, 163, 47 L. ed. 995, 999, 23 Sup. Ct. Rep. 817; William E. Peck & Co. v. Lowe, 247 U. S. 165, 62 L. ed. 1049, 38 Sup. Ct. Rep. 432.

The mere fact that a part of a judge's salary must be used to pay a tax does not render the tax unconstitutional.

Com. ex rel. Hepburn v. Mann, 5 Watts & S. 403; William E. Peck & Co. v. Lowe, supra; United States Glue Co. v. Oak Creek, 247 U. S. 321, 62 L. ed. 1135, 38 Sup. Ct. Rep. 499, Ann. Cas. 1918E, 748.

Mr. Justice Van Devanter delivered the opinion of the court:

This is an action to recover money paid under protest as a tax alleged to be forbidden by the Constitution.

The plaintiff is the United States district judge for the western district of Kentucky, and holds that office under an appointment by the President made in 1899, with the advice and consent of the Senate. The tax which he calls in question was levied under the Act of February 24, 1919, chap. 18, 40 Stat. at L. 1062, on his net income for the year 1918, as computed under that act. His compensation or salary as district judge was included in the computation. Had it been excluded, he would not have been called on to pay any income tax for that year. The inclusion was in obedience to a provision in § 213, requiring the computation to embrace all gains, profits, income, and the like, "including in the case of the President of the United States, the judges of the Supreme and inferior courts of the United States, [and others] . . . the compensation received as such." Whether he could be subjected to

such a tax in respect of his salary, consistently with the Constitution, is the matter in issue. If it be resolved against the tax, he will be entitled to recover what he paid; otherwise his action must fail. It did fail in the district court. 262 Fed. 550.

The Constitution establishes three great co-ordinate departments of the national government,—the legislative, the executive, and the judicial,—and distributes among them the powers confided to that government by the people. Each department is dealt with in a separate article, the legislative in the first, the executive in the second, and the judicial in the third. Our present concern is chiefly with the third article. It defines the judicial power, vests it in one supreme court and such inferior courts as Congress may from time to time ordain and establish, and declares: "The Judges both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

The plaintiff insists that the provision in § 213 which subjects him to a tax in respect of his compensation as a judge by its necessary operation and effect diminishes that compensation, and therefore is repugnant to the constitutional limitation just quoted.

Stated in its broadest aspect, the contention involves the power to tax the compensation of Federal judges in general,—and also the salary of the President, as to which the Constitution (art. 2, § 1, cl. 6) contains a similar limitation. Because of the individual relation of the members of this court to the question, thus broadly stated, we cannot but regret that its solution falls to us; and this although each member has been paying the tax in respect of his salary voluntarily and in regular course. But jurisdiction of the present case cannot

be declined or renounced. The plaintiff was entitled by law to invoke our decision on the question as respects his own compensation, in which no other judge can have any direct personal interest; and there was no other appellate tribunal to which, under the law, he could go. He brought the case here in due course, the government joined him in asking an early determination of the question involved, and both have been heard at the bar and through printed briefs. In this situation, the only course open to us is to consider and decide the cause,—a conclusion supported by precedents reaching back many years. Moreover, it appears that, when this taxing provision was adopted, Congress regarded it as of uncertain constitutionality, and both contemplated and intended that the question should be settled by us in a case like this.¹

With what purpose does the Constitution provide that the compensation of the judges "shall not be diminished during their continuance in office?" Is it primarily to benefit the judges, or rather to promote the public weal by giving them that independence which makes for an impartial and courageous discharge of the judicial function? Does the provision merely forbid direct diminution, such as expressly reducing the compensation from a greater to a less sum per year, and thereby leave the way open for indirect, yet effective, diminution, such as withholding or calling back a part as a tax on the whole? Or does it mean that the judge shall have a sure and

continuing right to the compensation, whereon he confidently may rely for his support during his continuance in office, so that he need have no apprehension lest his situation in this regard may be changed to his disadvantage?

The Constitution was framed on the fundamental theory that a larger measure of liberty and justice would be assured by vesting the three great powers—the legislative, the executive, and the judicial—in separate departments, each relatively independent of the others; and it was recognized that without this independence—if it was not made both real and enduring—the separation would fail of its purpose. All agreed that restraints and checks must be imposed to secure the requisite measure of independence; for otherwise the legislative department, inherently the strongest, might encroach on or even come to dominate the others, and the judicial, naturally the weakest, might be dwarfed or swayed by the other two, especially by the legislative.

The particular need for making the judiciary independent was elaborately pointed out by Alexander Hamilton in the *Federalist*, No. 78, from which we excerpt the following:

"The executive not only dispenses the honors, but holds the sword of the community; the legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated; the judiciary, on the contrary, has no influence over either the sword or the purse; no direction

¹ See House Report, No. 767, p. 29, 65th Cong. 2d Sess.; Senate Report, No. 617, p. 6, 65th Cong. 3d Sess. And see Cong. Record, vol. 56, p. 10,370, where the chairman of the House Committee, in asking the adoption of the provision, said: "I wish to say, Mr. Chairman, that while there is considerable doubt as to the constitutionality of taxing . . . Federal judges' or the President's salaries, . . . we cannot settle it; we have not the power to settle it. No power in the world can settle it except the Supreme Court of the United States. Let us raise it, as we have

done, and let it be tested, and it can only be done by someone protesting his tax and taking an appeal to the Supreme Court." And again: "I think really that every man who has a doubt about this can very well vote for it and take the advice of the gentleman from Pennsylvania [Mr. Graham], which was sound then and is sound now, that this question ought to be raised by Congress, the only power that can raise it, in order that it may be tested in the Supreme Court, the only power that can decide it."

either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment. . . . This simple view of the matter suggests several important consequences: It proves incontrovertibly that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks."

"The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice in no other way than through the medium of the courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing."

At a later period John Marshall, whose rich experience as lawyer, legislator, and chief justice enabled him to speak as no one else could, tersely said (*Debates Va. Conv. 1829-1831*, pp. 616, 619):

"Advert, sir, to the duties of a judge. He has to pass between the government and the man whom that government is prosecuting: between the most powerful individual in the community, and the poorest and most unpopular. It is of the last importance that, in the exercise of these duties, he should observe the utmost fairness. Need I press the necessity of this? Does not every man feel that his own personal security and the security of his property depends on that fairness? The Judicial Department comes home in its effects to every man's fireside: it passes on his property, his reputation, his life, his all. Is it not to the

last degree important that he should be rendered perfectly and completely independent, with nothing to influence or control him but God and his conscience? . . . I have always thought, from my earliest youth till now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and sinning people was an ignorant, a corrupt, or a dependent judiciary."

More recently the need for this independence was illustrated by Mr. Wilson, now the President, in the following admirable statement:

"It is also necessary that there should be a judiciary endowed with substantial and independent powers, and secure against all corrupting or perverting influences; secure, also, against the arbitrary authority of the administrative heads of the government.

"Indeed, there is a sense in which it may be said that the whole efficacy and reality of constitutional government resides in its courts. Our definition of liberty is that it is the best practicable adjustment between the powers of the government and the privileges of the individual."

"Our courts are the balance wheel of our whole constitutional system; and ours is the only constitutional system so balanced and controlled. Other constitutional systems lack complete poise and certainty of operation because they lack the support and interpretation of authoritative, undisputable courts of law. It is clear beyond all need of exposition that for the definite maintenance of constitutional understandings it is indispensable, alike for the preservation of the liberty of the individual and for the preservation of the integrity of the powers of the government, that there should be some nonpolitical forum in which those understandings can be impartially debated and determined. That forum our courts supply. There the individual may assert his rights; there the government must accept definition of its authority. There the individual may challenge the legality of governmental action and have it adjudged by the test of

fundamental principles, and that test the government must abide; there the government can check the too aggressive self-assertion of the individual and establish its power upon lines which all can comprehend and heed. The constitutional powers of the courts constitute the ultimate safeguard alike of individual privilege and of governmental prerogative. It is in this sense that our judiciary is the balance wheel of our entire system; it is meant to maintain that nice adjustment between individual rights and governmental powers which constitutes political liberty." *Constitutional Government in the United States*, pp. 17, 142.

Conscious of the nature and scope of the power being vested in the national courts, recognizing that they would be charged with responsibilities more delicate and important than any ever before confided to judicial tribunals, and appreciating that they were to be, in the words of George Washington,² "the keystone of our political fabric," the convention with unusual accord incorporated in the Constitution the provision that the judges "shall hold their offices during good behavior, and shall at stated times receive for their services a compensation which shall not be diminished during their continuance in office." Can there be any doubt that the two things thus coupled in place—the clause in respect of tenure during good behavior and that in respect of an undiminishable compensation—were equally coupled in purpose? And is it not plain that their purpose was to invest the judges with an independence in keeping with the delicacy and importance of their task, and with the imperative need for its impartial and fearless performance? Mr. Hamilton said in explanation and support of the provision (*Federalist*, No. 79): "Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for

their support. . . . In the general course of human nature, a power over a man's subsistence amounts to a power over his will. . . . The enlightened friends to good government in every state have seen cause to lament the want of precise and explicit precautions in the state constitutions on this head. Some of these, indeed, have declared that permanent salaries should be established for the judges; but the experiment has in some instances shown that such expressions are not sufficiently definite to preclude legislative evasions. Something still more positive and unequivocal has been evinced to be requisite. . . . This provision for the support of the judges bears every mark of prudence and efficacy; and it may be safely affirmed that, together with the permanent tenure of their offices, it affords a better prospect of their independence than is discoverable in the constitutions of any of the states in regard to their own judges." The several commentators on the Constitution have adopted and reiterated this view;³—Judge Story adding: "Without this provision [as to an undiminishable compensation], the other, as to the tenure of office, would have been utterly nugatory, and indeed a mere mockery;" and Chancellor Kent observing: "It tends, also, to secure a succession of learned men on the bench, who, in consequence of a certain undiminished support, are enabled and induced to quit the lucrative pursuits of private business for the duties of that important station."

These considerations make it very plain, as we think, that the primary purpose of the prohibition against diminution was not to benefit the judges, but, like the clause in respect of tenure, to attract good and competent men to the bench, and to promote that independence of action and judgment which is essential to the maintenance of the guar-

² Sparks's *Washington*, vol. X. pp. 35, 36.

³ 2 Story, § 1628; 1 Kent, Com. *294; 1 Wilson, Works, 410, 411; 2 Tucker, § 364; Miller, 340-343; 1 Carson, Sup. Ct. 6.

anties, limitations, and pervading principles of the Constitution, and to the administration of justice without respect to persons, and with equal concern for the poor and the rich. Such being its purpose, it is to be construed, not as a private

grant, but as a limitation imposed in the public interest; in other words, not restrictively, but in accord with its spirit and the principle on which it proceeds.

Obviously, diminution may be effected in more ways than one. Some may be direct and others indirect, or even evasive, as Mr. Hamilton suggested. But all which, by their necessary operation and effect, withhold or take from the judge a part of that which has been promised by law for his services, must be regarded as within the prohibition. Nothing short of this will give full effect to its spirit and principle. Here the plaintiff was paid the full compensation, but was subjected to an involuntary obligation to pay back a part, and the obligation was promptly enforced. Of what avail to him was the part which was paid with one hand and then taken back with the other? Was he not placed in practically the same situation as if it had been withheld in the first instance? Only by subordinating substance to mere form could it be held that his compensation was not diminished. Of course, the conclusion that it was diminished is the natural one. This is illustrated in *Dobbins v. Erie County*, 16 Pet. 435, 450, 10 L. ed. 1022, 1027, which involved a tax charged under a law of Pennsylvania against a revenue officer of the United States who was a citizen and resident of that state. The tax was adjusted or proportioned to his compensation, and the state court sustained it. 7 Watts, 513. In reversing that decision, this court, after showing that the compensation had been fixed by a law of Congress, said: "Does not a tax, then, by a state upon the office, diminishing

the recompense, conflict with the law of the United States, which secures it to the officer in its entirety? It certainly has such an effect; and any law of a state imposing such a tax cannot be constitutional."

But it is urged that what the plaintiff was made to pay back was an income tax, and that a like tax was exacted of others engaged in private employment.

If the tax in respect of his compensation be prohibited, it can find no justification in the taxation of other income as to which there is no prohibition; for, of course, doing what the Constitution permits gives no license to do what it prohibits.

The prohibition is general, contains no excepting words, and appears to be directed against all diminution, whether for one purpose or another; and the reasons for its adoption, as publicly assigned at the time and commonly accepted ever since, make with impelling force for the conclusion that the fathers of the Constitution intended to prohibit diminution by taxation as well as otherwise,—that they regarded the independence of the judges as of far greater importance than any revenue that could come from taxing their salaries.

True, the taxing power is comprehensive and acknowledges few exceptions. But that there are exceptions, besides the one we here recognize and sustain, is well settled. In *Collector v. Day* (*Buffington v. Day*) 11 Wall. 113, 20 L. ed. 122, it was held that Congress could not impose an income tax in respect of the salary of a judge of a state court; in *Pollock v. Farmers' Loan & T. Co.* 157 U. S. 429, 585, 601, 652, 653, 39 L. ed. 759, 820, 826, 844, 15 Sup. Ct. Rep. 673, it was held—the full court agreeing on this point—that Congress was without power to impose such a tax in respect of interest received from bonds issued by a state or any of its counties or municipalities; and in *United States v. Baltimore & O. R. Co.* 17 Wall. 322, 21 L. ed. 597, there

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compensation—
diminution
during continu-
ance in office.

was a like holding as to municipal revenues derived by the city of Baltimore from its ownership of stock in a railroad company. None of those decisions was put on any express prohibition in the Constitution, for there is none; but all recognized and gave effect to a prohibition implied from the independence of the states within their own spheres.

When we consider, as was done in those cases, what is comprehended in the congressional power to tax,—where its exertion is not directly or impliedly interdicted,—it becomes additionally manifest that the prohibition now under discussion was intended to embrace and prevent diminution through the exertion of that power; for, as this court repeatedly has held, the power to tax carries with it “the power to embarrass and destroy;” may be applied to every object within its range “in such measure as Congress may determine;” enables that body “to select one calling and omit another, to tax one class of property and to forbear to tax another;” and may be applied in different ways to different objects so long as there is “geographical uniformity” in the duties, imposts, and excises imposed. *M’Culloch v. Maryland*, 4 Wheat. 316, 431, 4 L. ed. 579, 607; *Pacific Ins. Co. v. Soule*, 7 Wall. 433, 443, 19 L. ed. 95, 98; *Austin v. Boston*, 7 Wall. 694, 699, 19 L. ed. 224, 226; *Yeazie Bank v. Fenno*, 8 Wall. 533, 541, 548, 19 L. ed. 482, 485, 487; *Knowlton v. Moore*, 178 U. S. 41, 92, 106, 44 L. ed. 969, 990, 995, 20 Sup. Ct. Rep. 747; *Treat v. White*, 181 U. S. 264, 268, 269, 45 L. ed. 853–855, 21 Sup. Ct. Rep. 611; *McCray v. United States*, 195 U. S. 27, 61, 49 L. ed. 78, 97, 24 Sup. Ct. Rep. 769, 1 Ann. Cas. 561; *Flint v. Stone Tracy Co.* 220 U. S. 107, 158, 55 L. ed. 389, 416, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312; *Billings v. United States*, 232 U. S. 261, 282, 58 L. ed. 596, 605, 34 Sup. Ct. Rep. 421; *Brushaber v. Union P. R. Co.* 240 U. S. 1, 24–26, 60 L. ed. 493, 504, 505, L.R.A. 1917D, 414, 36 Sup. Ct. Rep. 236,

Ann. Cas. 1917B, 713. Is it not, therefore, morally certain that the discerning statesmen who framed the Constitution, and were so sedulously bent on securing the independence of the judiciary, intended to protect the compensation of the judges from assault and diminution in the name or form of a tax? Could not the purpose of the prohibition be wholly thwarted if this avenue of attack were left open? Certainly, there is nothing in the words of the prohibition indicating that it is directed against one legislative power and not another; and, in our opinion, due regard for its spirit and principle requires that it be taken as directed against them all.

This view finds support in rulings in Pennsylvania, Louisiana, and North Carolina, made under like constitutional restrictions (*Com. ex rel. Hepburn v. Mann*, 5 Watts & S. 403, 415, et seq.;⁴ *New Orleans v. Lea*, 14 La. Ann. 194; 48 N. C. Appx.; N. C. Public Documents 1899, Doc. No. 8, p. 95; *Re Taxation of Salaries of Judges*, 131 N. C. 692, 42 S. E. 970; *Purnell v. Page*, 133 N. C. 125, 45 S. E. 534), and has strong sanction in the actual practice of the government, to which we now advert.

No attempt was made to tax the compensation of Federal judges prior to 1862. A statute of that year, July 1, 1862, chap. 119, § 86, 12 Stat. at L. 472, with its amendments, subjected the salaries of all civil officers of the United States to an income tax of 3 per cent, and was construed by the revenue officers as including the compensation of the President and the judges. Chief Justice Taney, the head of the ju-

⁴ The tax condemned was levied under a provision in a general revenue law, charging a tax of 2 per cent “upon all salaries and emoluments of office, created or held by or under the Constitution or laws of this commonwealth, and by or under any incorporation, institution, or company incorporated by the said commonwealth, where such salaries or emoluments exceed \$200.” Act No. 232, § 2, Pa. Laws 1840, p. 613; Act No. 117, § 9. Pa. Laws 1841, p. 310.

diciary, wrote to the Secretary of the Treasury a letter of protest (157 U. S. 701, 39 L. ed. 1155, 15 Sup. Ct. Rep. ix.) based on the prohibition we are considering, and in the course of the letter said:

"The act in question, as you interpret it, diminishes the compensation of every judge 3 per cent, and if it can be diminished to that extent by the name of a tax, it may, in the same way, be reduced from time to time, at the pleasure of the legislature.

"The judiciary is one of the three great departments of the government, created and established by the Constitution. Its duties and powers are specifically set forth, and are of a character that requires it to be perfectly independent of the two other departments, and in order to place it beyond the reach and above even the suspicion of any such influence, the power to reduce their compensation is expressly withheld from Congress, and excepted from their powers of legislation.

"Language could not be more plain than that used in the Constitution. It is, moreover, one of its most important and essential provisions. For the articles which limit the powers of the legislative and executive branches of the government, and those which provide safeguards for the protection of the citizen in his person and property, would be of little value without a judiciary to uphold and maintain them, which was free from every influence, direct or indirect, that might by possibility in times of political excitement warp their judgments.

"Upon these grounds I regard an act of Congress retaining in the Treasury a portion of the compensation of the judges, as unconstitutional and void."

The collection of the tax proceeded, and, at the suggestion of the Chief Justice, this court ordered his protest spread on its records. In 1869 the Secretary of the Treasury referred the question to the Attorney General (Judge Hoar), and that officer rendered an opinion in substantial accord with Chief Justice

Taney's protest, and also advised that the tax on the President's compensation was likewise invalid. 13 Ops. Atty. Gen. 161. The tax on the compensation of the President and the judges was then discontinued, and the amounts theretofore collected were all refunded,—a part through administrative channels and a part through the action of the court of claims and ensuing appropriations by Congress. *Wayne v. United States*, 26 Ct. Cl. 274; Act of July 28, 1892, chap. 311, 27 Stat. at L. 306. Thus the Secretary of the Treasury, the accounting officers, the court of claims, and Congress accepted and gave effect to the view expressed by the Attorney General. In the Income Tax Act of August 27, 1894, chap. 349, §§ 27 et seq., 28 Stat. at L. 509, nothing was said about the compensation of the judges; but Mr. Justice Field regarded it as included, and gave that as one reason for joining in the decision holding the act unconstitutional. 157 U. S. 604-606. On the rehearing the Attorney General (Mr. Olney) frankly said in his brief: "There has never been a doubt since the opinion of Attorney General Hoar that the salaries of the President and judges were exempt." The Income Tax Acts of October 3, 1913, September 8, 1916, and October 3, 1917 (chap. 16, 38 Stat. at L. 168; chap. 463, 39 Stat. at L. 758; chap. 63, 40 Stat. at L. 329), severally excepted the compensation of the judges then in office,—also that of the President for the then current term. In short, during a period of more than one hundred and twenty years there was but a single real attempt to tax the judges in respect of their compensation, and that attempt soon was disapproved and pronounced untenable by the concurring action of judicial, executive, and legislative officers. And so it is apparent that in the actual practice of the government the prohibition has been construed as embracing and preventing diminution by taxation.

Does the 16th Amendment authorize and support this tax and the attendant diminution; that is to say, does it bring within the taxing power subjects theretofore excepted? The court below answered in the negative; and counsel for the government say: "It is not, in view of recent decisions, contended that this Amendment rendered anything taxable as income that was not so taxable before." We might rest the matter here, but it seems better that our view and the reasons therefor be stated in this opinion, even if there be some repetition of what recently has been said in other cases.

Preliminarily we observe that, unless there be some real conflict between the 16th Amendment and the prohibition in article 3, § 1, making the compensation of the judges undiminishable, effect must be given to the latter as well as to the former; and also that a purpose to depart from or imperil a constitutional principle so widely esteemed and so vital to our system of government as the independence of the judiciary is not lightly to be assumed.

In *Knowlton v. Moore*, 178 U. S. 95, 44 L. ed. 991, 20 Sup. Ct. Rep. 747, this court said: "The necessities which gave birth to the Constitution, the controversies which preceded its formation, and the conflicts of opinion which were settled by its adoption, may properly be taken into view for the purpose of tracing to its source any particular provision of the Constitution, in order thereby to be enabled to correctly interpret its meaning." This sound rule is as applicable to the Amendments as to the provisions of the original Constitution.

Let us turn, then, to the circumstances in which this Amendment was proposed and ratified, and to the controversy it was intended to settle. By the Constitution all direct taxes were required to be apportioned among the several states according to their population, as ascertained by a census or enumeration (art. 1, § 2, cl. 3, and § 9, cl.

4), but no such requirement was imposed as to other taxes. And apart from capitation taxes, with which we now are not concerned, no rule was given for determining what taxes were direct and therefore to be apportioned, or what were indirect and not within that requirement. Controversy ensued and ultimately centered around the right classification of income from taxable real estate and from investments in taxable personal property. The matter then came before this court in *Pollock v. Farmers' Loan & T. Co.* 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673; 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912; and the decision, when announced, disclosed that the same differences in opinion existing elsewhere were shared by the members of the court,—five, the controlling number, regarding a tax on such income as in effect a direct tax on the property from which it arose, and therefore as requiring apportionment, and four regarding it as indirect and not to be apportioned. Much of the law then under consideration had been framed according to the latter view, and because of this and the adjudged inseparability of other portions the entire law was held invalid. Afterwards, to enable Congress to reach all taxable income more conveniently and effectively than would be possible as to much of it if an apportionment among the states were essential, the 16th Amendment was proposed and ratified. In other words, the purpose of the Amendment was to eliminate all occasion for such an apportionment because of the source from which the income came,—a change in no wise affecting the power to tax, but only the mode of exercising it. The message of the President⁵ recommending the adoption by Congress of a joint resolution proposing the Amendment, the debates⁶ on the resolution by which it was proposed,

⁵ Cong. Rec., vol. 44, p. 3344.

⁶ Cong. Rec., vol. 44, pp. 1568-1570, 3377, 3900, 4067, 4105-4107, 4108-4121, 4389-4441.

(853 U. S. 245, 64 L. ed. 887, 40 Sup. Ct. Rep. 550.)

and the public appeals,⁷—corresponding to those in the Federalist,—made to secure its ratification, leave no doubt on this point. And that the proponents of the Amendment, in drafting it, lucidly and aptly expressed this as its object, is shown by its words:

"The Congress shall have to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration."

True Governor Hughes, of New York, in a message laying the Amendment before the legislature of that state for ratification or rejection, expressed some apprehension lest it might be construed as extending the taxing power to income not taxable before; but his message promptly brought forth from statesmen who participated in proposing the Amendment such convincing expositions of its purpose,⁸ as here stated, that the apprehension was effectively dispelled and ratification followed.

Thus the genesis and words of the Amendment unite in showing that it does not extend the taxing power to

Internal
revenue-income
tax—purpose of
constitutional
amendment.

new or excepted subjects, but merely removes all occasion otherwise existing for an apportionment among the states of taxes laid on income, whether derived from one source or another.⁹ And we have so held in other cases.

In *Brushaber v. Union P. R. Co.* 240 U. S. 1, 60 L. ed. 493, L.R.A. 1917D, 414, 36 Sup. Ct. Rep. 236, Ann. Cas. 1917B, 713, where the purpose and effect of the Amendment were first drawn in question, the Chief Justice reviewed at length the legislative and judicial action

which prompted its adoption, and then, referring to its text, and speaking for a unanimous court, said, pp. 17, 18:

"It is clear on the face of this text that it does not purport to confer power to levy income taxes in a generic sense,—an authority already possessed and never questioned,—or to limit and distinguish between one kind of income taxes and another, but that the whole purpose of the Amendment was to relieve all income taxes when imposed from apportionment from a consideration of the source whence the income was derived. Indeed, in the light of the history which we have given and of the decision in the *Pollock Case*, and the ground upon which the ruling in that case was based, there is no escape from the conclusion that the Amendment was drawn for the purpose of doing away for the future with the principle upon which the *Pollock Case* was decided; that is, of determining whether a tax on income was direct, not by a consideration of the burden placed on the taxed income upon which it directly operated, but by taking into view the burden which resulted on the property from which the income was derived, since in express terms the Amendment provides that income taxes, from whatever source the income may be derived, shall not be subject to the regulation of apportionment."

What was there said was reaffirmed and applied in *Stanton v. Baltic Min. Co.* 240 U. S. 103, 112, 113, 60 L. ed. 546, 553, 554, 36 Sup. Ct. Rep. 278, and *William E. Peck & Co. v. Lowe*, 247 U. S. 165, 172, 62 L. ed. 1049, 1050, 38 Sup. Ct. Rep. 432, and in *Eisner v. Macomber*, 252 U. S. 189, 64 L. ed. 521, 9 A.L.R. 1570, 40 Sup. Ct. Rep. 189, decided

⁷ Cong. Rec., vol. 45, pp. 1694-1699, 2245-2247, 2539, 2540.

⁸ Cong. Rec., vol. 45, pp. 1694-1699, 2245-2247, 2539, 2540.

⁹ In passing the Income Tax Law of 1919 Congress refused to treat interest received from bonds issued by a state or any of its counties or municipalities as within the taxing power (Cong. Rec., vol. 57, pp. 11 A.L.R.—34.

553, 774-777, 2988; chap. 18, § 213, 40 Stat. at L. 1065, Comp. Stat. § 6336aff); and in the regulations issued under that law the administrative officers recognize that the salaries and emoluments of the officers of a state and its political subdivisions are not taxable by the United States (Reg. 45, published 1920, pp. 47, 313).

at the present term, we again held, citing the prior cases, that the Amendment "did not extend the taxing power to new subjects, but merely removed the necessity which otherwise might exist for an apportionment among the states of taxes laid on income."

After further consideration, we adhere to that view, and accordingly hold that the 16th Amendment does not authorize or support the tax in question.

Apart from his salary, a Federal judge is as much within the taxing power as other men are. If he has a home or other property, it may be taxed just as if it belonged to another. If he has an income other than his salary, it also may be taxed in the same way. And, speaking generally, his duties and obligations as a citizen are not different from those of his neighbors. But for the common good—to render him, in the words of John Marshall, "perfectly and completely independent, with nothing to influence or control him but God and his conscience"—his compensation is protected from diminution in any form, whether by a tax or otherwise, and is assured to him in its entirety for his support.

The court below concluded that the compensation was not diminished, and regarded this as inferable from our decisions in *William E. Peck & Co. v. Lowe*, 247 U. S. 165, 174, 175, 62 L. ed. 1049, 1051, 1052, 38 Sup. Ct. Rep. 432, and *United States Glue Co. v. Oak Creek*, 247 U. S. 321, 329, 62 L. ed. 1135, 1141, 38 Sup. Ct. Rep. 499, Ann. Cas. 1918E, 748. We think neither case tends to support that view. Each related to a business—one to exportation, the other to interstate commerce—which the taxing power—of Congress in one case, of a state in the other—was restrained from directly burdening; and the holding in both was that an income tax laid, not on the gross receipts, but on the net proceeds remaining after all expenses were paid and losses adjusted, did not directly burden the

business, but only indirectly and remotely affected it. Here the Constitution expressly forbids diminution of the judge's compensation, meaning, as we have shown, diminution by taxation as well as otherwise. The taxing act directs that the compensation—the full sum, with no deduction for expenses—be included in computing the net income, on which the tax is laid. If the compensation be the only income, the tax falls on it alone; and, if there be other income, the inclusion of the compensation augments the tax accordingly. In either event the compensation suffers a diminution to the extent that it is taxed.

We conclude that the tax was imposed contrary to the constitutional prohibition, and so must be adjudged invalid.

Judgment reversed.

Mr. Justice Holmes, dissenting:

This is an action brought by the plaintiff in error against an acting collector of internal revenue to recover a portion of the income tax paid by the former. The ground of the suit is that the plaintiff is entitled to deduct from the total of his net income \$6,000, being the amount of his salary as a judge of the district court of the United States. The Act of February 24, 1919, chap. 18, § 210, 40 Stat. at L. 1057, 1062, Comp. Stat. §§ 6371½a, 6336½c, taxes the net income of every individual, and § 213, p. 1065, requires the compensation received by the judges of the United States to be included in the gross income from which the net income is to be computed. This was done by the plaintiff in error and the tax was paid under protest. He contends that the requirement mentioned and the tax, to the extent that it was enhanced by consideration of the plaintiff's salary, are contrary to art. 3, § 1, of the Constitution, which provides that the compensation of the judges shall not be diminished during their continuance in office. Upon demurrer judgment was entered for the defendant, and the case comes here upon the single question of the

validity of the above-mentioned provisions of the act.

The decision below seems to me to have been right for two distinct reasons: that this tax would have been valid under the original Constitution, and that, if not so, it was made lawful by the 16th Amendment. In the first place, I think that the clause protecting the compensation of judges has no reference to a case like this. The exemption of salaries from diminution is intended to secure the independence of the judges, on the ground, as it was put by Hamilton in the *Federalist* (No. 79), that "a power over a man's subsistence amounts to a power over his will." That is a very good reason for preventing attempts to deal with a judge's salary as such, but seems to me no reason for exonerating him from the ordinary duties of a citizen, which he shares with all others. To require a man to pay the taxes that all other men have to pay cannot possibly be made an instrument to attack his independence as a judge. I see nothing in the purpose of this clause of the Constitution to indicate that the judges were to be a privileged class, free from bearing their share of the cost of the institutions upon which their well-being, if not their life, depends.

I see equally little in the letter of the clause to indicate the intent supposed. The tax on net incomes is a tax on the balance of a mutual account in which there always are some and may be many items on both sides. It seems to me that it cannot be affected by an inquiry into the source from which the items more or less remotely are derived. Obviously there is some point at which the immunity of a judge's salary stops; or, to put it in the language of the clause, a point at which it could not be said that his compensation was diminished by a charge. If he bought a house, the fact that a part or the whole of the price had been paid from his compensation as judge would not exempt the house. So, if he bought bonds. Yet in such cases the ad-

vantages of his salary would be diminished. Even if the house or bonds were bought with other money, the same would be true, since the money would not have been free for such an application if he had not used his salary to satisfy other more peremptory needs. At some point, I repeat, money received as salary loses its specific character as such. Money held in trust loses its identity by being mingled with the general funds of the owner. I see no reason why the same should not be true of a salary. But I do not think that the result could be avoided by keeping the salary distinct. I think that the moment the salary is received, whether kept distinct or not, it becomes part of the general income of the owner, and is mingled with the rest, in theory of law, as an item in the mutual account with the United States. I see no greater reason for exempting the recipients while they still have the income as income than when they have invested it in a house or bond.

The decisions heretofore reached by this court seem to me to justify my conclusion. In *William E. Peck & Co. v. Lowe*, 247 U. S. 165, 62 L. ed. 1049, 38 Sup. Ct. Rep. 432, a tax was levied by Congress upon the income of the plaintiff corporation. More than two thirds of the income were derived from exports, and the Constitution in terms prohibits any tax on articles exported from any state. By construction it had been held to create "a freedom from any tax which directly burdens the exportation." *Fairbank v. United States*, 181 U. S. 283, 293, 45 L. ed. 862, 866, 21 Sup. Ct. Rep. 648, 15 Am. Crim. Rep. 135. The prohibition was unequivocal and express, not merely an inference, as in the present case. Yet it was held unanimously that the tax was valid. "It is not laid on income from exportation because of its source, in a discriminative way, but just as it is laid on other income. . . . There is no discrimination. At most, exportation is affected only indirectly and remotely. The tax is levied

... after the recipient of the income is free to use it as he chooses. Thus what is taxed—the net income—is as far removed from exportation as are articles intended for export before the exportation begins.” 247 U. S. 174, 175. All this applies with even greater force when, as I have observed, the Constitution has no words that forbid a tax. In *United States Glue Co. v. Oak Creek*, 247 U. S. 321, 329, 62 L. ed. 1135, 1141, 38 Sup. Ct. Rep. 499, Ann. Cas. 1918E, 748, the same principle was affirmed as to interstate commerce, and it was said that if there was no discrimination against such commerce the tax constituted one of the ordinary burdens of government, from which parties were not exempted because they happened to be engaged in commerce among the states.

A second and independent reason why this tax appears to me valid is that, even if I am wrong as to the

scope of the original document, the 16th Amendment justifies the tax, whatever would have been the law before it was applied. By that Amendment Congress is given power to “collect taxes on incomes from whatever source derived.” It is true that it goes on “without apportionment among the several states, and without regard to any census or enumeration,” and this shows the particular difficulty that led to it. But the only cause of that difficulty was an attempt to trace income to its source, and it seems to me that the Amendment was intended to put an end to the cause, and not merely to obviate a single result. I do not see how judges can claim an abatement of their income tax on the ground that an item in their gross income is salary, when the power is given expressly to tax incomes from whatever source derived.

Mr. Justice Brandeis concurs in this opinion.

ANNOTATION.

Income tax in respect of salaries of public officers and employees.

- I. State taxation of Federal officers, 532.
- II. State taxation of state officers, 534.
- III. Federal taxation of state officers, 535.
- IV. Federal taxation of Federal officers, 537.
- V. Under English and colonial Income Tax Acts, 537.

1. State taxation of Federal officers.

It is the well-settled rule that a state or territory cannot impose a tax upon the salaries of officers or employees of the United States government. *Dobbins v. Erie County* (1842) 16 Pet. (U. S.) 435, 10 L. ed. 1022, reversing (1838) 7 Watts (Pa.) 513 (officer in United States revenue service); *Robertson v. Pratt* (1901) 13 Haw. 590 (territorial judges); *New Orleans v. Salmen Brick & Lumber Co.* (1914) 135 La. 828, 66 So. 237 (dictum); *King v. Hunter* (1871) 65 N. C. 603, 6 Am. Rep. 754 (dictum); *Purnell v. Page* (1903) 133 N. C. 125, 45 S. E.

534 (United States judge for district of state where taxed); *Ulsh v. Perry County* (1898) 7 Pa. Dist. R. 488 (postal clerk in Federal railway mail service); *State ex rel. Wickham v. Nygaard* (1915) 159 Wis. 396, 150 N. W. 513, Ann. Cas. 1917A, 1065 (dictum). In *Dobbins v. Erie County* (U. S.) *supra*, the United States Supreme Court, in holding that a state law which imposed a tax for county purposes upon the salary of a resident captain in the United States revenue service was unconstitutional and void, said: “Taxation is a sacred right, essential to the existence of government; an incident of sovereignty. The right of legislation is coextensive with the incident, to attach it upon all persons and property within the jurisdiction of a state. But in our system there are limitations upon that right. There is a concurrent right of legislation in the states and the United States, except as both are restrained

by the Constitution of the United States. Both are restrained upon this subject by express prohibitions in the Constitution; and the states by such as are necessarily implied when the exercise of the right by a state conflicts with the perfect execution of another sovereign power delegated to the United States. That occurs when taxation by a state acts upon the instruments, emoluments, and persons which the United States may use and employ as necessary and proper means to execute their sovereign powers. The government of the United States is supreme within its sphere of action. The means necessary and proper to carry into effect the powers in the Constitution are in Congress. . . . Congress has power to lay and collect taxes, duties, imposts, etc., and to regulate commerce with foreign nations and among the several states, and with the Indian tribes. Neither can be done without legislation. A complicated machinery of forms, instruments, and persons must be established; revenue districts were to be designated; collectors, naval officers, surveyors, inspectors, appraisers, weighers, measurers, and gaugers must be employed; 'the better to secure the collection of duties on goods and on the tonnage of vessels,' revenue cutters, and officers to command them, are necessary. The latter are declared to be officers of the customs, and they have large powers and authority. All of this is legislation by Congress to execute sovereign powers. They are means necessary to an allowed end: the end, the great objects which the Constitution was intended to secure to the states in their character of a nation. Is the officer, as such, less a means to carry into effect these great objects than the vessel which he commands, the instruments which are used to navigate her, or than the guns put on board to enforce obedience to the law? These inanimate objects, it is admitted, cannot be taxed by a state, because they are means. Is not the officer more so, who gives use and efficacy to the whole? Is not compensation the means by which his services are pro-

cured and retained? It is true it becomes his when he has earned it. If it can be taxed by a state as compensation, will not Congress have to graduate its amount with reference to its reduction by the tax? Could Congress use an uncontrolled discretion in fixing the amount of compensation, as it would do without the interference of such a tax? The execution of a national power by way of compensation to officers can in no way be subordinate to the action of the state legislatures upon the same subject. It would destroy, also, all uniformity of compensation for the same service, as the taxes by the states would be different. To allow such a right of taxation to be in the states would also, in effect, be to give the states a revenue out of the revenue of the United States, to which they are not constitutionally entitled, either directly or indirectly, neither by their own action, nor by that of Congress. The revenue of the United States is intended by the Constitution to pay the debts and provide for the common defense and general welfare of the United States, to be expended, in particular, in carrying into effect the laws made to execute all the express powers, 'and all other powers vested by the Constitution in the government of the United States.' But the unconstitutionality of such taxation by a state as that now before us may be safely put (though it is not the only ground) upon its interference with the constitutional means which have been legislated by the government of the United States to carry into effect its powers to lay and collect taxes, duties, imposts, etc., and to regulate commerce. . . . The powers of the national government can only be executed by officers whose services must be compensated by Congress. The allowance is in its discretion. The presumption is that the compensation given by law is no more than the services are worth, and only such in amount as will secure from the officer the diligent performance of his duties. 'The officers execute their offices for the public good. This implies their right of reaping from thence the recompense

the services they may render may deserve,' without that recompense being in any way lessened, except by the sovereign power from whom the officer derives his appointment, or by another sovereign power to whom the first had delegated the right of taxation over all the objects of taxation, in common with itself, for the benefit of both. And no diminution in the recompense of an officer is just and lawful, unless it be prospective, or by way of taxation by the sovereignty who has a power to impose it, and which is intended to bear equally upon all according to their estate. The compensation of an officer of the United States is fixed by a law made by Congress. It is in its conclusive discretion to determine what shall be given. It exercises the discretion and fixes the amount, and confers upon the officer the right to receive it when it has been earned. Does not a tax, then, by a state upon the office, diminishing the recompense, conflict with the law of the United States, which secures it to the officer in its entirety? It certainly has such an effect; and any law of a state imposing such a tax cannot be constitutional, because it conflicts with a law of Congress made in pursuance of the Constitution, and which makes it the supreme law of the land." However, it has been held that not everyone serving the Federal government is an officer within the meaning of the rule exempting the salaries of public officers from state taxation. For instance, in *Melcher v. Boston* (1845) 9 Met. (Mass.) 73, it was held that a postoffice clerk appointed by the local postmaster was not an official of the United States government within the meaning of the rule of exemption, although his appointment was approved by the Postmaster General and his salary was paid from money appropriated by Congress, the act regulating the Postoffice Department not having, in terms, created any such office or given any such character to such clerks as to entitle them to be denominated public officers of the national government.

And under a state income statute (Mass. Stat. 1916, chap. 269, § 5 (b))

which expressly provides that "the wages and salaries of employees and officers of the United States government shall not be taxed," it has been held that the salaries neither of a vice president of a railroad appointed Federal manager by the regional director, nor of an assistant counsel or solicitor of a railroad who continued as such after the road passed under Federal control, were subject to tax, the manager having been required to sever his official relation with his company, and "to become the exclusive representative of the United States Railroad Administration," and both having been under the exclusive control and subject to the direction of the Director General of Railroads, and having been paid out of funds controlled or provided by the United States government. *Biscoe v. Tax Comr.* (1920) 236 Mass. 201, 128 N. E. 16.

II. State taxation of state officers.

Where the Constitution of a state provides that the salaries of its judicial officers shall not be diminished during their continuance in office, it has been held that the state legislature cannot impose a tax upon the compensation paid to the judges of its court. *New Orleans v. Lea* (1859) 14 La. Ann. 194; *Opinion of Attorney-General of N. C.* (1856) 48 N. C. (3 Jones, L.) Appx. 1; *Re Taxation of Salaries of Judges* (1902) 131 N. C. 692, 42 S. E. 970; *Com. ex rel. Hepburn v. Mann* (1843) 5 Watts & S. (Pa.) 403 (but see to the contrary the earlier and much criticized case of *Northumberland County v. Chapman* (1829) 2 Rawle (Pa.) 73). The court in *New Orleans v. Lea* (La.) *supra*, argued that, since the Constitution provided for three distinct governmental departments, the existence of one department ought not to depend upon the will of a co-ordinate department, as it necessarily would if the legislature could diminish or destroy the salaries of the judicial officers by imposing a tax thereon.

However, a different rule prevails in Wisconsin, where it has been held (*State ex rel. Wickham v. Nygaard* (1915) 159 Wis. 396, 150 N. W. 513.

Ann. Cas. 1917A, 1065) that the provision of the Wisconsin Constitution to the effect that the compensation of any public officer shall not be diminished during his term of office must be read in connection with the subsequent amendment, which broadly provided that "taxes may also be imposed on incomes," so that the salary of a state judge is subject to taxation under the state Income Tax Law. The court, in speaking of the amendment, said: "We are not at liberty to rewrite this clause so as to read that taxes may be 'imposed on incomes, except where the income consists of a salary received by a public officer.' We perceive very little room for construction, and if a doubtful question were involved it should not be resolved against the exercise of the taxing power by the state."

III. Federal taxation of state officers.

It is agreed that Congress cannot, under the Constitution of the United States, impose a tax upon the salary of a judicial officer of a state. *Collector v. Day* (*Buffington v. Day*) (1871) 11 Wall. (U. S.) 113, 20 L. ed. 122, affirming (1871) 3 Cliff. 388, *Fed. Cas. No. 3,675*; *Freedman v. Sigel* (1873) 10 Blatchf. 327, *Fed. Cas. No. 5,080*; *New Orleans v. Salmen Brick & Lumber Co.* (1914) 135 La. 828, 66 So. 237. In *Collector v. Day* (U. S.) *supra*, the court (Mr. Justice Bradley, dissenting) stated its reasons as follows: "The general government, and the states, although both exist within the same territorial limits, are separable and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former, in its appropriate sphere, is supreme; but the states, within the limits of their powers not granted, or, in the language of the 10th Amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the states. . . . Two of the great departments of the government, the executive and legislative, depend upon the exercise of the powers, or upon the people of the states. The Constitution guarantees to the

states a republican form of government, and protects each against invasion or domestic violence. Such being the separate and independent condition of the states in our complex system, as recognized by the Constitution, and the existence of which is so indispensable that, without them, the general government itself would disappear from the family of nations, it would seem to follow, as a reasonable, if not a necessary consequence, that the means and instrumentalities employed for carrying on the operations of their governments for preserving their existence, and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired; should not be liable to be crippled, much less defeated, by the taxing power of another government, which power acknowledges no limits but the will of the legislative body imposing the tax. And, more especially, those means and instrumentalities which are the creation of their sovereign and reserved rights, one of which is the establishment of the judicial department, and the appointment of officers to administer their laws. Without this power, and the exercise of it, we risk nothing in saying that no one of the states, under the form of government guaranteed by the Constitution could long preserve its existence. A despotic government might. We have said that one of the reserved powers was that to establish a judicial department; it would have been more accurate, and in accordance with the existing state of things at the time, to have said the power to maintain a judicial department. All of the thirteen states were in the possession of this power, and had exercised it at the adoption of the Constitution; and it is not pretended that any grant of it to the general government is found in that instrument. It is, therefore, one of the sovereign powers vested in the states by their constitutions, which remained unaltered and unimpaired, and in respect to which the state is as independent of the general government as that government is independent of the states. The supremacy of the general

government, therefore, so much relied on in the argument of the counsel for the plaintiff in error, in respect to the question before us, cannot be maintained. The two governments are upon an equality, and the question is whether the power 'to lay and collect taxes' enables the general government to tax the salary of a judicial officer of the state, which officer is a means or instrumentality employed to carry into execution one of its most important functions, the administration of the laws, and which concerns the exercise of a right reserved to the states. We do not say the mere circumstance of the establishment of the judicial department, and the appointment of officers to administer the laws, being among the reserved powers of the state, disables the general government from levying the tax, as that depends upon the express power 'to lay and collect taxes;' but it shows that it is an original inherent power never parted with, and in respect to which the supremacy of that government does not exist, and is of no importance in determining the question; and, further, that being an original and reserved power, and the judicial officers appointed under it being a means or instrumentality employed to carry it into effect, the right and necessity of its unimpaired exercise, and the exemption of the officer from taxation by the general government, stand upon as solid a ground and are maintained by principles and reasons as cogent as those which led to the exemption of the Federal officer in *Dobbins v. Erie County* (U. S.) [set out and quoted supra, I.] from taxation by the state; for, in this respect, that is, in respect to the reserved powers, the state is as sovereign and independent as the general government. And if the means and instrumentalities employed by that government to carry into operation the powers granted to it are necessarily, and, for the sake of self-preservation, exempt from taxation by the states, why are not those of the states depending upon their reserved powers, for like reasons, equally exempt from Federal taxation? Their unimpaired existence in the one case

is as essential as in the other. It is admitted that there is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the states, nor is there any prohibiting the states from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government. Of what avail are these means if another power may tax them at discretion?"

And upon similar reasoning it has been held that a Federal income tax cannot be imposed upon the compensation paid to the executive officers of a state. *United States v. Ritchie* (1872) Fed. Cas. No. 16,168 (county prosecuting attorney); *King v. Hunter* (1871) 65 N. C. 603, 6 Am. Rep. 754 (dictum).

Some question has been made as to who are state officers and employees within the meaning of the rule exempting them from payment of a tax upon their official salary. Upon this point it has been ruled that officers and employees of universities, colleges, and agricultural experimental stations, who are paid by the state, are not taxable on the income so received. Ruling of the Treasury Department, dated May 17, 1919 (Income Tax Service, 1919, ¶ 3335). And the salaries of public school-teachers were declared exempt under the rule that the exemptions under the Federal Income Tax Act of 1916 extended to officers and employees of the states and of their counties, municipalities, townships, and other political subdivisions, by Treasury Regulations 33, art. 5. On the other hand, a contrary ruling has been made as to compensation paid by a municipality to a "special counsel" (Ruling of the Treasury Department, dated April 15, 1919; Income Tax Service 1919, ¶ 3313), as well as to moneys paid to one contracting with a state for the doing of a specified

thing, as for the construction of public works (Treasury Dec. 2152). In the latter instance, the Department ruled that such a contractor was neither an officer nor an employee within the rule exempting salaries of public officers and employees. And see Treasury Regulations 33, Rev. art. 4.

IV. Federal taxation of Federal officers.

The courts which have passed upon the question are agreed that article 3 of the Constitution of the United States, which provides that the President of the United States and the judges of the Supreme and inferior courts of the United States shall receive for their services a compensation "which shall not be diminished during their continuance in office," prevents Congress subjecting the salaries of either the President or such judges to an income tax, the theory being that such a tax would diminish the compensation provided for them by law and guaranteed by the Constitution. Taney's Letter (1863) 157 U. S. 701, 39 L. ed. 1155, 15 Sup. Ct. Rep. ix. (quoted in part in the reported case [EVANS v. GORE, ante, 519]); Pollock v. Farmers' Loan & T. Co. (1895) 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673 (per Mr. Justice Field); EVANS v. GORE (reported herewith) (expressly holding that article 3, does not merely forbid direct diminution, but was intended to include indirect diminution, such, for instance, as would be effected by the imposition of an income tax); Opinion of Attorney-General Hoar (1869) 13 Ops. Atty. Gen. 161; Wayne v. United States (1891) 26 Ct. Cl. (Fed.) 274.

And it is conclusively settled by the reported case (EVANS v. GORE) that the 16th Amendment to the Federal Constitution does not, by virtue of the provision giving Congress power to "collect taxes on incomes from whatever source derived," permit Congress to impose an income tax upon Federal judges. This, it will be remembered, was upon the theory that the Amendment did not extend the taxing power to new or excepted subjects, but merely removed the requirement

as to apportionment among the states of taxes laid on income. But compare State ex rel. Wickham v. Nygaard (1915) 159 Wis. 396, 150 N. W. 513, Ann. Cas. 1917A, 1065, as set out supra, II.

But with respect to Federal officers and employees other than the President and the judicial officers, as to whom there is express constitutional provision, it seems that Congress may lawfully impose an income tax upon their salaries. At least, in Galm v. United States (1903) 39 Ct. Cl. (Fed.) 55, it was held that the Income Tax Law of July 1, 1862, which expressly applied to salaries of officers and payments to persons in the civil, military, naval, or other employment or service of the United States, etc., attached to the pay of a lieutenant in the United States Army.

V. Under English and colonial Income Tax Acts.

In England, by schedule E of the Income Tax Acts (5 & 6 Vict. chap. 35, and succeeding statutes), the salary of everyone holding a public office, or employment of profit, payable out of public revenue of the United Kingdom, is expressly subjected to the payment of an income tax. See Atty. Gen. v. Lancashire & Y. R. Co. (1864) 2 Hurlst. & C. 792, 159 Eng. Reprint, 327, 33 L. J. Exch. N. S. 163, 10 Jur. N. S. 705, 10 L. T. N. S. 95, 13 Week. Rep. 8.

And it has been held by the judicial committee of the Privy Council (Webb v. Outtrim [1907] A. C. (Eng.) 81, 76 L. J. P. C. N. S. 25, 95 L. T. N. S. 850, 23 Times L. R. 147, 7 Ann. Cas. 84) that an officer (deputy postmaster general) of the Australian commonwealth, resident in the state of Victoria, and receiving his salary there, is subject to the provisions of the Victorian Income Tax Act. This was upon the theory that the commonwealth Constitutional Act did not expressly impose any restriction in favor of officers of the commonwealth, and that none could be implied. This conclusion, according to Abbott v. St. John (1908) 40 Can. S. C. 597, 12 Ann. Cas. 821, is in conflict with the earlier

Australian cases of *D'Emden v. Pedder*, 1 C. L. R. (Austr.) 91, and *Deakin v. Webb*, 1 C. L. R. (Austr.) 585. And it seems that even the High Court of Australia has refused to follow the decision in the *Outtrim Case*, it having been held in *Income Comrs. v. Cooper*, 4 C. L. R. (Austr.) 1304, affirming [1907] St. Rep. Qd. 110, W. N. 33, as set out in *Queensland Dig.* (1906-1917) col. 440, that the Australian Constitutional Act of 1867 conferred power upon the legislature of the state of Queensland to tax the official salary of judges of the courts of the commonwealth. And according to *Girouard, J.*, in *Abbott v. St. John (Can.) supra*, the decision in *Baxter v. Comrs. of Taxation*, 4 C. L. R. (Austr.) 1087, is to the same effect.

So in Canada, the Supreme Court has held (*Abbott v. St. John (Can.) supra*) that the British North American Act of 1867 confers power upon a province to impose an income tax upon the official salary of an official of the Dominion government, wherefore a municipality of New Brunswick could tax the official salary of a resident Dominion customs official. The court (one judge dissenting) said that subsec. 2 of § 92 of the British North American Act of 1867, which gave provincial legislatures exclusive powers of legislation in respect to direct taxation within the respective provinces, was not in conflict with subsec. 8 of § 91, which provided that the Dominion Parliament should have exclusive legislative authority over the "fixing of and providing for the salaries and allowances of civil and other officers of the government of Canada." This conclusion of the highest court of Canada is in conflict with and seemingly renders ineffective the decisions of provincial courts in a number of earlier cases. See *Reg. v. Bowell* (1896) 4 B. C. 498 (holding that the British Columbia legislature could not impose a tax upon the official salary of the collector of customs for the port of Vancouver); *Ex parte Owen* (1881) 20 N. B. 487 (holding that the city of St. Johns, New Brunswick, could not tax the official salary of a warehouse locker of the Dominion cus-

toms department); *Ackman v. Moncton* (1884) 24 N. B. 103 (holding that railway employees in the pay of the Dominion government could not be taxed on their salaries in the place where they resided); *Coates v. Moncton* (1886) 25 N. B. 605 (holding same as next preceding case); *Ex parte Burke* (1896) 34 N. B. 200 (holding that the province of New Brunswick could not tax the salary of an inspector of inland revenue for the Dominion); *Leprohon v. Ottawa* (1878) 2 Ont. App. Rep. 522, reversing (1877) 40 U. C. Q. B. 478 (holding that a provincial legislature can neither impose a tax, nor authorize a municipality to impose a tax, upon the official salary of an officer of the House of Commons of the Dominion of Canada). In *Leprohon v. Ottawa (Ont.) supra*, the court took a position directly contrary to that subsequently taken by the Canada Supreme Court in *Abbott v. St. John (Can.)* (set out *supra*, this subdivision), it having been squarely held that the provincial legislature had no power to impose a tax upon the official income of a servant of the Dominion government. The court adopted the same reasoning as that adhered to in the United States, namely, that to allow such taxation would permit the provincial legislature to reduce a salary fixed by the Federal government, and thus possibly interfere with and impair the means and instrumentalities necessary for the carrying on of the government.

But upon the theory that where the salary of a retired Dominion official is in the nature of a superannuation allowance from the government, the local or provincial taxation of such salary could not have the effect of impairing the means and instrumentalities necessary for carrying on the functions of the Dominion government, it has been held that the principal reason for exemption fails, and that a province may tax such an income. *Bucke v. London* (1905) 10 Ont. L. Rep. 628, distinguishing *Leprohon v. Ottawa* (1878) 2 Ont. App. Rep. 522, *supra*.

And the Canadian authorities are to

the effect that a province or territory may impose a tax upon the official salaries of its own public officers and employees. *Robson v. Reg.* (1899) 4 Terr. L. R. (Can.) 80 (officer of Northwest Territory); *Toronto v. Morson* (1916) 37 Ont. L. Rep. 369, 10 Ont. Week. N. 322, 28 D. L. R. 188 (junior county court judge). And as to liability of salaries of county court judges to municipal assessment under

the British North American Act, see *Re County Ct. Judges' Income Assessment*, 5 Ont. Week. N. 657, as cited in *Can. Ann. Dig.* (1914) col. 743. And such a tax may be imposed, notwithstanding the funds from which the salary was paid were formed in part by money granted by the Dominion government "for schools, official assistance," etc. *Robson v. Reg.* (Can.) supra. G. J. C.

STATE OF WYOMING EX REL. E. L. FITCH

v.

STATE BOARD OF SCHOOL LAND COMMISSIONERS of Wyoming
et al.

Wyoming Supreme Court—September 1, 1920.

(— Wyo. —, 191 Pac. 1073.)

Auction — method of bidding.

1. A bid at an auction may be made orally or in writing, by a wink, or a nod, or by any mode by which the bidder signifies his willingness and intention to give a particular price, or by words privately spoken to the auctioneer or by letter.

[See note on this question beginning on page 543.]

— closing on letter bid.

2. The closing by the auctioneer of a sale to one who agreed by letter to bid a certain amount, and made the necessary deposit, constitutes a binding sale, although the bidder was not present when the contract was closed.

[See 2 R. C. L. 1117, 1125.]

Estoppel — disputing validity of bid.

3. State officials who have construed a guaranty to bid a certain amount upon a sale of school lands as a bid, and declared the land sold to the bidder, cannot subsequently insist on a different construction of it.

Auction — how bids accepted.

4. Acceptance of bids is denoted by fall of the hammer, or by any other audible or visible means signifying to the bidder that he is entitled to the property on payment of the amount of his bid according to the terms of the sale.

[See 2 R. C. L. 1126.]

— bidding at second sale — waiver of rights.

5. One whose written bid for public land has been duly accepted does not, by bidding at a second sale without the knowledge of the acceptance of his bid, waive his rights thereunder.

APPLICATION by relator for a writ of mandamus to require respondents to issue to him a certificate of purchase for certain land, or to show cause why they refuse to do so. *Writ granted.*

The facts are stated in the opinion of the court.

Messrs. Don. L. Wakeman and R. R. Ryan, for relator:

An auction is a public sale of property to the highest bidder.

Russell v. Miner, 61 Barb. 534.

A bid may be made by words spoken

aloud or put in writing, by a wink, or nod, or in any mode by which the bidder signifies his willingness and intention to give a particular price.

Warehime v. Graf, 83 Md. 98, 34 Atl. 364.

The mere absence of the offerer at the time the sale was cried is no ground upon which the offeree might repudiate the alleged contract.

Tyree v. Williams, 3 Bibb, 365, 6 Am. Dec. 663.

To complete an auction sale, there must be a bidder, the property must be struck off or knocked down, and the person to whom it is struck off must complete his purchase by complying with the terms of the sale.

Sherwood v. Reade, 7 Hill, 431.

Property is understood to be struck off or knocked down when the auctioneer, by the fall of his hammer or by any other audible or visible announcement, signifies to the bidder that he is entitled to the property on paying the amount of his bid according to the terms of the sale.

State v. Second Nat. Bank, 84 Md. 325, 35 Atl. 889; *Sherwood v. Reade*, *supra*.

As soon as the hammer is struck the bargain is concluded. Thereafter, as a rule, the seller has no right to accept a higher bid, nor has the buyer any right to withdraw from the contract.

Coker v. Dawkins, 20 Fla. 141.

A bid is an offer by an intending purchaser to pay a designated price for property which is about to be sold at auction.

United States v. Vestal, 12 Fed. 59; *Payne v. Cave*, 3 T. R. 149, 100 Eng. Reprint, 502, 1 Revised Rep. 679; *Eppes v. Mississippi*, G. & T. R. Co. 35 Ala. 56.

Mr. W. L. Walls, Attorney General, for respondents:

Relator is not entitled to the writ of mandamus requiring respondents to issue to him a certificate of purchase of the lands in question upon the terms of the alleged sale, at the sum of ten (\$10) dollars per acre, with deferred payments and interest, or any other sum, or upon any terms whatsoever, and he is not entitled to any relief of any kind or character whatsoever, by reason of his action against respondents.

Beard, Ch. J., delivered the opinion of the court:

In this case, on the petition of the relator, an alternative writ of mandamus was issued to the respondents, requiring them to issue to the relator a certificate of purchase for the east half of section 1, township

52, north of range 76, situated in Campbell county, state of Wyoming, at the sale price therefor of \$10 per acre, or to show cause why they refuse to do so. The respondents filed their answer to said petition, to which relator filed a reply. On the issues thus joined, written stipulations as to certain facts were entered into by the parties, and the balance of the evidence was taken in writing by a commissioner appointed for that purpose.

There are but few controverted questions of fact in the case. About February 1, 1915, the relator applied in writing to the commissioner of public lands to have the lands above described selected as state or indemnity school lands, and for the sale of the same, and at the same time the relator agreed in said application to bid at a public sale of said lands the sum of \$10 per acre therefor, and, as a guaranty that he would do so, deposited with the state land commissioner \$1 per acre, or a total of \$323.47; said written guaranty being in the words and figures following: "I inclose herewith a deposit of \$1 upon each acre of said land, said deposit to be held as a guaranty that I will bid \$10 an acre for the land when same is offered for sale."

On August 22, 1918, the relator was advised that the state had become the owner of said lands, and that it would offer the same for sale at public auction to the highest bidder; and at the same time the relator was requested by the state land commissioner to deposit with him the further sum of \$20 to cover the cost of advertising said lands, providing he, the relator, still desired said lands sold under his application of February 1, 1915. The land was, on September 9, 1918, ordered sold by the state board of land commissioners, and thereupon, on September 10, 1918, the relator informed the state land commissioner, by letter, that he still desired the land sold under said application, and then deposited with said commissioner the said sum of \$20.

The said lands, together with numerous other tracts of land, were duly advertised for sale, said notice containing the following, to wit: "Notice is hereby given that pursuant to law and at the order of the state board of school land commissioners, the commissioner of public lands will, on the 6th day of December, 1918, at 9 o'clock A. M. at the front door of the courthouse in the city of Gillette, county of Campbell, state of Wyoming, offer for sale at public auction and sell to the highest and best bidder, the following described school lands. [Here follows a description of the various parcels of land, including the tract involved in this action.]"

Said notice also contained the following: "The state board of school land commissioners reserves the right to reject any and all bids offered at the said sale."

The sale was held and conducted at the time and place designated in the notice, by the deputy commissioner of public lands, who acted as auctioneer. Thus far there is no dispute between the parties. The deputy commissioner who conducted the sale testified that prior to the commencement of the sale, "having been requested to put up a number of pieces out of order in the notice of sale, in order that some of the parties might get away from town, I took the sales out of their regular order. There would be two bidders that I knew of on the east half of section 1, township 52, range 76, an agent of Mr. Johnson, of Sheridan, having spoken to me regarding the procedure of receiving bids, prior to the hour of sale. Both Mr. Fitch and the agent of Mr. Johnson were present at the sale, but inadvertently I took the sale of Mr. Fitch and offered it while both parties were absent from the room, and, receiving no bids, and supposing both parties to be present, I declared the land sold to Mr. Fitch, subject to the approval of the state board of school land commissioners."

She further testified on cross-examination: That she did not know

Mr. Johnson, or whether or not he was present at that time. That the land was sold to relator for \$10 per acre on his application and deposit, without any verbal bid at the time. That at the same sale another tract of land was sold to him, in his absence, in the same manner. That a large portion of the land sales throughout the state are made on the application to purchase and a guaranty deposit, without the receipt of any other bid at the sale, and that the written application and deposit are considered a bid, and a sale made on that, if there are no other bids. That later during the sale, Mr. Fitch and the agent of Mr. Johnson being present, she again offered this land for sale, and, as we understand the evidence, Johnson's agent and relator were competitive bidders until the land was again struck off to relator at \$30 per acre. That she did not at the time she offered the land the second time, or prior thereto, inform the relator that the land had been earlier in the day declared sold to him for \$10 per acre. That she made a full report of all the facts to the board. The relator testified that he was not present at the time of the first sale, and did not learn of it until after the second sale; that he then claimed under the first sale; but on the demand of the deputy commissioner, and under protest, paid to her the initial payment of 10 per cent of the bid of \$30 per acre; that he told her he did not think it was right, and she said he would have to pay it; that she had sold it for that much money, and she would have to require him to make that payment, and that if he had any recourse it would be from the board. Another witness testified that he was present when the land was first sold, and that relator was not then present, and that the land was then sold to relator at \$10 per acre; that he was present when relator asked the auctioneer about the double sale, and that she admitted the second sale was a mistake; that the Mr. Johnson, above mentioned, was present at the first

sale. Another witness testified that he was present during the entire course of the sale; that this land was sold twice. The first time early, about the third tract; and the last time it was sold in the regular order of the advertisement. There were no bids the first time, and the auctioneer declared it sold to the applicant at \$10 per acre. That relator was not present at the time of the first sale. That Johnson was present during the entire sale. That when there were no bids, other than the guaranteed bid, the lands were declared sold to applicant.

The only controversy in the case is whether or not the first transaction constituted a valid sale of the land to the relator. If it did, the second attempted sale was without authority and void.

It is contended by the attorney general, for respondents, that relator failed to make good his guaranty to bid \$10 per acre for the land at the first sale, and hence there was no bid at that time, and could be no sale. But we do not agree with that contention. A bid may be

Auction—method of bidding. made orally, or in writing, by a wink, or a nod, or by any mode by which the bidder signifies his willingness and intention to give a particular price (2 R. C. L. 1125), or by words spoken privately to the auctioneer (*Millingar v. Daly*, 56 Pa. 245), or by letter (*Tyree v. Williams*, 3 Bibb, 365, 6 Am. Dec. 663; 6 C. J. 829). In the last-cited case the sale was by executors under the terms of a will; and a few days before the sale Jordan (the bidder) informed the executors by letter the price he would give for the property. His bid being the highest, the property was sold to him. The court said: "It is not necessary that a person should be present at an auction to become a purchaser; he may, as Jordan did in this case, make his bid by letter. As his bid was the highest, and the lot was in fact exposed to public sale, he may well be considered the purchaser at the sale."

In the present case, the relator not only had expressed in writing his willingness to pay

\$10 per acre for the **—closing on letter bid.**

land, but also guaranteed to bid that amount at the sale, and had actually deposited the percentage of that amount required in such cases with the commissioner. It further appears by the respondent's own evidence that not only in this instance, but also in such sales throughout the state generally, the state officers have regarded and acted upon the guaranty of the applicant as a bid. Having placed that construction upon the language contained in the guaranty, they should not be heard to here **Estoppel—disputing validity of bid.** insist upon a different construction of

it. The land was offered at public auction at the time and place advertised, the bid was accepted, there were no other bids, and the land was declared by the auctioneer sold to relator for \$10 per acre. "Acceptance of a bid is denoted by the fall of the hammer, or by any other audible or visible means signifying to the bidder that he is

entitled to the property on paying the amount of his bid according to the terms of the sale. Once a bid has been accepted, the parties occupy the same relation toward each other as exists between promisor and promisee in an executory contract of sale conventionally made. Thereafter, as a rule, the seller has no right to accept a higher bid, nor may the buyer withdraw his bid." 2 R. C. L. 1126; *Coker v. Dawkins*, 20 Fla. 141, 153; *State v. Second Nat. Bank*, 84 Md. 325-331, 35 Atl. 889; *Sherwood v. Reade*, 7 Hill, 439.

Auction—how bids accepted. We are clearly of the opinion that the first sale was valid, and that the relator is entitled to a certificate of purchase of the land at \$10 per acre, upon complying with the terms and conditions contained in the advertisement. The second sale being

unauthorized, and relator having
—bidding at
second sale— had no knowledge of
waiver of rights. the first when he bid
at the second at-
tempted sale, he did not waive his
rights under the first and only valid
sale. A peremptory writ of manda-
mus will issue, requiring the re-

spondents to issue and deliver to the
relator a certificate of purchase for
said lands in accordance with the
views herein expressed.

Writ granted.

Potter and Blydenburgh, JJ., con-
cur.

ANNOTATION.

Modes of making and accepting bids at auctions.

- I. Scope, 543.
- II. Introduction, 543.
- III. Ways of bidding, 543.
- IV. Ways of accepting bids, 545.
- V. Conclusion, 546.

I. Scope.

This annotation has been rigidly confined to a presentation of the cases before the courts which have involved the varied ways and means of making and accepting bids at public auction, whereby they become valid and effective as bases of contracts of purchase and sale of properties exposed for sale.

It is not concerned in any respect with the rights and remedies of sellers or buyers at public vendues.

It includes judicial sales so far as bidding and accepting bids thereat are concerned, but does not follow such transactions as far as the approval and confirmation of the courts are requisite to bind the parties.

The subject is a narrow one, and the pertinent cases are not numerous.

II. Introduction.

If the selection of this subject needs any justification, it may be found in an opinion of the United States Supreme Court wherein it was said that, inasmuch as the consent of parties to a contract of purchase and sale at public auction is essential to a binding obligation to transfer and take property bid for and knocked down, "it becomes important to ascertain in what way and to what extent such assent must be manifested, and to distinguish accurately between mere offers or proposals by one party not accepted or approved by the other, and mutual and positive engagements

which neither party can retract or withdraw." *Blossom v. Milwaukee & C. R. Co.* (1866) 3 Wall. (U. S.) 196, 18 L. ed. 43.

A sale at auction, like every other sale, must have the assent, express or implied, of both vendor and vendee. *Farr v. John* (1867) 23 Iowa, 286, 92 Am. Dec. 426; *Grottenkemper v. Achtermeyer* (1875) 11 Bush (Ky.) 222.

When property has been offered at a public sale, and after bids have been made struck off to the highest bidder, the sale, in ordinary circumstances, is closed. The bid has been accepted; the minds of seller and buyer have come together by an offer of a certain price on one side and the acceptance of the offer on the other. *Coombs v. Steere* (1881) 8 Ill. App. 147.

The contract of sale and purchase is then complete, and naught remains but for the seller to deliver the property bought and the buyer to take it and pay the price he bid according to the terms of the sale. *Chamberlain v. Bain* (1888) 27 Ill. App. 634.

III. Ways of bidding.

There is no formal or prescribed mode of bidding for property put up at auction. Any way of making a bid which plainly indicates the bidder's intention is sufficient.

The court, therefore, in the reported case (*STATE EX REL. FITCH v. STATE BD. OF SCHOOL LAND COMRS.* ante, 539), was well within the authorities in holding that at an auction sale a bid may be made orally, or in writing, by a wink or a nod, or by any mode by which the bidder signifies his willingness and intention to give a particular price.

It is not necessary that biddings at auction should be *vivâ voce*. *Atty. Gen. v. Taylor* (1824) 13 Price, 636, 147 Eng. Reprint, 1106, per Baron Graham, s. c., sub. nom. *Rex v. Taylor* (1824) M'Clel. 362, 148 Eng. Reprint, 151.

A bid at an auction may be made by word of mouth, a nod of the head, or in any other manner, and a bid by nodding the head, where that method has been used in the locality for several years, is good. *Warehime v. Graf* (1896) 83 Md. 98, 34 Atl. 364; In *Millingar v. Daly* (1867) 56 Pa. 245, where the supreme court reversed a judgment against a bidder at an auction sale of land, who had refused to accept a proffered conveyance because it excepted (without giving him notice when he bid) a part of the land he bid for, the trial court had instructed the jury that a "bid may be made" in words, uttered aloud in the hearing of the bystanders, or spoken privately to the auctioneer; or by writing in words or figures; or it may be made by a wink or nod, or in any mode by which the bidder signifies his willingness and intention to give a particular sum or price for the property offered for sale," and the instruction in this regard received tacitly the approval of the appellate tribunal as the law of the state, for it was said in the opinion of the court that except in a single particular, referring thereby to the exception from the offered deed of part of the land sold, it discovered no error in the manner in which the case was submitted to the jury.

It is not essential to the validity of a bid at an auction sale that the bidder should be personally present at the sale and make it then and there. *Dickerman v. Burgess* (1858) 20 Ill. 266; *Wenner v. Thornton* (1880) 98 Ill. 156; *Ingalls v. Rowell* (1894) 149 Ill. 163, 36 N. E. 1016; *Gibbs v. Davies* (1897) 168 Ill. 205, 48 N. E. 120; *Quigley v. Breckenridge* (1899) 180 Ill. 627, 54 N. E. 580; *Farr v. John* (1867) 23 Iowa, 286, 92 Am. Dec. 426; *Tyree v. Williams* (1814) 3 Bibb (Ky.) 365, 6 Am. Dec. 663; *Cohen v. Wagner* (1847) 6 Gill (Md.) 236.

The employment by a bidder of an-

other person to bid for him at an auction sale is not improper; it is common knowledge that bidders are frequently representatives of other persons. *Ingalls v. Rowell* (1894) 149 Ill. 163, 36 N. E. 1016; *Gibbs v. Davies* (1897) 168 Ill. 205, 48 N. E. 120; *Quigley v. Breckenridge* (1899) 180 Ill. 627, 54 N. E. 580.

Whether a bid is made personally by a purchaser at an auction sale, or by another acting in his behalf, is immaterial. *Cohen v. Wagner* (Md.) *supra*.

A bid at auction may be made by letter, and if it proves to be the highest made, the writer will be deemed the purchaser of the property put up for sale. *Tyree v. Williams* (1814) 3 Bibb (Ky.) 365, 6 Am. Dec. 663.

A letter from a prospective purchaser at auction, sent or delivered to the auctioneer at the beginning of the sale, offering a definite sum for the property put up and cried to the assembled bidders, is a good and valid bid. *Dickerman v. Burgess* (Ill.) *supra*; *Wenner v. Thornton* (1880) 98 Ill. 156.

A method of bidding by which the persons desirous of buying goods offered at auction retired to another room by request, each to write on separate slips of paper two different sums, upon the understanding that whoso set down and turned in the highest sum should be declared the purchaser, was sanctioned as good in *Rex v. Taylor* (1824) M'Clel. 362, 148 Eng. Reprint, 151, s. c. sub. nom. *Atty. Gen. v. Taylor* (1824) 13 Price, 636, 147 Eng. Reprint, 1106.

A bid lodged with the auctioneer prior to an auction sale is good. *Cohen v. Wagner* (1847) 6 Gill (Md.) 236.

In *Conover v. Walling* (1852) 15 N. J. Eq. 173, two tracts of land had been sold at auction, and the highest bidder for the tract first sold had made his bid upon a prior understanding with the auctioneer that he would keep his thumb in the buttonhole of his coat during the bidding, and that the auctioneer should, until he withdrew it, advance each bid in the ratio of the preceding one from his competitor.

Pursuant to this arrangement, the first tract was knocked down to him, and the sale of it was confirmed, but when the second tract was put up, and the same bidder kept his thumb in his buttonhole to signify to the auctioneer that he was bidding for that in the same way, the auctioneer ignored the signal and struck down the property to another bidder. This sale was set aside, and another ordered by the orphans' court, and its action in so doing was affirmed, but without costs, and with condemnatory remarks on the auctioneer's conduct.

According to Lord Halsbury, the method of bidding at an auction sale is usually regulated by the conditions of sale. 1 Laws of England, 510, § 1039.

A bid at an auction which does not conform to the published terms of the sale is no bid at all, and need not be noticed by the auctioneer. Moore v. Owsley (1872) 37 Tex. 603.

IV. Ways of accepting bids.

The same informality which marks the making characterizes the accepting of bids at auctions. Any method of signifying to the bidder that his bid has been accepted, and that the property put up is his upon paying his bid and complying with the terms of the sale, is sufficient.

The more common mode of accepting a bid is the letting fall of the auctioneer's hammer. As soon as the hammer falls the bid is accepted, and the contract of purchase and sale is considered closed.

United States.—Blossom v. Milwaukee & C. R. Co. (1866) 3 Wall. 196, 18 L. ed. 43.

Florida.—Coker v. Dawkins (1883) 20 Fla. 141.

Georgia. — Tillman v. Dunman (1901) 114 Ga. 406, 57 L.R.A. 784, 88 Am. St. Rep. 28, 40 S. E. 244; Mallard v. Curran (1905) 123 Ga. 872, 51 S. E. 712.

Hawaii.—McDonald v. Green (1885) 5 Haw. 325.

Kentucky.—Grotenkemper v. Achtermeyer (1875) 11 Bush, 222.

Maryland. — Warehime v. Graf (1896) 83 Md. 98, 34 Atl. 364; State 11 A.L.R.—35.

v. Second Nat. Bank (1896) 84 Md. 325, 35 Atl. 889.

Minnesota.—Anderson v. Wisconsin C. R. Co. (1909) 107 Minn. 296, 20 L.R.A.(N.S.) 1133, 131 Am. St. Rep. 462, 120 N. W. 39.

Nebraska.—Nebraska Loan & T. Co. v. Hamer (1894) 40 Neb. 281, 58 N. W. 695.

New York. — Sherwood v. Reade (1844) 7 Hill, 431.

Pennsylvania. — Fisher v. Seltzer (1854) 23 Pa. 308, 62 Am. Dec. 335.

England.—Payne v. Cave (1789) 3 T. R. 148, 100 Eng. Reprint, 502, 1 Revised Rep. 679; Routledge v. Grant (1828) 4 Bing. 653, 130 Eng. Reprint, 920, 1 Moore & P. 717, 6 L. J. C. P. 166, 3 Car. & P. 267, 29 Revised Rep. 672; Warlow v. Harrison (1858) 1 El. & El. 295, 120 Eng. Reprint, 920.

Payne v. Cave (Eng.) supra, has been called "the parent case" in the English reports respecting sales at auction. Anderson v. Wisconsin C. R. Co. (Minn.) supra.

A bid at auction is in the nature of an offer, which is accepted by knocking down the hammer. Langdell, Contr. § 19.

Lord Halsbury says that until property put up at auction is actually knocked down, there is no complete contract of sale. 1 Laws of England, 510, § 1039. Chancellor Kent is in accord. 2 Kent. Com. 538.

The fall of the auctioneer's hammer amounts to an acceptance of the offer of the bidder, but only when that conforms to the conditions of the sale. McManus v. Fortescue [1907] 2 K. B. (Eng.) 1, 76 L. J. K. B. N. S. 393, 96 L. T. N. S. 444, 23 Times L. R. 292.

Although the fall of the auctioneer's hammer is the more frequently resorted-to way of accepting a bid at auction, it is not the exclusive one used.

A bid at an auction is only an offer to buy, and there is no contract of sale until the crier, by the fall of the hammer or other recognized act, signifies acceptance of the offer. Nebraska Loan & T. Co. v. Hamer (1894) 40 Neb. 281, 58 N. W. 695.

Mr. Benjamin pronounces complete a sale by auction when the auctioneer announces its completion by the fall

of the hammer, or in another customary manner. Benjamin, Sales, 5th ed. 1906, p. 66.

By the British Sales of Goods Act of 1893 (56 & 57 Vict. chap. 71, § 58, subd. 2), the acceptance of a bid at an auction completes the sale, and is indicated "by the fall of the hammer, or in other customary manner."

According to Senator Bockee, in *Sherwood v. Reade* (1844) 7 Hill (N. Y.) 431, the words "struck off," as used in the then statute of New York respecting sales at auction to satisfy mortgages given to secure loans made by the commissioners for lending money of the United States deposited with the state of New York, were synonymous with "knocked down," and, in common parlance and the language of auction rooms, property is understood to be "struck off," or "knocked down," when the auctioneer by the fall of his hammer, or by any other audible or visible announcement, signifies to the bidder that he is entitled to the property on paying the amount of his bid according to the terms of the sale.

This language was adopted in *State v. Second Nat. Bank* (1896) 84 Md. 325, 35 Atl. 889.

In *Blossom v. Milwaukee & C. R. Co.* (1866) 8 Wall. (U. S.) 196, 18 L. ed. 43, the counsel for the successful litigant asserted in his argument that "in all public sales, or sales at auction, the sale is consummated by the fall of the hammer,—by striking off—or by the words 'going, going, gone,' or 'sold,' or equivalent expressions showing that the auctioneer accepts some bid that has been made," and the court in affirming the judgment apparently assented.

The court, then, in the reported case (*STATE EX REL. FITCH v. STATE BD. OF SCHOOL LAND COMRS.* ante, 539) is on firm ground in holding that the acceptance of a bid at an auction sale is denoted by the fall of the hammer, or by any other audible or visible means signifying to the bidder that he is entitled to the property on paying the amount of his bid according to the terms of sale.

In England, an excise tax on auction sales has long been levied by act of Parliament, and various ingenious schemes of evading it have been concocted. When the efficacy of these is tested in the court, the question turns upon whether or not the transactions in which they were worked out were auctions, and so subject to the tax.

An unusual and probably unique method of accepting a bid has been described by Lord Chancellor Eldon. "When I was attorney general," said his Lordship in *Walker v. Advocate-General* (1813) 1 Dow. 111, 3 Eng. Reprint, 640, "they had a case in the exchequer of a female auctioneer. She continued silent during the whole time of the sale; but whenever anyone bid she gave him a glass of brandy. The sale broke up, and, in a private room, he that got the last glass of brandy was declared to be the purchaser."

V. Conclusion.

It may be said with confidence, since a careful search of authorities has revealed no case to the contrary, that any method of bidding which makes plain to those conducting the sale the bidder's offer of a definite price for property put up at auction is good, and, reciprocally, that any way in which the acceptance of his bid is clearly conveyed to him is sufficient to close the sale.

The authorities, therefore, sustain the court in the reported case (*STATE EX REL. FITCH v. STATE BD. OF SCHOOL LAND COMRS.* ante, 539) in holding that an established custom of state officers in sales generally of the public lands, to regard as a bid, and to act upon it as such, a preliminary application for a sale, accompanied by a pledge to bid thereat a stated sum, and a payment of 10 per cent of that sum in cash as a guaranty of good faith in the absence of the bidder at the sale, and to knock the property down to him if no other bid is made, is a proper and effective way of making and accepting a bid for property put up at auction, and makes a valid contract of purchase and sale.

J. B. G.

W. C. BOWMAN LUMBER COMPANY
v.

S. B. PIERSON et al.

Texas Supreme Court — May 12, 1920.

(— Tex. —, 221 S. W. 930.)

Corporation — guaranteeing customer's contract — validity.

A corporation organized to deal in lumber has no power to guarantee performance of the contract by a building contractor merely to enable it to sell lumber to the contractor.

[See note on this question beginning on page 554.]

CERTIFICATION by the Court of Civil Appeals for the determination by the Supreme Court of a question arising upon reversal of a judgment in plaintiffs' favor in an action on a bond given to guarantee compliance with a certain building contract. *Question answered.*

The facts are stated in the opinion of the court.

Messrs. R. M. Reed and Theodore Mack for plaintiffs.

Mr. D. M. Oldham, Jr., for defendant:

Defendant being a private corporation incorporated to do a general lumber business in buying and selling lumber, and not incorporated as a surety or guaranty company, its act of signing said bond as surety is ultra vires and void.

Northside R. Co. v. Worthington, 88 Tex. 562, 53 Am. St. Rep. 778, 30 S. W. 1055; Deaton Grocery Co. v. International Harvester Co. 47 Tex. Civ. App. 267, 105 S. W. 556; South Texas Nat. Bank v. La Grange Oil-Mill Co. — Tex. Civ. App. —, 40 S. W. 328; Morgan v. Missouri, K. & T. R. Co. 50 Tex. Civ. App. 420, 110 S. W. 978; 10 Cyc. 1109; Re S. P. Smith Library Co. 132 Fed. 620.

A surety on a contractor's bond has the right to rely upon and expect the terms and conditions of the same will be observed, and unless the obligee in the bond does observe and comply with the same, the surety will be discharged from liability thereon.

Simpkins, Contr. p. 274; Shelton v. American Surety Co. 127 Fed. 736; Ryan v. Morton, 65 Tex. 258; Loneragan v. San Antonio Loan & T. Asso. 101 Tex. 63, 22 L.R.A.(N.S.) 364, 130 Am. St. Rep. 803, 104 S. W. 1061, 106 S. W. 876.

Phillips, Ch. J., delivered the opinion of the court:

The W. C. Bowman Lumber Company is a corporation chartered "to buy, sell, hold, and deal in lumber and other building materials, both at wholesale and retail, and generally to do and perform all matters and things incident or necessary in such business." As surety, it signed the bond given by A. T. Robinson, a contractor, to secure his performance of a certain building contract. During the negotiation for the contract, it was agreed between Robinson and the Lumber Company that he would purchase and it would sell him the lumber and other like material needed in the construction of the building if he secured the contract. Upon being awarded the contract, Robinson made such purchases of the Lumber Company. Thereafter, the Lumber Company executed the bond.

In a suit where recovery was sought against the Lumber Company upon the bond, the honorable court of civil appeals for the second district held that its act in signing the bond was ultra vires. Because of the conflict between this holding and that of the honorable court of

civil appeals for the fourth district in *Munoz v. Brassel*, — Tex. Civ. App. —, 108 S. W. 417, at a former term in a mandamus proceeding we directed that the question be certified here for the settlement of the conflict. *First Nat. Bank v. Conner*, 106 Tex. 549, 172 S. W. 1106.

It does not appear that any estoppel was pleaded against the Lumber Company's assertion that its act in signing the bond was ultra vires, based upon the benefit it received through its sale to the contractor of the lumber needed for the building. No estoppel having been invoked, the question is simply one as to the power of the corporation to pledge its credit as a surety for the contractor's undertaking.

Every corporation is created with certain express powers. Being endowed with these express powers, it has the implied power to do whatever is necessary or reasonably appropriate to their exercise. It has, in a word, the authority to do whatever will legitimately effect the express purposes of its creation. A corporation formed for the prosecution of a business may foster that business by necessary or appropriate means—those means which are direct, in their nature related to the objects of the corporation, and by whose employment those objects will be directly furthered. Under the pretense of fostering its own business, or even for that avowed purpose, it cannot, however, entangle itself in engagements or enterprises not necessary or reasonably appropriate to the advancement of its interests, from which it will receive only an indirect or remote benefit, if any, and with which, therefore, as tested by its charter powers and

their objects, it can have no true concern.

The pledging by a corporation of its credit for another's benefit as a means simply of enabling him to purchase its goods, is not a direct, and hence not a legitimate, means of promoting its own business. It is a means purely indirect, and any benefit derived by the corporation from the transaction is equally indirect. It is not a fostering

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of the business of a corporation to pledge its capital as security for the debts of prospective customers for the purpose of enabling them to buy its wares. It is inviting its destruction. The creation of custom by such a method is only a delusive benefit to the corporation at best, for the price of it is to jeopardize its capital, not for its own direct benefit, but for the private advantage of another. Its benefit from such a transaction can be only incidental. Such use of its credit is clearly beyond the power of an ordinary business corporation, such as the Lumber Company here. *Northside R. Co. v. Worthington*, 88 Tex. 562, 53 Am. St. Rep. 778, 30 S. W. 1055.

While a writ of error was refused by this court in *Munoz v. Brassel*, the question of the power of the corporation to pledge its credit under the circumstances there shown, was not presented in the application for our review.

NOTE.

The power of a corporation to guarantee the contracts of its customers or vendors with third persons is the subject of the annotation following *WOODS LUMBER CO. v. MOORE*, post, 554.

WOODS LUMBER COMPANY, Respt.,
v.

W. C. MOORE, JR., Trustee, etc., of Goldstein Company, Bankrupt, Appt.

California Supreme Court (Dept. No. 1)—August 10, 1920.

(— Cal. —, 191 Pac. 905.)

Corporation — authority to guarantee debts.

1. Charter authority to make films for moving picture plays and build structures for the purpose of making such films does not empower a corporation to guarantee the obligations of other persons engaged in such business.

[See note on this question beginning on page 554.]

— implied authority to guarantee accounts.

2. A corporation engaged in furnishing costumes under an existing contract to the producer of a motion picture film may guarantee such producer's bill for lumber necessary to the production of the film, where the statute permits corporations to make all contracts which are essential to the successful prosecution of their business.

[See 7 R. C. L. 604.]

Guaranty — sufficiency of consideration.

3. Furnishing more material to one whose accounts have been guaranteed by another is a sufficient consideration to support the guaranty.

[See 12 R. C. L. 1078.]

Corporation — contract — necessity of action by board of directors.

4. Authorization by the board of directors of a corporation is not necessary to validate a contract signed by the secretary, by direction of the president and business manager, who have power to direct and control the affairs and business of the corporation.

[See 7 R. C. L. 621.]

Evidence — proof of authority of corporate officer.

5. The authority of an officer or agent of a corporation to make contracts in its behalf may be shown by proof of conduct, without resort to the minutes of the board of directors.

[See 7 R. C. L. 667.]

APPEAL by defendant from a judgment of the Superior Court for Los Angeles County (Taft, J.) in favor of plaintiff in an action brought to recover from the bankrupt company, original defendant, as guarantor, an amount alleged to be due from another company for building materials and merchandise bought by it from plaintiff. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Adams, Adams, & Binford, G. Harold Janeway, Hunsaker & Britt, LeRoy M. Edwards, and Samuel Poorman, Jr., for appellant.

Mr. R. W. Clapp for respondent.

Shaw, J., delivered the opinion of the court:

The defendant appeals from the judgment. The plaintiff sued to recover of Goldstein Company, as guarantor, the sum of \$2,845.55 owing to plaintiff from Continental Producing Company for building materials and merchandise bought

of plaintiff by said Continental Company. The guaranty contract alleged to have been executed by Goldstein Company is as follows:

Jan. 6, 1917.

Woods Lumber Company,
Beverly Hills, Calif.

Gentlemen:—This is to confirm conversation Mr. Woods had with R. Goldstein on the afternoon of the 4th inst., guaranteeing the payment of all bills which you have or will have against the Continental Pro-

ducing Co. 650 S. Broadway st.
city. Yours very truly,

Goldstein Company,

Los Angeles, Inc.,

By L. C. Armbrust,
Secretary.

Goldstein Company was the original defendant, but during the pendency of the action it was adjudged a bankrupt and the defendant, Moore, was appointed trustee in bankruptcy, and substituted as defendant.

The answer alleged that the guaranty contract above set forth was given without consideration and for accommodation only; that the officer of defendant corporation that executed the same had no authority to do so, and that the guaranty of said Continental Producing Company's debts was not within the scope of the Goldstein Company's business. The court below made findings to the effect that the guaranty contract was given for a valuable consideration; that the officer who executed it was duly authorized to do so; and that the making of said guaranty contract was within the scope of the said Goldstein Company's corporate powers.

The appellant claims that the evidence shows: (1) That the contract of guaranty was not within the scope of the powers of the corporation as set forth in its articles, nor in direct furtherance of its business, and consequently that it is ultra vires; (2) that the said Goldstein Company received no benefit from the making of said guaranty, and is therefore not estopped to assert that it was ultra vires; (3) that the officers who executed the contract had no authority to bind the corporation thereby.

The articles of incorporation of Goldstein Company stated that it was incorporated "to manufacture, . . . buy, sell, lease, or otherwise acquire, and generally deal in all kinds of goods, wares, merchandise, and property of every class and description; to construct, purchase, lease, or otherwise acquire, . . . operate, maintain and conduct

theaters, concert halls, and amusement places of all kinds and descriptions; to manage theatrical, concert hall, and vaudeville companies of all kinds; . . . and to purchase, own, produce, and present theatrical plays, operas, and exhibitions of all kinds."

The principal business in which the Goldstein Company was engaged at and before the making of this guaranty was the selling and renting of costumes to persons engaged in the operation of theaters or shows and to persons engaged in the manufacture of films for moving picture shows. The Continental Producing Company was engaged in manufacturing films for the production by moving pictures of a play entitled "The Spirit of '76." On May 31, 1916, the Goldstein Company and the Continental Producing Company entered into a contract whereby the Goldstein Company agreed to sell and furnish to the Continental Company the costumes and other similar articles necessary for the production of this film. The contract price the Goldstein Company was to receive therefor amounted to \$8,300. In producing the film it was necessary for the Continental Company to buy a large amount of lumber and building materials for the erection of structures to be shown in the pictures. The Woods Lumber Company had arranged to furnish such materials to the Continental Company, as required. Robert Goldstein was president of the Goldstein Company and the principal stockholder therein. L. C. Armbrust was the secretary. Goldstein was also a stockholder in the Continental Company. Although the evidence is conflicting on the subject, it is sufficient to show that Goldstein was at that time acting as the manager of both companies, and was actively superintending the work of the Continental Company in producing the films, and was also controlling the operations of Goldstein Company. Woods Lumber Company began furnishing building materials to the Continental Company in September, 1916. Pay-

(— Cal. —, 191 Pac. 905.)

ments were made from time to time, but in the latter part of December the Continental Company was delinquent in payments. Thereupon W. E. Woods, manager of the Woods Lumber Company, informed Goldstein that the Woods Lumber Company would give the Continental Company no further credit, and would furnish it no more materials, unless Goldstein Company would guarantee the payment of the bills of the Continental Company for materials to be furnished to it by Woods Lumber Company. Goldstein Company was at that time financially interested in the success of the proposed moving picture then being made by the Continental Company, by reason of the fact that if the Continental Company was unable to go on with that enterprise, it would not order any more costumes from the Goldstein Company under the contract aforesaid. This, at least, was a fair inference from the evidence. Goldstein, in reply to the statement by Woods, said his company would execute such guaranty. In pursuance of this promise, and by order of Goldstein to Armbrust, the secretary, the guaranty contract above quoted was executed by the secretary and delivered to Mr. Woods for the Woods Lumber Company. The evidence is in conflict on these points, but there is substantial evidence to the effect stated. Thereafter the Woods Lumber Company, on the faith of this guaranty, furnished materials to the Continental Company to the amount herein sued for, and the indebtedness thereby created was not paid.

1. The articles of incorporation of Goldstein Company gave it power to make films for moving picture plays, and to exhibit them to the public, and also to build structures for the purpose of making such films. This fact, however, did not empower it to guarantee the obligations of other persons or corporations engaged in such business. It was not authorized to make contracts of guaranty as an independent busi-

ness. It had no express power to make such contracts. The guaranty in question can be upheld as binding upon it only upon the theory that under the circumstances existing at the time it was within its implied powers.

A corporation engaged in carrying on a business, which it is authorized to do by its articles and the law under which it is organized, has implied power to make all contracts which are "essential to the successful prosecution of the business" (Civ. Code, § 354, subd. 8; *Bates v. Coronado Beach Co.* 109 Cal. 163, 41 Pac. 855; *Mercantile Trust Co. v. Kiser*, 91 Ga. 636, 18 S. E. 358), or the making of which is an appropriate means by which it may be "reasonably expected that the business in which the corporation is engaged will be advanced" (*Depot Realty Syndicate v. Enterprise Brewing Co.* 87 Or. 560, L.R.A.1918C, 1001, 170 Pac. 294, 171 Pac. 223), or which are "necessary and helpful to the conduct of its authorized business" (*Timm v. Grand Rapids Brewing Co.* 160 Mich. 371, 27 L.R.A. (N.S.) 186, 125 N. W. 357), or which tends directly to promote the business authorized by its articles, and which it is doing (*Kraft v. West Side Brewing Co.* 219 Ill. 205, 76 N. E. 372; *Central Lumber Co. v. Kelter*, 201 Ill. 503, 66 N. E. 543; *Blue Island Brewing Co. v. Fraatz*, 123 Ill. App. 26; *Horst v. Lewis*, 71 Neb. 365, 98 N. W. 1046, 103 N. W. 460).

The question whether or not a contract of guaranty comes within the reasons above mentioned is one which is to be primarily "determined by the corporation, or those to whom the management of its affairs is intrusted." *Bates v. Coronado Beach Co.* supra. The court cannot determine that it is beyond the powers of the corporation, unless it clearly appears to be so as a matter of law. With respect to the means which the corporation may adopt to further its objects and promote its business, its managers "are not limited in law to the use of such means as are usual or necessary to the ob-

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jects contemplated by their organization, but, where not restricted by law, may choose such means as are convenient and adapted to the end, though they be neither the usual means, nor absolutely necessary" for the purpose intended. *Winterfield v. Cream City Brewing Co.* 96 Wis. 239, 71 N. W. 101.

For illustration: A sawmill corporation may guarantee bonds of an auxiliary railway corporation, formed to build a railroad penetrating the country from which the sawmill company expects to obtain its timber. *Mercantile Trust Co. v. Kiser*, *supra*. A brewing company can lawfully guarantee the payment of rent of a saloon keeper who has agreed to sell the beer of the brewing company exclusively, or the rent of a hotel which was one of the brewing company's customers, or the bond required by the state law of a liquor dealer who was one of its customers, or notes of a saloon keeper to obtain money from a third person for the erection of a saloon building in which he has agreed to sell exclusively the beer of the guarantor, or when by such contract the brewing company creates for itself a new customer and an additional outlet for its product. *Depot Realty Syndicate v. Enterprise Brewing Co.*; *Winterfield v. Cream City Brewing Co.*; *Timm v. Grand Rapids Brewing Co.* and *Kraft v. West Side Brewery Co.* *supra*; *Blue Island Brewing Co. v. Fraatz*, 123 Ill. App. 26; *Holm v. Claus Lipsius Brewing Co.* 21 App. Div. 204, 47 N. Y. Supp. 518; *H. Koehler & Co. v. Reinheimer*, 26 App. Div. 1, 41 N. Y. Supp. 755; *Horst v. Lewis*, *supra*; *Miller v. Northern Brewery Co.* (D. C.) 242 Fed. 164; *McQuaide v. Enterprise Brewing Co.* 14 Cal. App. 315, 111 Pac. 927. A lumber company may become surety on the bond of a building contractor to induce him to purchase of the lumber company the lumber used in such building. *Central Lumber Co. v. Kelter*, 201 Ill. 503, 66 N. E. 543.

There is a seeming conflict of authority on this subject, but, except

for a few cases, it is more apparent than real. In the following cases the guaranty was not shown to be directly connected with or beneficial to the authorized business carried on by the company, and the question of implied power was not discussed. *Memphis Grain Elevator Co. v. Memphis & C. R. Co.* 85 Tenn. 703, 4 Am. St. Rep. 798, 5 S. W. 52; *Lucas v. White Line Transfer Co.* 70 Iowa, 541, 59 Am. Rep. 449, 30 N. W. 771; *Norton v. Derry Nat. Bank*, 61 N. H. 589, 60 Am. Rep. 334; *Wheeler v. Home Sav. & State Bank*, 188 Ill. 34, 80 Am. St. Rep. 161, 58 N. E. 598; *First Nat. Bank v. Winchester*, 119 Ala. 168, 72 Am. St. Rep. 904, 24 So. 351; *Morgan v. Missouri, K. & T. R. Co.* 50 Tex. Civ. App. 420, 110 S. W. 978. There are other "border line cases," where it was held that benefit from the guaranty was too remote or too indirect to justify the conclusion that it was within the implied powers. The following are of this class: The fact that the operation of a railroad and a street car line would each tend to increase the population of the city and the business over each road did not authorize either company to guarantee the bonds of the other. *Northside R. Co. v. Worthington*, 88 Tex. 562, 53 Am. St. Rep. 778, 30 S. W. 1055. A railroad company cannot make a guaranty to enable a hotel company to build a summer hotel on its line, merely because the guests of the hotel would probably travel on the railroad and increase its business and profits. *Western Maryland R. Co. v. Blue Ridge Hotel Co.* 102 Md. 321, 2 L.R.A. (N.S.) 887, 111 Am. St. Rep. 362, 62 Atl. 351. A brewing company could not erect a building for a boarding house and saloon for rent, in order that the saloon keeper might buy its beer. *United States Brewing Co. v. Dolese & S. Co.* 259 Ill. 274, 47 L.R.A. (N.S.) 898, 102 N. E. 753. A few cases are directly contrary to the weight of authority. *Twiss v. Guaranty Life Asso.* 87 Iowa, 733, 43 Am. St. Rep. 418, 55 N. W. 8; *Anheuser-Busch Brewing Asso. v.*

Heistand, 101 C. C. A. 367, 177 Fed. 197; Davis v. Old Colony R. Co. 131 Mass. 258, 41 Am. Rep. 221. In each of the other cases the doctrine of implied powers was recognized. In Best Brewing Co. v. Klassen, 185 Ill. 37, 50 L.R.A. 765, 76 Am. St. Rep. 26, 57 N. E. 20, where the benefit to the corporate business was held to be too remote, the court said that the question as to such contract being within the implied powers was one to "be determined according to the facts of each case," and that such guaranty must be a means tending directly to promote the corporate business, "and not amounting to a separate unauthorized business." The doctrine we are following was thus recognized.

The case presented by the record comes clearly within the principle of the first-mentioned cases. The Goldstein Company was in the business of selling theatrical costumes, and had a pending contract with the Continental Company for the sale of a large amount of such costumes, presumably for a good profit. It was directly interested in the continuance of the business by the Continental Company, and in the success of the enterprise of producing the proposed play. The circumstances are such as to create the inference, which the court might reasonably have drawn, that the payment of the expenses of the Continental Company in producing the film for the play, including the price of the costumes aforesaid, was very largely dependent upon its completion and its successful production. The expressed purpose of the lumber company to refuse further credit to the Continental Company threatened to stop the entire enterprise, both that of the Continental Company in manufacturing the film and that of the Goldstein Company in selling the costumes therefor. The manager of the company reasonably concluded that this could only be prevented by making the guaranty in question. In a business view the guaranty ap-

peared to be essential to enable the Goldstein Company to obtain payments upon its contract with the Continental Company. It was to be reasonably expected that the making of the guaranty would advance the business of the Goldstein Company, and would secure to it the payment of the debt that would be due to it from its customer, the Continental Company. It was a thing helpful to the conduct of its business, and tended directly to promote the same. All of these things are held in the foregoing cases to be sufficient to bring the contract of guaranty within the scope of the implied powers of a corporation. We are of the opinion that the guaranty was a valid contract of the Goldstein Company.

2. It is apparent from what we have said that the Goldstein Company had what it deemed to be good reason to expect a substantial benefit from the making of the guaranty. As we have held that it had implied power to do so, under the circumstances, it is not necessary to consider the question whether or not the benefit was sufficient to create an estoppel to prevent it from asserting that it was ultra vires. If any consideration was necessary to make the guaranty binding, the selling of more lumber by the plaintiff to the Continental Company, in reliance thereon, was sufficient for that purpose. Civ. Code, §§ 1605, 1606, 2792.

Guaranty—
sufficiency of
consideration.

3. Under the circumstances shown by the evidence, it was not necessary for the plaintiff to prove that the guaranty contract was directly authorized by the board of directors of Goldstein Company, or that it was ratified by them. It was signed by the secretary by the direction of R. Goldstein, the president and business manager of the corporation; the man who, apparently, had the power to direct and control, and who did direct and control, its affairs and business. Woods knew this, and relied

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of directors.

upon it in accepting the guaranty and furnishing the lumber in reliance upon it. The authority of an officer or agent of a corporation to make contracts in its behalf may be shown by proof of conduct, and without resort to the minutes of its board of directors, or even where the minutes do not speak on the subject. "It may be shown by evidence that the person does business for the corporation and on its behalf, as agent, with the knowledge and acquiescence of its directors. . . . The company, in such a case, is bound by his acts . . . within the scope of the business intrusted to him." *Venice v. Short Line Beach Land Co.* 180 Cal. 447, 181

**Evidence—
proof of
authority of
corporate
officer.**

Pac. 658. "If a corporation allows its officers to conduct its business, and third persons act upon the apparent authority thus shown, it cannot defeat the rights of such persons arising from transactions done and completed under such ostensible authority, by failing to enter upon its minutes any order giving its officers authority to act." *Fowler Gas Co. v. First Nat. Bank*, 180 Cal. 471, 181 Pac. 663, citing *Fresno Street R. Co. v. Southern P. Co.* 135 Cal. 202, 67 Pac. 773; *Blood v. La Serena Land & Water Co.* 134 Cal. 370, 66 Pac. 317; *Crowley v. Genesee Min. Co.* 55 Cal. 276, 4 Mor. Min. Rep. 71. We find no error in the record.

The judgment is affirmed.

We concur: Olney, J.; Lawlor, J.

ANNOTATION.

Power of corporation to guarantee for accommodation the contracts of its customers or vendors with third persons.

I. Introductory, 554.

II. Guaranties for the purpose of increasing sales:

a. In general, 555.

b. Cases holding the guarantor liable, 555.

1. Introductory.

In general, corporations have no implied powers to make guaranties, or to sign or indorse paper for accommodation. Any implied powers of this kind are by way of exception to the general rule.

This annotation is intended to include the cases touching the question whether the power may be implied to a corporation to guarantee the contracts of its customers with third persons on the ground that it may thus promote the business of its customers, and so stimulate its own business, or to guarantee the contracts of its vendors with third persons in order that it may obtain goods. The question whether the relation between corporations arising out of their interlocking ownership, etc., will itself take a case out of the general rule that a corporation may not, for accommodation,

II.—continued.

c. Cases not holding the guarantor, 558.

III. Guaranties for the purpose of obtaining goods, 559.

IV. Miscellaneous, 560.

guarantee or indorse the paper of another, is not within the scope of the annotation. Cases where there is explicit power to guarantee are not included.

This is a subject of much uncertainty. The typical case is that of a brewer. It is generally considered that for the purpose of increasing its business a corporation operating a brewery has implied power to assist its customers, the retail dealers, by guaranteeing their rent, etc. Following this in number are the building cases. May a lumber company guarantee a building contract whereby it may make a sale of lumber? Here some difference of opinion has appeared. Instances of guaranties by corporations in various other businesses appear in the cases.

The doctrine that a corporation may lawfully stimulate its business by as-

sisting customers with guaranties seems to be making headway, though a step in the other direction is taken by the court in *W. C. BOWMAN LUMBER Co. v. PIERSON* (reported herewith) ante, 547. The reader will recognize the need of caution in relying on cases which, although sustaining a guaranty on the ground that it was *intra vires*, may be cited hereafter as not having required for their decision anything more than the principle of estoppel.

II. *Guaranties for the purpose of increasing sales.*

a. *In general.*

The largest class of cases touching the implied powers of corporations to guarantee their customers' contracts arises where it is claimed that the guaranty of the corporation was for the purpose of enlarging its sales.

b. *Cases holding the guarantor liable.*

Most of the cases of this class holding the guarantor liable have arisen on guaranties by corporations carrying on a brewery.

It is a general rule that corporations formed to manufacture and sell beer have implied power to guarantee contracts of their customers, the retail dealers.

United States.—*Miller v. Northern Brewing Co.* (1917) 242 Fed. 164 (guaranty of rent of customer).

Illinois.—*Standard Brewery v. Kelly* (1896) 66 Ill. App. 267 (guaranteeing customer's rent; both on ground of power and of estoppel); *Blue Island Brewing Co. v. Fraatz* (1905) 123 Ill. App. 26 (guaranteeing notes of prospective customer).

Michigan.—*Timm v. Grand Rapids Brewing Co.* (1910) 160 Mich. 371, 27 L.R.A. (N.S.) 186, 125 N. W. 357 (contracting to indemnify sureties on its customer's bonds).

Minnesota.—*Halloran v. Jacob Schmidt Brewing Co.* (1917) 137 Minn. 141, L.R.A.1917E, 777, 162 N. W. 1082 (Iowa contract guaranteeing rent of customer who was to handle guarantor's beer exclusively).

New York.—*Fuld v. Burr Brewing Co.* (1892) 45 N. Y. S. R. 649, 18 N. Y.

Supp. 456 (guaranty of lease of premises occupied by customer containing fixtures mortgaged to the company). *Holm v. Claus Lipsius Brewing Co.* (1897) 21 App. Div. 204, 47 N. Y. Supp. 518 (guaranty of customer's rent); *H. Koehler & Co. v. Reinheimer* (1898) 26 App. Div. 1, 49 N. Y. Supp. 755 (guaranty of lease of customer who promised to buy his beer of guarantor).

Oregon.—*Depot Realty Syndicate v. Enterprise Brewing Co.* (1918) 87 Or. 560, L.R.A.1918C, 1001, 170 Pac. 294, 171 Pac. 223 (guaranteeing rent of customer who promised to handle its products exclusively).

Wisconsin.—*Winterfield v. Cream City Brewing Co.* (1897) 96 Wis. 239, 71 N. W. 101 (guaranty of customer's rent where the company owned the bar fixtures and furniture).

In *Munoz v. Brassel* (1908) — Tex. Civ. App. —, 108 S. W. 417, a corporation, formed principally to buy and sell liquors at wholesale and retail, was held to have implied power to sign a saloon keeper's bond, although there was no express or implied agreement entered into that the saloon keeper should purchase liquor of the corporation.

In *Star Brewery v. Farnsworth* (1898) 172 Ill. 247, 50 N. E. 228, a brewery corporation was held liable on a guaranty to the builder of the cost of a building constructed for a saloon keeper, where it does not appear that the question of ultra vires was raised.

McQuaide v. Enterprise Brewing Co. (1910) 14 Cal. App. 315, 111 Pac. 927, cited in *WOODS LUMBER Co. v. MOORE* (reported herewith) ante, 549, was not a case of guaranty. In that case the defendant, a brewery corporation, took a lease as tenant, and sublet part of the property as a saloon to an old customer who used its beer, and the question decided was that the defendant had corporate power to take the lease and sublet.

The decision in *Filon v. Miller Brewing Co.* (1891) 38 N. Y. S. R. 602, 15 N. Y. Supp. 57, that the act of a corporation organized for the purpose of manufacturing and selling beer and

malt, in signing a lease of a hotel with one who agreed to buy his beer of the company, was ultra vires, not being within the scope of the business for which the concern was formed, must now be considered as overruled, so far as the question of ultra vires is concerned. See the comment in *H. Koehler & Co. v. Reinheimer* (1898) 26 App. Div. 1, 49 N. Y. Supp. 755.

In *Miller v. Northern Brewing Co.* (1917) 242 Fed. 164, supra, it was held that a guaranty of rent of one of its customers by a brewing company was within its corporate powers "to do all things incident to or convenient in carrying out the foregoing purposes," that is, "to manufacture, produce, buy, sell, and deal in and with beer, ale, malt liquors, malt, ice, and other similar products," etc. In this case the customer agreed to handle only the guarantor's beer on the premises, and it was further agreed that default in selling the same over the counter should operate as an immediate assignment and transfer to the guarantor all of the tenant's rights in and to the lease.

In *Halloran v. Jacob Schmidt Brewing Co.* (Minn.) supra, it was held that a guaranty of rent of one of its customers by a brewing company was not prohibited by a statute of Iowa, providing that no corporation engaged in the manufacture and brewing of intoxicating liquors shall be interested or engaged, either directly or indirectly, in the retail sale of intoxicating liquors, or own, operate, or lease any building to be used for the sale of intoxicating liquors at retail. The prohibition, the court stated, goes only to an interest in the instrumentalities used and acquired in the conduct of the business as such by the retailer, and to an interest in the profits derived by him, and the brewing company in this case was not interested in the business which the lessees would conduct on the premises, and did not pay or guarantee their license bond.

A brewing company may become surety on the bond of a liquor dealer carrying on his business in a building belonging to the company, who at the

time he obtained his license, and at the time of the execution and delivery of the bond, and as a part of the same transaction, obligated himself to purchase beer for sale in his saloon exclusively from the company, where the articles of incorporation of the company contain the following grant of power: "The general nature of the business to be transacted by the corporation is to do a general business of manufacturing and sale of lager beer, ale, porter, and malt, the erection of suitable buildings for the carrying on of said business, and to buy, sell, lease, rent, exchange, or otherwise handle real estate in the state of Nebraska, or elsewhere, and the execution of such deeds and leases, bonds, mortgages, notes, and trust deeds as may be proper in connection with such business." *Horst v. Lewis* (1904) 71 Neb. 365, 98 N. W. 1046.

Where a brewing company has power to guarantee the obligation of others for a valuable consideration moving to it, it is not ultra vires of the authority of the president and manager of the brewery to guarantee the purchase price of a business, in consideration of the purchaser's agreement to sell the brewing company's beer exclusively. *Hagerstown Brewing Co. v. Gates* (1912) 117 Md. 348, 83 Atl. 570.

It has been held, however, that a corporation organized to engage in the wholesale liquor and rectifying business has no power to guarantee the payment of a customer's notes, although the latter desires the loan for which the notes were given to increase its business. *Re Liquor Dealers' Supply Co.* (1910) 101 C. A. 367, 177 Fed. 197, where the court said: "Assuming that power may be implied 'to adopt and promote all reasonable expedients directly calculated to increase the number of patrons of the business,' this resolution of the corporation to guarantee payment of its present customer's loan neither states nor contemplates any such direct benefit to the guarantor. The pretense of benefit through increase of the customer's business is indirect, not within either authority cited; and

the utmost import of the resolution is to secure the good will of the customer, the usual inducement held out to guarantors, making it a case of 'naked guaranty' of the debt of another, not within the corporate powers."

The case of *McBroom v. Cheboygan Brewing & Malting Co.* (1910) 162 Mich. 323, 127 N. W. 361, was distinguished from *Timm v. Grand Rapids Brewing Co.* (1910) 160 Mich. 371, 27 L.R.A.(N.S.) 186, 125 N. W. 357, *supra*, so far as the point under consideration is concerned, upon the ground that the record in the *McBroom* Case failed to show any agreement on the part of the saloon keeper whose lease was guaranteed, to buy beer, exclusively or otherwise, from the defendant brewery company, or any agreement that would tend to benefit the defendant, or did benefit it, or any inducement held out to defendant, and upon the ground that the guaranty related to the rent of a dwelling house as well as a saloon. The main ground of the decision, however, was upon the ground, not within the scope of this annotation, that the guaranty was beyond the authority of the officer of the brewery company who signed the same.

And in *Lewer v. Cornelius* (1913) 72 Wash. 124, 129 Pac. 911, under a statute prohibiting a brewing company "to pay, advance or loan or become surety for the payment for any other person of the license fee required by any state law, city charter or ordinance," it was held that a note of a retail dealer payable to a bank, given to a brewing company for the purpose of soliciting a loan thereon to pay the retail dealer's license, would be void as against public policy, if, as alleged in the answer, the payee knew the purpose for which the loan was desired, and allowed its name to be used as payee of the notes, "with the view to, and for the purpose of, aiding and assisting said brewing company, and did so aid and assist said brewing company in evading and circumventing the law; that said promissory notes were taken by said bank as a cloak under which to hide the fact

that said brewing company had, contrary to law, paid the license fee of defendant;" and that the notes, when signed, were not delivered to the bank, but were delivered to the brewing company, who delivered them to the bank.

There are a number of cases in the books where corporations selling lumber have guaranteed a builder's contract for the sake or with the expectation of furnishing the lumber. The courts are not agreed as to whether such a guaranty is within the implied corporate powers.

In *Central Lumber Co. v. Kelter* (1903) 201 Ill. 503, 66 N. E. 543, it was held that a lumber company, for the sake of making the sale, has implied power to guarantee a builder's contract of a house for which it intends to supply the lumber.

In *Wheeler, O. & Co. v. Everett Land Co.* (1896) 14 Wash. 630, 45 Pac. 316, it was held that a lumber company may guarantee a bond to secure a building contract made by its customer, that being the custom of neighboring manufacturers of lumber, where its articles authorized it to carry on the manufacture and sale of lumber in its various forms, "and to purchase and sell timber and timberlands, and to do anything and all kinds of business allowed to corporations, as provided for under the laws of Washington territory." This case was decided both on the ground of implied power and of estoppel.

It has been held that a lumber company guaranteeing a builder's bond and the absence of mechanics' liens may not, after furnishing the lumber, file such a lien, and this decision was grounded both on the power to make the guaranty, and on estoppel. In *Interior Woodwork Co. v. Prasser* (1901) 108 Wis. 557, 84 N. W. 833. The same was held in *Wittmer Lumber Co. v. Rice* (1900) 23 Ind. App. 587, 55 N. E. 868, where, however, the court, while apparently considering that the contract was *intra vires*, may have grounded the decision rather more on estoppel.

In *Hoosier Brick Co. v. Floyd County Bank* (1917) 64 Ind. App. 445, 116 N. E. 87, it was held that conceding

the act of a brick company in guaranteeing that a builder will not permit any mechanic's lien to be filed is ultra vires, the brick company, having furnished the brick, cannot file a mechanic's lien therefor.

On the other hand, it was held in *Re S. P. Smith Lumber Co.* (1904) 132 Fed. 620, that a lumber company is not empowered to guarantee the performance of a contract to build a house, by reason of the fact that it expects to furnish the lumber for the house.

This case was approved in *W. C. Bowman Lumber Co. v. Pierson* (1911) — Tex. Civ. App. —, 139 S. W. 618, where the court laid stress upon the fact that the corporation had sold the material before signing the guaranty, which signing is considered a pure gratuity. This last case was certified to the supreme court, and its decision is now reported herewith (*W. C. Bowman Lumber Co. v. Pierson*, ante, 547), and it will be seen that it is held to be ultra vires for a corporation to pledge its credit for another's benefit, as a means simply of enabling him to purchase its goods.

It will be seen that it has been held in *Woods Lumber Co. v. Moore* (reported herewith) ante, 549, that a corporation engaged in the business of furnishing costumes, etc., to persons engaged in the operation of theaters or shows, and to persons manufacturing films for moving pictures, may guarantee the purchase of lumber needed in producing film by a company to which it was under contract to supply costumes.

In *Armour & Co. v. R. Rosenberg & Sons Co.* (1918) 36 Cal. App. 773, 173 Pac. 404, where a manufacturer of salad oil, in re-entering business after bankruptcy, made an arrangement with a creditor corporation, the defendant, that he would pay its claim if it would guarantee his purchases of certain materials, and also that he would buy bottles from it exclusively, it was held that the defendant had power to make the guaranties in question, as furthering its own interests. Followed in *Cudahy Packing Co. v. R. Rosenberg & Sons Co.* (1918) 36 Cal. App. 818, 173 Pac. 406.

So it was held that a corporation dealing in store fixtures had power to guarantee rent, where as a result of such guaranty it sold certain fixtures owned by it. *Weiss v. Fred Bender Store Fixture Co.* (1917) 207 Ill. App. 72.

And that a company owning an opera house had power to supply funds to its lessee to keep him going, although the transaction took the form of lending him its credit. *Thoma v. East End Opera House Co.* (1899) 30 Pittsb. L. J. N. S. (Pa.) 230.

In *Edwards v. International Pavement Co.* (1917) 227 Mass. 206, 116 N. E. 266, it was held that a Connecticut corporation engaged in the business of issuing licenses under certain patents and contracts which it owns for the use of asphalt for block pavements and tiles, and supplying to its licensees the asphalt required of them, may guarantee that its licensees, ordering asphalt of a company with which it had a long contract, will pay for the same.

On the other hand, in *Humboldt Min. Co. v. American Mfg. Min. & Mill. Co.* (1894) 10 C. C. A. 415, 22 U. S. App. 334, 62 Fed. 356, it was held that a corporation organized for the purpose of making ironwork for mining plants may not guarantee the performance of another's contract for the erection of a mining plant, with the accompanying warranties, on the ground that the guaranty will secure a sale of the ironwork to be used in the plant, where the warranties covered parts of the contract in the fulfilment of which the iron works would and could exercise no control, and in which it had no such direct and legitimate interest as to warrant its risking its capital therein. The court said: "If the warranties had only covered the character of the ironwork furnished by the guarantor company, a different question might be presented."

c. Cases not holding the guarantor.

For brewery and lumber cases not holding the guarantor liable, see *supra*, b.

For an ironwork case not holding the guarantor, see *supra*, b.

A corporation organized to manufacture and sell reed organs and other musical instruments may not guarantee the expenses of a musical festival on the ground that it may increase its business. *Davis v. Smith American Organ Co.* (1881) 131 Mass. 258.

So a railroad company may not guarantee the expenses of a musical festival on the ground that it may increase its business. *Davis v. Old Colony R. Co.* (1881) 131 Mass. 258, 41 Am. Rep. 221.

In *Johansen v. Cheplin* (1889) Mont-real L. Rep. 6 Q. B. (Quebec) 111, it was held that a bank was not authorized to guarantee the payment by a customer of the hire of a vessel under a charter party, although the customer was importing coal, and the bank was discounting his drafts against the bills of lading, and the bank thus enabled him to carry on the business.

"A railroad company has no power, unless expressly or by necessary implication authorized by its charter, to guarantee the performance of duties by another carrier;" consequently, it may not guarantee an ocean rate of freight on goods shipped over its line, where there is no contract for through transportation. *J. H. Hamlen & Sons Co. v. Illinois C. R. Co.* (1914) 212 Fed. 324 (not necessary to result).

See also IV. *infra*.

III. *Guaranties for the purpose of obtaining goods.*

There are a number of cases where it has been held that a corporation has implied power to guarantee payments for goods which it needs in its business.

In *Holmes, Booth, & Haydens v. Willard* (1890) 125 N. Y. 75, 11 L.R.A. 170, 25 N. E. 1083, the court said: "A corporation dealing in manufactured goods and needing them for sale may, as a proper incident to its business, extend financial aid to a manufacturer by advancing him money to enable him to furnish the goods."

In *Bacon v. Montauk Brewing Co.* (1909) 130 App. Div. 737, 115 N. Y. Supp. 617, it was held that one brewery company had power to issue pa-

per to take up the debt of another brewery company to a third person, for materials used in making beer sold and being sold to the first company by the second company. The defense of *ultra vires* was discussed, though not pleaded.

In *Whitehead v. American Lamp & Brass Co.* (1905) 70 N. J. Eq. 581, 62 Atl. 554, where the court does not pass on the question of power, it was held that a corporation, having guaranteed the purchases of a manufacturer in order to enable him to procure goods to be manufactured for its account, is estopped, after having had the benefit, from pleading want of power.

But it was held, *obiter*, in *National Bank v. Young* (1886) 41 N. J. Eq. 531, 7 Atl. 488, that a manufacturing corporation buying large quantities of material from an importing corporation has no power to exchange accommodation paper with it.

In *Carter Dewar Crowe Co. v. Columbia Bitulithic* (1914) 20 B. C. 37, 28 West. L. R. 758, 6 West. Week. Rep. 1215, 18 D. L. R. 520, it was held that a contracting company chiefly engaged in street paving may not issue or advance paper on behalf of a quarry company, simply because it owns shares therein, because it is a creditor and mortgagee of its effects, and because it expects, in the ordinary course of business, to obtain stone from it for use in its business.

It was held in *Thompson v. Whitney* (1905) 17 Haw. 107, that an allegation of an indorsement by a corporation of a buyer's note to give him credit with the seller, the goods being delivered to the indorser, alleges an accommodation indorsement, and does not show that the indorsement was made in or required by the exigencies of the indorser's business, and shows no cause of action against such indorser.

But it may be noted that in *Knapp v. Tidewater Coal Co.* (1912) 85 Conn. 147, 81 Atl. 1063, where B company bought coal of A company, and sold it to its customer, C company, and gave A company its note for the coal indorsed by C company, which informed A company in writing that its

indorsement was in consideration of its receipt of the coal, which it did receive, it was held that C company could not escape payment of the note to A company on the ground that the indorsement was ultra vires, as it had not shown that it was an accommodation party.

IV. Miscellaneous.

A trading company may not guarantee the debt to a bank of another corporation whose business it is not authorized to engage in, and whose sole connection with it is that it is a customer of the guarantor. *Union Bank v. A. McKillop & Sons* (1915) 51 Can. S. C. 518, 24 D. L. R. 787, where the facts as to the business between the two companies do not appear.

The three following cases, while not strictly within the scope of this annotation, may be here referred to:

In *Cunningham Hardware Co. v. Gama Transp. Co.* (1912) 4 Ala. App. 561, 58 So. 740, it was held that a lumber company owning practically the whole of the right of way of a

railroad of a transportation company, on which its logs are hauled, and owning or furnishing also the rails and rolling stock used by the transportation company, has power to indorse notes of such company for materials to be used on such railroad, where the transportation company does practically no other business than that of hauling logs for the lumber company.

In *Mercantile Trust Co. v. Kiser* (1893) 91 Ga. 636, 18 S. E. 358, it was held that a sawmill corporation has power to guarantee the interest on the bonds of a railway company issued for its construction, the railroad being constructed chiefly for the business of the sawmill corporation, and both corporations being substantially in the same control.

But in *A. R. Williams Machinery Co. v. Crawford Tug Co.* (1908) 16 Ont. L. Rep. 245, it was held that a towing company employing a tug in its business may not guarantee the contract of the owner of the tug for a new boiler.
B. B. B.

BESSIE COLE

v.

CITY OF DURHAM

and

SAMUEL STRAUSS et al., Trading as Strauss-Rosenberg Company, et al.,
Appts.

North Carolina Supreme Court—October 30, 1918.

(176 N. C. 289, 97 S. E. 33.)

Joint debtors — opening of doors in sidewalk — joint liability.

1. The one in possession of a door forming part of a sidewalk through which coal is delivered to the building, and the coal merchant attempting to make a delivery, are jointly and severally liable for injury to a pedestrian injured by the sudden opening of the doors by a servant of the former, without warning by a servant of the latter, who was on guard to give the warning.

[See note on this question beginning on page 571.]

Evidence — motion for nonsuit — assumption of truth.

2. Upon motion for nonsuit, all of plaintiff's evidence will be assumed to be true.

[See 9 R. C. L. 26; 26 R. C. L. 1063, 1076.]

Highway — raising doors in sidewalk — negligence.

3. It is negligence for one in a coal room under a sidewalk to raise the doors forming a portion of the sidewalk without signal or notice from anyone, after signifying readiness to

open them, that such act will not interfere with persons on the walk.

— necessity of notice to pedestrians.

4. One about to open doors forming part of a sidewalk must give notice of his intention to persons using the walk, so as to prevent injuries to them.

Trial — question for jury — negligence of pedestrian.

5. The jury must determine the question of the negligence of a pedestrian on the sidewalk, who, in passing another pedestrian, steps on doors forming part of the sidewalk at a time when a load of coal stands in front of

them, and the presence of the delivery-man indicates that the coal is to be put into the cellar through them.

Master and servant — independent contractor — delivery of coal.

6. The delivery of coal through a door in a sidewalk is of a hazardous character so far as it affects pedestrians on the walk, within the rule that one undertaking a hazardous enterprise cannot escape liability for injury by employing an independent contractor to make the delivery.

[See 13 R. C. L. 439, 440.]

(Brown, J., dissents in part.)

APPEAL by defendants Strauss et al., from a judgment of the Superior Court for Durham County (Bond, J.), in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. *Affirmed.*

Statement by Walker, J.:

This action is brought by the plaintiff against the city of Durham, Strauss-Rosenberg Company, and the Carolina Light & Power Company, to recover damages for injuries sustained by falling into a coal hole about 4 by 6 feet in the sidewalk on Main, the principal business street of the city of Durham. On July 30th the plaintiff was going from her home, about 8 o'clock in the morning, to C. W. Kendall's store, where she worked as a milliner. The evidence discloses that, when plaintiff reached the point in front of Strauss-Rosenberg Company's store, someone passed her on the north, and that she stepped a little to the south, upon the steel doors that covered the coalhole and constituted a part of the sidewalk, and when she did so the door was pushed up from underneath and she was thrown to the ground and injured; that at the time she approached the coalhole a member of the firm of Strauss-Rosenberg Company was standing in the front door of the store, and a colored man in workman's garb was standing east of the coalhole doors; that the defendants Strauss-Rosenberg Company had purchased from the defendant power company 5 tons of

coke, to be delivered in the basement of said Strauss-Rosenberg's store about July 30th, the date of the injury; that the Power Company had employed Allen Jeffries to make the delivery of the coke, and that the colored man standing near the coalhole was the son of Allen Jeffries, who had been sent with a load of coke; the son (George Jeffries) told one of the firm of Strauss-Rosenberg Company that he had a load of coke to unload, and a young fifteen-year-old boy was sent to the basement to unfasten and open the coalhole doors, and this fact was known by defendant Rosenberg, and the colored man, George Jeffries, who was sent to deliver the coke, and who was standing just east of the doors when the injury happened. It was not contended by plaintiff that the coalhole doors were dangerous when closed.

Plaintiff testified, in part, as follows: "I had to step on the door to pass the person I was meeting. I turned to get out of the way of someone and stepped on this coalhole door. I kept my left foot on the sidewalk until I raised it up and it went under the edge of the door (demonstrating to jury). I could not tell you whether I was in the middle of the sidewalk, coming down

the street, until I got to the doors, or not. I was walking so that I had to step on that door. If I had kept straight on and had not turned, I would have passed by the door, I suppose, without stepping on it. Someone passed me, though. I stepped my right foot on the door and it bumped me up so I had to fall. The first time I stepped on the door to my knowledge I put my right foot on the door and it bumped me up, and I tried to catch hold with my left foot, and it caught under the door and threw me. . . . Before I fell, I saw the coke wagon standing there, and that is why I looked around. That was before I reached the door. I knew they were to put the coke in that hole, of course. The doors were down when I stepped on them. No one was standing there to open it. The man didn't tell me to stay off. The man was standing where I said he was when I first saw him. I don't know that I saw him when I stepped on the door. If they had been opening the door I would not have stepped on it. I saw a man standing there; he was standing on the sidewalk at the southeast corner of the door. The door opened back towards him. . . . When Mr. Strauss came to see me after the injury, he told me he had sent his boy to unlatch the door, and the boy said he pushed the door up. I have stated as a matter of fact that the doors were flat down when I first stepped on them. They bumped up under my feet. The wagon was backed up to the curbing, and the driver was standing on the sidewalk to the east of the doors. He was not standing on the doors, but was standing on the sidewalk to the east of the doors. A few seconds before I stepped on the door I saw him standing up straight. If he had leaned forward to catch hold of the door I certainly could have seen him. I could have seen the motion of him if I had been looking down on the ground. It would have taken a mighty long man to have reached over there to catch on this door from where I saw him standing at that time and raise that catch.

He could not have done it without my seeing him. The man or lady whom I spoke of as coming from the east, as I was coming from the west, caused me to step on the side to let them pass."

The jury returned as their verdict upon the four issues submitted by the court that the defendants, except the city of Durham, were guilty of negligence as alleged in the complaint; that plaintiff was not guilty of contributory negligence; and then assessed her damages at \$5,000.

There was in force at the time of this occurrence an ordinance of the city of Durham as follows: "Every owner or occupant of a house on a street which has a cellar door or vault in a public footway shall keep the same in good repair, and shall keep the door closed at all times, or a guard stationed there to warn the public."

A penalty was attached for disobedience of it.

The court entered judgment of nonsuit as to the city of Durham, and judgment upon the verdict as to the other defendants, and the latter separately appealed.

Messrs. J. S. Manning and R. O. Everett, for appellant Strauss-Rosenberg Company:

Plaintiff, with her knowledge, her information, and the appearances indicating the distinct purpose to use the hole, was bound to act upon this knowledge, this information, and these appearances, and use ordinary care and prudence in shielding and protecting herself.

Austin v. Charlotte, 146 N. C. 336, 59 S. E. 701; Walker v. Reidsville, 96 N. C. 382, 2 S. E. 74; Owens v. Charlotte, 159 N. C. 332, 74 S. E. 748; Parker v. Wilmington & W. R. Co. 86 N. C. 221; Chicago, R. I. & P. R. Co. v. Houston, 95 U. S. 697, 24 L. ed. 542, 7 Am. Neg. Cas. 345; Dill. Mun. Corp. § 789; Beach, Contrib. Neg. 40; Bruker v. Covington, 69 Ind. 33, 35 Am. Rep. 202; Neal v. Marion, 126 N. C. 412, 35 S. E. 812.

If plaintiff was injured by the negligent act of the contractor—the Power Company—in unloading the coke, this defendant would not be liable for the resulting damages.

Benjamin v. Metropolitan Street R. Co. 133 Mo. 274, 34 S. W. 590.

Persons using the streets should take notice of such structures as are necessary for purposes of convenience.

Russell v. Monroe, 116 N. C. 727, 47 Am. St. Rep. 823, 21 S. E. 550; **Buesching v. St. Louis Gaslight Co.** 6 Mo. App. 85; **Edwards v. Raleigh**, 150 N. C. 276, 63 S. E. 1040.

Plaintiff was negligent, and her negligent act was the cause of her injury.

Quimby v. Filter, 62 N. J. L. 766, 42 Atl. 1051; **Edwards v. Raleigh**, supra; **Picquett v. Wellington-Wild Coal Co.** 200 Mass. 470, 86 N. E. 899; **Cohoon v. Davis**, 175 N. C. 145, 95 S. E. 36; **Hinson v. Postal Teleg. Cable Co.** 132 N. C. 460, 43 S. E. 945.

If both defendants are, in law and under the findings of facts by the jury, liable to the plaintiff as tort-feasors, as between the defendants, the Carolina Light & Power Company is primarily liable.

Brown v. Louisburg, 126 N. C. 701, 78 Am. St. Rep. 677, 36 S. E. 166; **Scott v. Curtis**, 195 N. Y. 424, 40 L.R.A. (N.S.) 1147, 133 Am. St. Rep. 811, 88 N. E. 794; **Churchill v. Holt**, 127 Mass. 165, 34 Am. Rep. 355; **Waters v. Pioneer Fuel Co.** 52 Minn. 474, 38 Am. St. Rep. 564, 55 N. W. 52; **Evans v. Dare Lumber Co.** 174 N. C. 31, 93 S. E. 430.

Before plaintiff can contend that violation of the ordinance requiring a guard at the coalhole when the door is about to be opened is negligence per se on the part of this defendant, she must go further, and show that such violation was the proximate cause of the injury.

Rich v. Asheville Electric Co. 152 N. C. 689, 30 L.R.A. (N.S.) 428, 68 S. E. 232; **Leathers v. Blackwell Durham Tobacco Co.** 144 N. C. 330, 9 L.R.A. (N.S.) 349, 57 S. E. 11; **Cheek v. Oak Grove Lumber Co.** 134 N. C. 225, 46 S. E. 488, 47 S. E. 400.

The degree of care required from persons on the street is, in general, such as a person with common and reasonable prudence ordinarily exercises under like circumstances.

Elliott, Roads & Streets, § 817.

What is contributory negligence upon a given state of facts, and whether there is any evidence, are questions of law for the court.

Mitchell v. Raleigh Electric Co. 129 N. C. 171, 55 L.R.A. 398, 85 Am. St. Rep. 735, 39 S. E. 801; **Cohoon v. Davis**,

175 N. C. 145, 95 S. E. 36; **Hinson v. Postal Teleg. Cable Co.** 132 N. C. 466, 43 S. E. 945; **Cooley, Torts**, p. 1432.

If one contracts to do a certain thing, he cannot excuse his failure by saying that he employed another to do it.

14 R. C. L. 99, ¶ 35; **Atlanta & F. R. Co. v. Kimberly**, 87 Ga. 161, 27 Am. St. Rep. 231, 13 S. E. 277; **John H. Radel Co. v. Borches**, 147 Ky. 506, 39 L.R.A. (N.S.) 227, 145 S. W. 155; **Stone v. Cheshire R. Corp.** 51 Am. Dec. 205, note; **Anderson v. Fleming**, 66 L.R.A. 148, and note, 160 Ind. 597, 67 N. E. 443; **St. Paul Water Co. v. Ware**, 16 Wall. 566, 21 L. ed. 485; **Mulchey v. Methodist Religious Soc.** 125 Mass. 487; **Schutte v. United Electric Co.** 68 N. J. L. 435, 53 Atl. 204, 12 Am. Neg. Rep. 522; **Leeds v. Richmond**, 102 Ind. 372, 1 N. E. 711; **Bast v. Leonard**, 15 Minn. 304, Gil. 235; **Hinde v. Wabash Nav. Co.** 15 Ill. 72; **Houston & G. N. R. Co. v. Meador**, 50 Tex. 77; **Eyler v. Allegany County**, 49 Md. 257, 33 Am. Rep. 249; **Smith v. Milwaukee Builders' & T. Exch.** 91 Wis. 360, 30 L.R.A. 504, 51 Am. St. Rep. 912, 64 N. W. 1041; **Mitchell v. Raleigh Electric Co.** 129 N. C. 170, 55 L.R.A. 398, 85 Am. St. Rep. 735, 39 S. E. 801; **Carrick v. Southern Power Co.** 157 N. C. 378, 72 S. E. 1065; **Covington & C. Bridge Co. v. Steinbrock**, 61 Ohio St. 215, 76 Am. St. Rep. 375, 55 N. E. 618, 7 Am. Neg. Rep. 154; **Spence v. Schultz**, 103 Cal. 208, 37 Pac. 220; **Curtis v. Kiley**, 153 Mass. 123, 26 N. E. 421; **Jefferson v. Chapman**, 127 Ill. 438, 11 Am. St. Rep. 136, 20 N. E. 33.

Mr. William G. Bramham, for appellant Power Company:

At the close of all the evidence, defendant Power Company, having renewed its motion for judgment of nonsuit, was entitled to have it sustained.

Embler v. Gloucester Lumber Co. 167 N. C. 457, 83 S. E. 740; **Anderson v. Tug River Coal & Coke Co.** 59 W. Va. 301, 53 S. E. 713; **Burns v. Michigan Paint Co.** 152 Mich. 613, 16 L.R.A. (N.S.) 816, 116 N. W. 182.

Delivering coal or coke through a coalhole in the sidewalk does not come within the term "intrinsically dangerous."

Vogh v. F. C. Geer Co. 171 N. C. 672, 88 S. E. 874; **Scales v. Lewellyn**, 172 N. C. 494, — A.L.R. —, 90 S. E. 521; **Laffery v. United States Gypsum Co.** 83 Kan. 349, 45 L.R.A. (N.S.) 930, 111 Pac. 498, Ann. Cas. 1912A, 590.

George Jeffries, the driver of the wagon making delivery of the coke, was the servant of an independent contractor.

Singer v. McDermott, 30 Misc. 738, 62 N. Y. Supp. 1086; *Philadelphia & R. Coal & I. Co. v. Barrie*, 102 C. C. A. 618, 179 Fed. 50; *Foster v. Wadsworth-Howland Co.* 168 Ill. 514, 48 N. E. 163; *Connolly v. People's Gaslight & Coke Co.* 260 Ill. 162, 102 N. E. 1057; *Chicago Hydraulic Press Brick Co. v. Campbell*, 116 Ill. App. 322; *Standard Oil Co. v. Anderson*, 212 U. S. 215, 58 L. ed. 480, 29 Sup. Ct. Rep. 254; *De Forrest v. Wright*, 2 Mich. 368; *Higham v. T. W. Waterman Co.* 32 R. I. 578, 80 Atl. 178; *Zeitlow v. Smock*, 65 Ind. App. 643, 117 N. E. 665; *Peach v. Bruno*, 224 Mass. 447, 113 N. E. 279; *Re Clancy*, 228 Mass. 316, 117 N. E. 347; *Embler v. Gloucester Lumber Co.* 167 N. C. 457, 83 S. E. 740; *Evans v. Dare Lumber Co.* 174 N. C. 35, 93 S. E. 430; *Patrick v. Giant Lumber Co.* 164 N. C. 208, 80 S. E. 153.

Messrs. Brawley & Gantt and Scarlett & Scarlett, for appellee:

Both defendants Strauss and the Power Company were liable to plaintiff.

Russell v. Monroe, 116 N. C. 727, 47 Am. St. Rep. 823, 21 S. E. 550; *Embler v. Gloucester Lumber Co.* 167 N. C. 457, 83 S. E. 740; *Evans v. Dare Lumber Co.* 174 N. C. 31, 93 S. E. 430; *John H. Radel Co. v. Borches*, 147 Ky. 506, 39 L.R.A.(N.S.) 227, 145 S. W. 155; *French v. Boston Coal Co.* 195 Mass. 334, 11 L.R.A.(N.S.) 993, 122 Am. St. Rep. 257, 81 N. E. 265; *Waters v. Pioneer Fuel Co.* 52 Minn. 474, 38 Am. St. Rep. 564, 55 N. W. 52.

Walker, J., delivered the opinion of the court:

The record in this case is quite voluminous, and the briefs, lengthy but very ably prepared, have been of great assistance to us in eliminating from the great mass of testimony and argument the real questions at issue, which are few, and, as we think, free from any difficulty.

We may say in the beginning that there is no complaint from anyone of the coal cellar and its doors either as to construction or the material used. The owner in this respect had fully complied with the law and his duty in the premises, in making the opening in the sidewalk both safe

for the public and practically convenient for those using it as a receptacle for the storage of coal, which is the purpose for which it was designed.

The simple facts are that the plaintiff was in the rightful use of the sidewalk in this populous and thriving city, coming from her home to her place of business about 8 o'clock in the morning. As she approached the doors of the cellar in the sidewalk, near its middle, over which pedestrians constantly passed and repassed, she met someone walking on the same side that she was, and this caused her to step a little to the south side, with her right foot on the door of the cellar, and as she did so it bounced up and threw her into the street in a sitting posture. She stated that the door was pushed up suddenly and unexpectedly, as it was "flat down" when she stepped upon it. No one gave any signal or warning of danger, or that the door was then being used and would be raised by a man in the cellar or any other person just at that time, and there is evidence to show that she felt justified in supposing that she could pass over the doors safely. As there was a motion for nonsuit, we must assume all evidence in her favor to be true, and we

Evidence—
motion for
nonsuit—
assumption of
truth.

need, therefore, refer to so much only as tends to prove an actionable wrong to her. George Jeffries, who was driver of the truck filled with coke, was near the cellar doors, but was not raising them, or if he did assist in opening the doors by raising them from the outside, while Raymond Shives, servant of defendants Strauss-Rosenberg Company, who was in the cellar, was pushing them from below, he gave plaintiff no warning of the impending danger, and by his inaction led her to believe that no harm would come to her if she proceeded on her way. There is evidence that one of the defendants, Charles Rosenberg, had been told by George Jeffries, the driver, in the store, that he had coke in the truck

at the front, to be placed in the cellar, and that he could not raise the doors; and Rosenberg, who was in the gallery of the store, then "called down" to Raymond Shives, and ordered him to the basement to unlock the door, which order he obeyed, and in doing so he unlocked the door, and, receiving from the man on the sidewalk no answer to his signal that the door was unlocked, he raised the doors himself. This was manifestly negligence on his part, and for it his employers are re-

Highway—
raising doors in
sidewalk—
negligence.

sponsible. The mere fact that he got no answer from the

man supposed to be in position on the sidewalk to raise the doors was some notice to him that the latter was not on guard, and that it would be dangerous to raise the door, and it proved to be so in this case. He could not know the situation above him with the doors between him and the surface of the sidewalk, and it was not only negligence, but recklessness, to have acted as he did under the circumstances, as it was the contention of the defendant Strauss-Rosenberg Company, and there was proof to support it, that the doors were to be raised by someone on the sidewalk, and not from the basement. Raymond Shives was seen in the cellar when the cellar door was ajar. It is true that one, or perhaps two, of the witnesses testified that George Jeffries did raise the door; but this, if true, is not necessarily inconsistent with the fact that Raymond Shives pushed it up from the cellar, for one may have pushed while the other pulled, as it is apparent that in this operation they were expected to act in concert, one to unlatch the door and the other to raise it. George Jeffries may have been a little slow in his movements. If he had been at his proper place and in the performance of his duty of raising the door at the right time, he would, by his very act, have warned those approaching the doors on the sidewalk of the danger. We have no doubt of the negligence of Raymond Shives. His

act was per se dangerous, and almost sure to cause injury to pedestrians on the main street in that populous city, at an hour, too, when the street was much used by those going from their homes to their daily tasks. As to George Jeffries, if he was there, as the evidence shows he was, to lift the doors and set them perpendicular to the sidewalk, by the use of the horizontal iron rod, he should have given notice to those using the sidewalk of his purpose. —necessity of notice to pedestrians.

The ordinance required that the man in his position should stand on guard, and inform the public when the doors were about to be used; so that they might be avoided. Its language is that the door shall be kept closed at all times, or a guard stationed there to warn the public. This notice must be given before the doors are opened, or in time for the public to keep away from them. If that had been done in this instance, the lady would not have received her injuries; for she says that she stepped on the door when it was closed, and, of course, if it had been kept in that condition, she would not have been harmed; or, if she had been properly warned, the same result would have followed. Before leaving this part of the case, we may say that if Mr. Rosenberg thought that, because George Jeffries was there, it was a sufficient compliance with the ordinance, and he relied on Jeffries to give the necessary warning to the public, it is the misfortune of his firm that Jeffries did not do so, and not the fault of the plaintiff, and they must take the consequences of his neglect.

The defendants, though, contend that the plaintiff saw Jeffries on the sidewalk, near the doors, knew that he was driving the truck, as he had on "business garb," and also knew that the coke would be put in the cellar, and that, knowing all of this, it was her clear legal duty to be forewarned and not step on the door, and that, as a matter of law, she was guilty of contributory negligence which proximately caused her ter-

rible injuries. But, even if this be so, it leaves out of consideration other important facts and circumstances, which she is entitled to have weighed by the jury in passing upon her negligence, which makes it a question for the jury, to be tested and determined under the rule of the prudent man. She testified that the doors were "flat down" when she stepped upon one of them, and it was raised after she got upon it, and that Jeffries did not stoop or attempt to open the doors, nor was he near enough to do so. Her language is: "The man was standing straight and beyond the door. . . . It was not but a little while after I saw him until I fell. He didn't stoop. I didn't watch him all the time, but I saw him standing there. I did not stumble on the door; it was raised under my feet. The door was pushed up and me standing on it. My right foot was on the door and the door pushed up. I could not tell where my left foot was."

In this view of the evidence, and it could be presented much more strongly for the plaintiff should more of it be added, it was proper to submit the question of contributory negligence to the jury, if there was any evidence of it at all. Her freedom from negligence more clearly appears when we consider that she saw one of the defendant firm—Mr. Rosenberg—in the door of the store as she passed, and neither he nor George Jeffries warned her not to step on the cellar door, though they both knew that Raymond Shives had gone down to open the door. They must have deemed it safe for the public to use the door as a part of the sidewalk, or surely they would have been on the alert and given proper notice of the danger. Rosenberg denied that he was in the door, and Strauss was not there, so he testified, but this apparent conflict in the testimony was a matter for the jury to consider. The city, by its ordinance, had provided for a warning and a safeguarding of the public, by having a man stationed there for the special pur-

pose of giving it; but this was not done, or, if George Jeffries was there for the purpose, or relied on by Rosenberg to perform this service, he utterly failed to do so, and he might as well have not been there as to thus fail in the duty assigned to him. *Holland v. Seaboard Air Line R. Co.* 143 N. C. 435, 438, 55 S. E. 835, id. 137 N. C. 373, 374, 49 S. E. 359. We said there that where one is required to watch and guard at a dangerous place to prevent injury to others, which resulted by reason of his omission to do so, it is negligence to fail in this duty, and the injury is referred by the law to the neglect to watch and forewarn as its proximate cause. 143 N. C., at page 438.

Our conclusion is that there was evidence of the joint negligence of the two defendants, the Power Company and Strauss-Rosenberg Company, and that it was properly and correctly submitted to the jury. The conduct of the plaintiff would not have warranted an instruction that, upon the admitted facts in regard to it, she was guilty of negligence which made her in law the sole author of her own injury. The case was without doubt one where the jury was required to pass upon the evidence and find the ultimate fact of negligence under the instructions of the court. We have so far considered only the evidence in the case, as we think that whether the defendants were jointly negligent is largely a question of fact. It may be proper, perhaps, to refer generally to the principles of law which are involved, although they are well settled.

The case of *French v. Boston Coal Co.* 195 Mass. 334, 11 L.R.A.(N.S.) 993, 122 Am. St. Rep. 257, 81 N. E. 265, is much like this one in its facts and principles, and the court there said: "It was the duty of the defendant Converse [owner of the premises], and his servants and agents, to see that the coalhole, when used for the purpose of putting in coal for heating purposes, was properly guarded and protected,

Trial—question
for jury—
negligence of
pedestrian.

so that persons passing along the sidewalk, and in the exercise of due care, would not be liable to fall into it. They were not relieved of this duty by the fact that the coal company was also using it for the purpose of putting in the coal which had been ordered of them. *Poor v. Sears*, 154 Mass. 539, 26 Am. St. Rep. 272, 28 N. E. 1046; *Blessington v. Boston*, 153 Mass. 409, 26 N. E. 1113. Similarly, the coal company owed a like duty to those passing along the sidewalk, and was not relieved of it by the obligation which rested upon the defendant Converse and his servants and agents. There was evidence warranting a finding that the servants of each defendant were negligent in the performance of this duty. The jury could have found that the servants of the defendant Converse knew, or ought to have known, that coal was being put in, and that the cover was laid back and the hole was open, but that they took no precautions to warn or protect travelers from falling into it. They also could have found that, notwithstanding their testimony to the contrary, the men who were putting in the coal for the coal company took no precautions to guard against such an accident as happened to the plaintiff. The question of the plaintiff's due care was rightly left to the jury. It could not be ruled, as matter of law, that he was not in the exercise of due care."

It can make no material difference in the result whether Miss Cole fell in the hole, which was opened by raising its covering, or was lifted on one of the door lids and catapulted into the street, except in the degree of injury to her. As it was, she was severely and most painfully hurt, having sustained a serious fracture of both wrists, and a permanent injury, according to the medical testimony. The danger of this place consisted in its being on the sidewalk of the principal street of this city, where its inhabitants passed every minute of the day, and there was a constant and continuing menace to their safety, unless it was properly

guarded, and sufficient warning given when it is about to be used, and whether it would constitute a pitfall or a stumbling block is beside the question. The defendants are jointly and severally responsible, because they together caused the injury, and, as between them and the plaintiff, the law

Joint debtors—
opening of doors
in sidewalk
—Joint liability.

will not apportion the liability. *Gregg v. Wilmington*, 155 N. C. 18, 70 S. E. 1070. In *Chicago v. Robbins*, 2 Black. 418, 17 L. ed. 298; *Robbins v. Chicago*, 4 Wall. 657, 18 L. ed. 427, and *Homan v. Stanley*, 66 Pa. 464, 5 Am. Rep. 389, it was held that the owner of the abutting property could not escape liability to the injured party by showing that the work was being done by an independent contractor, who negligently left the opening in the sidewalk unguarded. See also *French v. Boston Coal Co.* 11 L.R.A.(N.S.) 994, and note (195 Mass. 334, 122 Am. St. Rep. 257, 81 N. E. 265, *supra*). In *Chicago v. Robbins*, *supra*, it was held to be essential that, in regard to an area in the street or sidewalk, every possible precaution should be used against danger, and that the owner of the lot cannot escape liability by letting work to another or independent contractor, who is negligent in doing the work which proves to be harmful to those rightfully using the street. The following propositions were substantially stated and decided in *Robbins v. Chicago*, *supra*, as appears from the syllabus of the case, to be found in the report of it at page 427 in 18 L. ed.: "The principal, for whom the work was done, cannot defeat the just claim of the corporation or of the injured party by proving that the work which constituted the obstruction or defect was done by an independent contractor. Where the obstruction or defect caused or created in the street is purely collateral to the work contracted to be done, and is entirely the result of the wrongful acts of the contractor or his workmen, the employer is not liable. Where the obstruction or de-

fect which occasioned the injury results directly from the acts which the contractor agrees and is authorized to do, the person who employs the contractor and authorizes him to do those acts is equally liable to the injured party."

In this case the defendants were doing this work together, through their respective servants or employees, and they both did it negligently, whereby this plaintiff was injured, not being in fault herself, as the jury have determined. The defendants who contracted for the purchase and delivery of the coke in the coal vault are undoubtedly, legally and morally, liable for such negligence, unless they can shift the responsibility clearly upon someone else, and this principle is necessary for the safety of the public, especially in populous places. As we will demonstrate hereafter by the authorities, they have failed to do this, and therefore are liable. *Hart v. McKenna*, 106 App. Div. 219, 94 N. Y. Supp. 216. The other defendant, who was to deliver the coke in the coal vault by lifting the door which covered it, failed in its duty to the public by not giving proper warning against an impending danger of which its servant had knowledge and the public none. When plaintiff approached the door it was at rest, and she was lifted, as she stepped upon it, by its being pushed up from below, and without any previous notice to her that this would be done, or that the door would be moved at that time in any way. The mere fact that the driver was standing near by with his truck, even if some notice of the fact, has been held by the jury not to have been a sufficient warning.

There is another contention, which is, that the power company is not liable because it employed Allen Jeffries to haul the coke to the store on the truck, and unload it into the basement, and, in this connection, the power company pleaded that Jeffries was an independent contractor, and his negligence, or that of his driver, George Jeffries, was not imputable to it. Conceding, for

the sake of argument, that, but for the nature of the work to be done, he would be an independent contractor, and liable solely for his own negligence, we are of the opinion that the work was of a hazardous character, or inherently dangerous, as it is said, and that such a

Master and
servant—
independent
contractor—
delivery of coal.

plea cannot avail the power company. Accepting as correct the definition of intrinsically dangerous work, as stated in the cases cited by this defendant's counsel (*Vogh v. F. C. Geer Co.* 171 N. C. 672, 676, 88 S. E. 874; *Scales v. Lewellyn*, 172 N. C. 494, 497, — A.L.R. —, 90 S. E. 521; *Laffery v. United States Gypsum Co.* 83 Kan. 349, 45 L.R.A. (N.S.) 930, 111 Pac. 498, Ann. Cas. 1912A, 590), we yet hold that the work to be performed in this instance was of an inherently dangerous character. It was to be done on the sidewalk of a populous city, at a place where people were constantly passing to and fro, and required the raising of the doors of a cellar, practically in the middle of the sidewalk, thereby leaving a hole therein, with obstructing doors, above a deep basement. Both parties to the contract of hauling knew the situation and what was to be done. It is not like the case where baggage merely was hauled from one place to another, to be deposited there (*Singer v. McDermott*, 30 Misc. 738, 62 N. Y. Supp. 1086), which is safe in itself, and only becomes dangerous by any negligence of the driver or those in charge of the wagon. Here the work was so dangerous that the city had passed an ordinance to safeguard the public, and to minimize the danger, and to prevent it, if possible. It is a case where the work itself is dangerous, and care must be taken to render it harmless to the public to the extent that this can be done. It is the opposite of the other case we have put. Everybody will say it is dangerous to open a hole in the middle of a street or sidewalk, by raising a door where people may stumble or fall in, even when exercis-

ing care themselves, and which requires that proper caution be taken to prevent its natural tendency to do harm from actually resulting in injury to others.

In *Davis v. Summerfield*, 133 N. C. 325, 328, 329, 63 L.R.A. 492, 45 S. E. 655, quoting from *Bower v. Peate*, L. R. (1876) 1 Q. B. Div. 321, the court says: "The answer to the defendant's contention may, however, as it appears to us, be placed on a broader ground; namely, that a man who orders a work to be executed from which, in the natural course of things, injurious consequences to his neighbor might be expected to arise, unless means are adopted by which such consequences might be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing someone else—whether it be the contractor employed to do the work from which the danger arises, or some independent person—to do what is necessary to prevent the act he has ordered to be done from becoming wrongful. There is an obvious difference between committing work to a contractor to be executed, from which, if properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless preventive measures are adopted."

It was held in *Southern Ohio R. Co. v. Morey*, 47 Ohio St. 207, 7 L.R.A. 701, 24 N. E. 269, that "one who causes work to be done is not liable, ordinarily, for injuries that result from carelessness in its performance by the employees of an independent contractor to whom he has let the work, without reserving to himself any control over the execution of it. But this principle has no application where a resulting injury, instead of being collateral, and flowing from the negligent act of the employee alone, is one that might have been anticipated as a direct or probable consequence of the performance of the work contracted for, if reasonable care is omitted in the

course of its performance. In such case the person causing the work to be done will be liable, though the negligence is that of an employee of an independent contractor."

The court said in *City & Suburban R. Co. v. Moores*, 80 Md. 352, 45 Am. St. Rep. 345, 30 Atl. 644: "Even if the relation of principal and agent or master and servant does not, strictly speaking, exist, yet the person for whom the work is done may still be liable if the injury is such as might have been anticipated by him as a probable consequence of the work let out to the contractor, or if it be of such character as must result in creating a nuisance, or if he owes a duty to third persons or the public in the execution of the work."

See also *Waters v. Pioneer Fuel Co.* 52 Minn. 474, 38 Am. St. Rep. 564, 55 N. W. 52; *John H. Radel Co. v. Borches*, 147 Ky. 506, 39 L.R.A. (N.S.) 227, 145 S. W. 155. Cases recently decided by this court are to the same effect as *Summerfield's Case* and the others above cited.

In *Carrick v. Southern Power Co.* 157 N. C. 378, 381, 72 S. E. 1066, it is said, quoting from *Covington & C. Bridge Co. v. Steinbrock*, 61 Ohio St. 215, 76 Am. St. Rep. 375, 55 N. E. 618, 7 Am. Neg. Rep. 154: "The weight of reason and authority is to the effect that, where a party is under a duty to the public or third person to see that work that he is about to do or have done is carefully performed so as to avoid injury to others, he cannot, by letting it to a contractor, avoid his liability in case it is negligently done, to another's injury."

And addressing itself to the proposition in a way more clearly related to the facts of our case, it was further said: "The governing authorities of a town may not absolve themselves of the duty of proper care and supervision as to the condition of its streets and sidewalks, and when they authorize work to be done on them which is essentially dangerous, or which will create a nuisance unless special care and precaution are taken, they are chargeable with

a breach of duty in this respect [if care is not taken], whether the work is being done by a licensee or by an independent contractor. . . . The same principle holds as to the obligations of licensees and independent contractor doing work of the kind suggested; that is, when the work that is being done for their benefit or by their procurement is of a kind to create a nuisance unless special care is taken, they are charged with the duty of properly safeguarding it, and may not relieve themselves by delegating the duty to others,"—citing numerous cases, and, among them, *Bailey v. Winston*, 157 N. C. 252, 72 S. E. 966, where the matter is fully discussed.

An independent contractor is defined to be one "who undertakes to do specific pieces of work for other persons, without submitting himself to their control in the details of the work, or one who renders the service in the course of an independent employment, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished." 1 *Shearm. & Redf. Neg.* §§ 164, 165. So it is said that an independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods, and without being subject to the control of his employer, except as to the result of the work. *Powell v. Virginia Constr. Co.* 88 Tenn. 692, 17 Am. St. Rep. 925, 13 S. W. 691; *Waters v. Pioneer Fuel Co.* *supra*.

See also *Denny v. Burlington*, 155 N. C. 33, 70 S. E. 1085, 3 N. C. C. A. 922; *Hopper v. Ordway*, 157 N. C. 125, 72 S. E. 839; and *Johnson v. Carolina, C. & O. R. Co.* 157 N. C. 382, 72 S. E. 1057, and the cases cited therein.

If the defendant Power Company has, by the proof, brought itself

within the definition given as to the liability of an employer who is operating through an independent contractor, the rule does not apply to the relation existing between it and Allen Jeffries at the time the injury was received by the plaintiff, according to the principles stated in the authorities we have cited. If the work to be done is dangerous only by reason of the absence of proper care in doing it, the doctrine as to an independent contractor may apply; but if it is dangerous in itself, and will continue to be so, and probably cause injury, unless reasonable care is taken to render it harmless to others who are themselves in the exercise of due care, it does not apply.

The cases cited by the Power Company in its brief may be distinguished from this one, and, if any one of them really conflicts with the cases upon which we have relied, they are, in our opinion, opposed to the great weight of authority. Our decisions clearly support the view we have taken. We have not discussed the question whether Allen Jeffries was an independent contractor, if the doctrine applied to a case of this kind.

Our conclusion as to this defense renders it useless to discuss the question as to the insolvency of Allen Jeffries, or the other exceptions of this defendant or those of its codefendant, as the points we have considered are the dominant ones in the case. If there was error regarding other matters, it was harmless; but we do not mean even to intimate that there was any such error.

In all essential respects the case was correctly tried.

No error.

Brown, J., dissents as to Carolina Power & Light Company.

ANNOTATION.

Liability for injuries resulting from failure of independent contractor to guard opening in sidewalk while delivering merchandise, etc.**Liability of owner or occupant of premises.**

The general rule is to the effect that a person who occupies premises, and maintains or controls, for his own convenience, an opening in the adjacent sidewalk, through which he contracts for the delivery of goods, is liable for injuries received by a pedestrian as a result of the negligence of the deliveryman in not properly guarding or in failing to properly close the aperture.

Massachusetts.—*French v. Boston Coal Co.* (1907) 195 Mass. 334, 11 L.R.A. (N.S.) 993, 122 Am. St. Rep. 257, 81 N. E. 265.

Minnesota.—*Ray v. Jones & A. Co.* (1904) 92 Minn. 101, 99 N. W. 782, 16 Am. Neg. Rep. 424.

Missouri.—*Benjamin v. Metropolitan Street R. Co.* (1896) 133 Mo. 274, 34 S. W. 590.

New York.—*Scott v. Curtis* (1909) 195 N. Y. 424, 40 L.R.A. (N.S.) 1147, 133 Am. St. Rep. 811, 88 N. E. 794; *Campion v. Rollwagen* (1899) 43 App. Div. 117, 59 N. Y. Supp. 308.

North Carolina.—See *COLE v. DURHAM* (reported herewith) ante, 560.

Ohio.—*King v. Herb* (1899) 18 Ohio C. C. 41, 9 Ohio C. D. 797.

England.—*Pickard v. Smith* (1861) 10 Q. B. N. S. 470, 142 Eng. Reprint, 535, 4 L. T. N. S. 470. And see *Whiteley v. Pepper* (1877) L. R. 2 Q. B. Div. 276, 46 L. J. Q. B. N. S. 436, 36 L. T. N. S. 588, 25 Week. Rep. 607, and *Penny v. Wimbledon Urban Dist. Council* [1898] 2 Q. B. 212, 67 L. J. Q. B. N. S. 754, 62 J. P. 582, 78 L. T. N. S. 748, 14 Times L. R. 477.

In *Pickard v. Smith* (Eng.) supra, in holding that a lessee of a cellar was liable to a pedestrian who fell into the cellar opening, which a coal merchant's servant had negligently left insufficiently guarded, Williams, J., said: "The defendant employed the coal merchant to open the trap in order to put in the coals; and he trusted him to guard it whilst open, and to

close it when the coals were all put in. The act of opening it was the act of the employer, though done through the agency of the coal merchant; and the defendant, having thereby caused danger, was bound to take reasonable means to prevent mischief. The performance of this duty he omitted; and the fact of his having intrusted it to a person who also neglected it furnishes no excuse, either in good sense or law."

In *Ray v. Jones & A. Co.* (Minn.) supra, where an action was held to be maintainable for personal injuries sustained by a pedestrian from falling into a coalhole of a sidewalk, negligently opened by the servant of a dealer in coal, who was permitted by the abutting owner to use the same, the court there laid down the law: "It was undoubtedly the duty of the coal company to use ordinary care in the delivery of the coal; but we are of the opinion that the owner, notwithstanding the fact that the business of delivering the coal was within the contract with the coal company, still owed a duty either to see that the coal company did its duty, or should have properly warned pedestrians on the highway of the dangers incident to such acts which it authorized." "It must be borne in mind that the place where the opening in the Manhattan Company's sidewalk existed was a public thoroughfare, which pedestrians were permitted and invited to use when necessary, and the use of the same by the owner of the building was subordinate to the public rights in these respects. That the work which was being done was of utility, and justified a lawful use of the sidewalk and the openings by the owner of the building or those who served its interests, may be conceded; yet, from the very nature of such use, the reasonable protection that is obvious and essential to such public rights was required. Under these circumstances the Manhattan

Company could not receive the benefits to be given by the coal company in using the opening over its area under the walk to supply it with coal and renounce all interest therein, to the manifest jeopardy of the rights of travelers and pedestrians over the public thoroughfare. The movable coverings of the coalhole openings were retained in the walk by the Manhattan Company to the extent of their proper use only, and in exercising its privilege in this regard was involved the manifest duty to maintain them properly guarded, or protect them by such practicable and reasonable means as would prevent their use from being a menace and trap to travelers on the sidewalk, who had a right to pass thereon; and, if it failed to exercise ordinary care in this respect, the permission which it gave to the coal company to remove the covers ought not and could not relieve it from legal responsibility for accidents which might arise from its negligence. Had there been no public interest involved, or had the coal been delivered upon the private property of the Manhattan Company, an injury would not probably have resulted, and a liability would not have arisen from Anderson's act, except, perhaps, in the case of a trap or pitfall; but, upon the public thoroughfare, under the plainest principles of common prudence, there was a duty of protection incumbent upon the owner of the building, which it could not shirk or decline to recognize."

In *Scott v. Curtis* (1909) 195 N. Y. 424, 40 L.R.A.(N.S.) 1147, 133 Am. St. Rep. 811, 88 N. E. 794, where a passerby fell into a coalhole, maintained in front of the defendant's premises, which had been left open by the employees of a coal dealer when they were delivering coal, the liability of the defendant was predicated upon the ground that the work was dangerous, requiring special precaution on his part, in respect of seeing that proper safeguards for the protection of the public were provided while it was being performed. In reaching this conclusion one of the precedents cited was *Campion v. Rollwagen* (1899) 43

App. Div. 117, 59 N. Y. Supp. 308, where a judgment for the defendant in an action brought to recover for an injury caused by similar conditions was affirmed. In the *Campion Case* evidence given by the defendant, tending to show that, at the time when the accident occurred, persons were engaged in putting coal into the building through a coalhole, under a contract to do so, was held, in so far as it was offered with relation to the effect of the independency of the contract, to be incompetent and immaterial. It was also held, however, that the evidence was admissible as bearing upon the question of the plaintiff's contributory negligence, on the theory that the defendant could not free himself from his duty to protect the hole in the sidewalk by delegating that work to any other person.

In *Benjamin v. Metropolitan Street R. Co.* (1896) 133 Mo. 274, 34 S. W. 590, where defendant was permitted or licensed by the city to maintain coalholes in the sidewalk for its personal use, and owed both the plaintiff, a pedestrian, and the public the duty to guard the same, and the cover of a scuttle hole into which a coal dealer's servant had been unloading coal about a quarter of an hour before turned under the plaintiff's foot, the court reasoned thus: It was the duty of the owner to exercise reasonable care to keep the sidewalk in a safe condition. "This was a personal duty from which it could not relieve itself by imposing it upon another. As soon as the unloading of the wagon was complete and the contractor ceased to use the coalhole, the duty of the defendant in respect to its condition commenced again. It must be remembered that defendant furnished to the contractor this means for unloading the coal, and knew it was being so used almost daily. The use, as was known, required the removal of the cover and again replacing it. These acts were not done by a wrongdoer without the knowledge of defendant, but by its consent and under its implied, if not its express, direction. If defendant had given direction to the contractors in regard to the manner of replacing

the cover, then, in that particular, it would have made them their [its] agents, and would have been responsible for their negligence; but as no direction was given, it was the duty of defendant to give its personal attention to seeing that the cover was properly replaced. They [it] knew the construction of the cover and that care in replacing it was necessary. They [it] knew, or should have known, that it had been removed, and should have seen at once that it had been properly replaced. The principle is well settled that a city which authorizes excavations in its streets is not entitled to notice of the dangerous condition in which they have been left, in order to hold it liable for injury to third persons occasioned thereby.

. . . It seems to us the same principle applied to defendant in respect to keeping its scuttle hole in a safe condition. It was under obligation to do so. It authorized the removal of the cover; why should it have notice of the condition in which it was left?

. . . But we are not required to go so far here. For the time being the contractors had completed their work, and the question is whether notice of the dangerous condition in which the hole was left could fairly be inferred by the jury after the lapse of fifteen minutes thereafter. The court held that the question of notice was for the jury, and of this ruling the defendant cannot reasonably complain." But, in this connection, see *Brady v. Shepard* (1899) 42 App. Div. 24, 58 N. Y. Supp. 674, 6 Am. Neg. Rep. 353, wherein the evidence showed that the cover of the coalhole into which plaintiff fell had been removed about 7 P. M., by one of the drivers of a trucking company, which a coal company, under contract to deliver coal to a tenant of defendant's building, had employed as subcontractor. The trial judge charged that "there is no evidence in the case that the coalhole was improperly constructed, and the evidence does show that the defendant Shepard had no knowledge or notice that the coal would be delivered at this time, and there is no evidence that the employees of the defendant Shepard

knew that coal was to be delivered at that time, and there is no evidence showing that the cover of the coal vault was removed with the consent or with the knowledge of Mrs. Shepard." The court said: "Under such a state of facts we are unable to see how the defendant Shepard can be held liable to respond in damages for the injuries sustained by the plaintiff. The plaintiff's right to recover was predicated upon the defendant's negligence in permitting the coalhole to be uncovered, unprotected, and unguarded; but there is no evidence that she ever consented to or had any knowledge, until subsequent to the accident, of the removal of the cover. As owner of the building she was undoubtedly under a legal obligation to see to it that this opening was kept in a safe condition, so that a person lawfully passing along the sidewalk would not sustain injury by reason of it; but the cover was so constructed and arranged that it would be securely held in its place, and so that it could not be removed except by design, and this was all that she was required to do. She was not bound to guard against its unauthorized removal."

In *Hart v. McKenna* (1905) 106 App. Div. 219, 94 N. Y. Supp. 216, the evidence showed that before the performance of the contract was commenced, the defendant had vacated the house; that her attention was not directed to the cover while the repairs were being made; that she had no knowledge that it had been opened or used by the contractor; that she passed by the premises several times while the work was in progress, but had no recollection of seeing the coalhole open or in use on such occasions; that the contractor furnished all materials and labor required; that she had nothing to do with the work from the time she vacated the building until it was completed; and that she did not direct the work in any way; and it was held that, as it could not be said as a matter of law that the defendant was free from liability under the circumstances, the complaint had been improperly dismissed by the trial judge. The court argued thus: "The coalhole

. . . was an obstruction interfering with the use of the sidewalk by the public and with the rights of the public (*Clifford v. Dam* (1880) 81 N. Y. 52), and liable at any time, through negligence in properly securing and fastening the cover, to cause injury to persons lawfully using and passing over the sidewalk. The contractor did not create the obstruction. It existed on the property when he commenced work under his contract, and was an instrumentality made use of by him to get his materials from the street into the building to be repaired. His use of it was connected with making the repairs and doing the work contracted for by the defendant. His negligence was in the maintenance and restoration of the coalhole after use, not its construction, and consisted of failure to guard and protect the rights of the public by omitting to fasten or secure the cover so that it would not, on contact with the foot of a pedestrian, fly off and result in injuries similar to those sustained by the plaintiff. This duty rested upon the defendant, who had acquired a special privilege, acceptance and enjoyment of which had charged her with the special duty to the public of maintaining the coalhole at all times in a safe condition and properly guarded; she could not avail herself of this privilege without discharging the duty; the two were at all times coexistent, and she could not absolve herself from the liability thus created by delegating the performance of the duty to another."

The evidence of duty as between a city and an abutting owner with respect to a coalhole in a sidewalk is shown by the following statement taken from *Canandaigua v. Foster* (1898) 156 N. Y. 354, 41 L.R.A. 554, 66 Am. St. Rep. 575, 50 N. E. 971, 4 Am. Neg. Rep. 441, affirming (1894) 81 Hun, 147, 30 N. Y. Supp. 686: "The implied duty assumed when the hole was cut and the grate placed over it requires reasonable precaution on the part of the owner to protect the public as long as he remains the owner and is in possession of any part of the building on the abutting land. He cannot cast the

burden of maintenance on the public any more than he could have cast upon them the burden of original construction, for the grate is wholly for the benefit of his property. Nor can he relieve himself of the duty without parting with the entire possession of the property benefited, for the safety of the public requires that the owner, as long as he is in possession of any part of the property, should be compelled to keep his structure in the sidewalk in a suitable condition for use as a part of the sidewalk."

In *Anderson v. Caulfield* (1901) 60 App. Div. 560, 69 N. Y. Supp. 1027, where the plaintiff fell into the coalhole of a tenement house rented by the defendant to various families, the evidence showed that he retained control of the coalhole. On the occasion in question one of the tenants had procured the key of the vault to which the hole gave access in order to bring wood into the house for his personal use, and the liability of the defendant for the negligence of his tenant or his servants in leaving the hole unguarded was affirmed on the following grounds: "If the defendant had given up the possession and control of the entire property to tenants, it may very well be that he would be held absolved from all duty in the maintenance of a safe sidewalk for the use of public pedestrians. That is not the question presented for determination. Having retained the control of the sidewalk and the coalhole constructed by him therein under a municipal license which carried with it the duty of seeing that the hole was properly guarded and protected, he could not exercise the privilege without discharging the duty. And that this duty could not be so delegated as to relieve him from liability for nonperformance is well settled by the authorities." And see *King v. Herb* (1899) 18 Ohio C. C. 41, 9 Ohio C. D. 797, wherein the court distinguished the cases in which the entire premises are put into the possession of a lessee or the control of an independent contractor for the purpose of repair or construction of some building or other structure on the premises, and held

that, notwithstanding the contract for the delivery of the coal, the abutting owners still owed a duty to properly guard and protect a traveler on the highway from the dangers incident to its use. And that the lessor of a building is liable for injuries to a pedestrian resulting from the failure of one delivering coal to the tenant to properly guard the opening through which the coal was being delivered, see opinion of Williams, J., in *Pickard v. Smith* (1861) 10 C. B. N. S. 470, 142 Eng. Reprint, 535, 4 L. T. N. S. 470.

Liability of employer of deliveryman.

It has been held in a number of cases that the merchant whose goods are being delivered is liable for the failure of the deliveryman to properly guard an opening in a sidewalk while delivering goods to a purchaser. *French v. Boston Coal Co.* (1907) 195 Mass. 334, 11 L.R.A.(N.S.) 993, 122 Am. St. Rep. 257, 81 N. E. 265; *Ray v. Jones & A. Co.* (1904) 92 Minn. 101, 99 N. W. 782, 16 Am. Neg. Rep. 424; *COLE v. DURHAM* (reported herewith)

ante, 560; *Whiteley v. Pepper* (1877) L. R. 2 Q. B. Div. (Eng.) 276, 46 L. J. Q. B. N. S. 436, 36 L. T. N. S. 588, 25 Week. Rep. 607, disapproving the dictum of Williams, J., in *Pickard v. Smith* (Eng.) supra, to the effect that a coal merchant would not be liable for the negligence of his servant in not properly guarding a hole through which he was delivering coal. And see *Hart v. McKenna* (1905) 106 App. Div. 219, 94 N. Y. Supp. 216.

In the reported case (*COLE v. DURHAM*, ante, 560), the court adopted the theory that the general rule which renders an independent contractor liable for his own negligence, and exonerates the employer, does not apply in the case of work of a hazardous character, or which is inherently dangerous, and held that delivering goods through an opening in a sidewalk was work of that character, so that the duty rested upon the dealer to see that the proper precautionary measures were taken to guard the opening.

G. J. C.

E. J. HOOVER et al., Trading as Hoover-Dimeling Lumber Company,
Limited, Plffs. in Err.,

v.

A. D. NEILL.

West Virginia Supreme Court of Appeals—January 25, 1916.

(*Hoover-Dimeling Lumber Co. v. Neill*, 77 W. Va. 470, 87 S. E. 855.)

Account stated — effect as estoppel.

1. An account stated does not create an estoppel; and, while it affords presumptive evidence of the accuracy and correctness of the charges therein stated, such presumption may be rebutted by showing fraud, mistake, or error in its execution or procurement, unless the position of the opposite party has been altered to his prejudice. And the burden of proof rests on him who challenges the verity of such account.

[See note on this question beginning on page 586.]

Set-off — action for debt.

2. In an action for a debt, defendant may at the trial offer and have allowed against such debt any payment or set-off which is so described in his plea, or in his account filed therewith, before the trial, as to give notice of its

nature, whether he acquired the account before or since the commencement of the action.

[See 24 R. C. L. 833.]

Account stated — when exists — general rule.

3. Generally, where persons who

have had previous transactions of a monetary character agree that the account representing the transactions and the balance shown are correct, and the debtor expressly or impliedly promises to pay such balance, the account thereby becomes an account stated.

[See 1 R. C. L. 207.]

— by court commissioner — conclusiveness.

4. An account stated by a commissioner under an order of reference entered in an action at law, while not conclusive against the parties, will be treated as prima facie correct; and on him who challenges its accuracy or justness devolves the duty of showing it to be unjust or inaccurate.

Interest — on unliquidated claim.

5. Ordinarily, interest will not be allowed on an unliquidated account or claim, except from the time the amount due is ascertained judicially or by the act of the parties.

[See 15 R. C. L. 7.]

Account stated — when exists — promise to pay.

6. To constitute an account stated there must have been a settlement satisfactory to the parties interested, and concurrence by the parties in the result thereof, and a promise by the debtor, express or implied, to pay the balance so ascertained as due.

[See 1 R. C. L. 207.]

ERROR to the Circuit Court for Randolph County to review a judgment in favor of defendant in an action brought to recover a balance alleged to be due upon a contract of sale of real and personal property to defendant and another. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Talbott & Hoover for plaintiffs in error.

Mr. Samuel T. Spears, for defendant in error:

Even though the statement of March 20, 1906, be construed to be a stated account, yet it is subject to correction for fraud, errors, mistakes, and omissions.

Neff v. Wooding, 83 Va. 432, 2 S. E. 731; McNeel v. Baker, 6 W. Va. 153; Ruffner v. Hewett, 7 W. Va. 585; Ferrell v. Ferrell, 53 W. Va. 515, 44 S. E. 187; Norfolk & W. R. Co. v. Mills, 91 Va. 613, 22 S. E. 556; Stuart v. Ludington, 1 Rand. (Va.) 403, 10 Am. Dec. 550.

Plaintiffs were trustees for the defendant as to the transactions between February 1 and April 10, 1906, and are held strictly accountable for these transactions, and the burden of proof is upon the plaintiffs to show that they acted fairly and honestly in these matters.

2 Pom. Eq. Jur. §§ 902, 956.

Interest should have been allowed upon the amount found due by the commissioner of \$7,082.12, from April 10, 1906.

Jones v. Williams, 2 Call (Va.) 102; McVeigh v. Howard, 87 Va. 599, 13 S. E. 31; Shank v. Groff, 45 W. Va. 543, 32 S. E. 248.

The defendant, Neill, has the right to recover under his plea of offsets the

amount found by the commissioner, even though these amounts may have technically belonged to Gilfillan, Neill, & Company, a corporation, at the time of the institution of the suit, because of the assignment or authority vesting said right in him.

Wheeling Bridge & Terminal R. Co. v. Cochran, 15 C. C. A. 321, 25 U. S. App. 306, 68 Fed. 141.

Mr. Andrew Price also, for defendant in error:

The statute of set-offs is intended to lessen litigation, and is to be liberally construed to further that end.

Tidewater Quarry Co. v. Scott, 105 Va. 160, 115 Am. St. Rep. 864, 52 S. E. 835, 8 Ann. Cas. 736.

Offsets may be allowed up to the time of trial.

Trimyer v. Pollard, 5 Gratt. 460; Allen v. Hart, 18 Gratt. 722; Wheeling Bridge & Terminal R. Co. v. Cochran, 15 C. C. A. 321, 25 U. S. App. 306, 68 Fed. 141; Turberville v. Self, 4 Call (Va.) 580.

An account stated may be impeached for fraud, mistake, or error.

Camp v. Wilson, 97 Va. 274, 33 S. E. 591.

Lynch, J., delivered the opinion of the court:

In an action of assumpsit brought to recover of A. D. Neill, sole defendant, a balance by plaintiffs,

John Dimeling and E. J. Hoover, partners trading as Hoover-Dimeling Lumber Company, Limited, claimed to be due them upon a contract of sale of real and personal property to defendant and A. Gilfillan (since deceased), a reference was ordered to state an account between the parties, pursuant to § 10, chap. 129, Code 1913 (§ 4855); they agreeing thereto. The account so stated and reported by the commissioner showed a balance of \$7,082.12 due defendant, and for this amount, with interest, judgment was rendered accordingly; and plaintiffs brought the case before us for review on writ of error.

The cause of action arose out of a contract dated March 31, 1906, whereby Hoover and Dimeling, as owners, sold to Gilfillan and Neill all the timber lands therein mentioned and the lumber business conducted by plaintiffs thereon, together with the fixtures, contracts, easements, rights, and privileges unto said premises or business belonging or in any wise appertaining, as they stood on February 1, 1906, or as had since accrued thereunto. On that date the property was to be clear and free of any debts or charges due from the grantors other than the deferred purchase-money notes and payments listed and described in the agreement, with the provision that any balance due on account of the conduct of the business subsequent to February 1, 1906, should be ascertained upon final settlement and paid accordingly. The contract contained other covenants and conditions not material upon the issues.

Of the six contracts so assigned, only one need be noted. It was a verbal contract between the Hoover-Dimeling Lumber Company and W. J. Cox "relative to stocking of logs, the terms and specifications of which," according to the recitals of the sale agreement, then were known by all the parties thereto.

As to the several assigned agreements, the reciprocal provisions were that the vendors conveyed all the rights possessed by them there-

in, and the purchasers assumed the obligations thereby imposed on the vendors. There were two verbal stocking contracts between plaintiffs and Cox at that time, distinguished and known as the 1905 and 1906 contracts. Of these it seems reasonably certain the first or 1905 Cox contract is the only one involved in this action; for, so far as otherwise appears, the contract for the next year was to be, and virtually has been, fully performed and all matters arising out of it settled and adjusted by the purchasers and Cox. Plaintiffs were relieved from any responsibility as to it. That Gilfillan and Neill, before the institution of this action, had paid all the consideration directly payable to plaintiffs under the terms of the contract, aggregating several hundred thousand dollars, except the \$4,837.95, the amount of the original bill of particulars filed with the declaration, apparently is conceded. This sum plaintiffs claim the right to recover as part of a balance due them on an account stated as of March 20, 1906, after deducting a note of \$7,000 since paid to them. Whether such unpaid balance was retained by the purchasers, as they contend, to cover the cost of completing the 1905 Cox contract, then only partially performed, or whether that sum was part of the consideration for the sale to Gilfillan and Neill, to be paid without regard to the Cox contract, and whether plaintiffs paid Cox for the services performed by him in completing the same,—are questions as to which much of the conflicting testimony taken before the commissioner and by him returned as part of his report relates.

His findings, adverse to the contentions of the plaintiffs as regards these inquiries, based on such testimony, the trial court, hearing the case in lieu of a jury, by agreement of the parties, approved and entered judgment thereon.

Was the account of March 20, 1906, an "account stated," within the legal meaning of that term? That the answer to this interroga-

tory may more readily be comprehended and its significance and scope understood, it is necessary to note that, although the purchasers acquired the property and business as of February 1, 1906, they did not personally assume the control and management thereof until April 10th of that year; and that, by some understanding or agreement between them and plaintiffs, the purport and terms of which are not fully disclosed, the Hoover-Dimeling Lumber Company continued to conduct the business of manufacturing timber into lumber and marketing the product in the same manner and to the same extent as it had done prior to February 1, 1906. They collected the proceeds derived from such operations, paid all the expenses thereof, and performed such other services and functions as are incidental to the management and conduct of enterprises of that character. They undertook to account therefor to the purchasers as of the date the latter entered into active control of the property and business purchased. By an amendment, plaintiffs enlarged the original bill of particulars so as to include the items claimed by them as charges against the defendant to that date.

As to these additional items, the account, of course, did not fall within the meaning of a stated account. To constitute an account stated, there must have been a settlement satisfactory to the parties interested, and concurrence by them in the result thereof, and a promise by the debtor, express or implied, to pay the balance so ascertained to be due. The meeting of minds is as essential to the existence of an account stated as such concurrence is in any other agreement. Both must assent to the correctness of the account and the balance due. Such we find to be the essential prerequisites of an account stated.

**Account stated—
when exists—
promise to pay.**
**—when exists—
general rule.**

Robertson v. Wright, 17 Gratt. 534; McNeel v. Baker, 6 W. Va. 165; McCarty v. Chalfant, 14 W. Va. 531;

McGraw v. Trader's Nat. Bank, 64 W. Va. 510, 63 S. E. 398; Camp v. Wilson, 97 Va. 265, 274, 33 S. E. 591.

As defined in 1 R. C. L. 207, an "account stated" is "an account which has been rendered by one to another, containing the balance which is alleged to be due, which balance is assented to or admitted to be a correct account of the debt it represents as due from the debtor." Or, as defined by 1 C. J. 678, "an account stated is an agreement, between parties who have had previous transactions of a monetary character, that all the items of the account representing such transactions and the balance struck are correct, together with a promise, express or implied, for the payment of such balance."

Viewed only in the light of plaintiffs' testimony the account sued on may be an account stated within the definitions stated by these authorities. The witnesses introduced by them testify that defendant examined each of the items constituting the account and consented to the correctness of the balance ascertained. If that be true, thence arose an implied promise to pay it. But the evidence to the contrary renders doubtful the question whether either Gilfillan or Neill intended or understood the account to have the effect of an account stated, or that it justified the inference or presumption that they promised to pay such balance. Neill was not present when the account was prepared, if his testimony is to be taken as true, though Stouck, plaintiffs' bookkeeper, says he was. Besides, Neill says he only casually examined it, and expressed no opinion as to its verity, and treated it merely as advisory of the extent of the business done by plaintiffs for the benefit of himself and associate. Nor does the letter of August 14, 1906, justify the conclusion, urged by counsel for plaintiffs, that Gilfillan and Neill dealt with the account as one stated. On the contrary, the letter purports to challenge its correctness. The letter says: "In regard to what you say

(Hoover-Dimeling Lumber Co. v. Neill, 77 W. Va. 470, 87 S. E. 855.)

about the balance due on settlement, we do not make note to cover this for the reason that Mr. Stouck has gotten the account so mixed up we cannot at present tell what the balance is. We will, however, try to get this straightened out soon and will then make settlement. The writer may arrange to see you with reference to this matter soon."

It is manifest that at that time there had been no final adjustment of the transactions between the parties growing out of the conduct of the business since the 1st day of February. For aught appearing to the contrary, Neill contemplated a settlement of all matters of account arising out of operations conducted by plaintiffs as the representatives of the purchasers in the interval between February 1st and April 10th.

But an account stated by the parties is not generally conclusive. It may be impeached and corrected for fraud, mistake, or error in the items composing it, or in the balance ascertained. While the agreement of the parties operates as an admission that the account is correct, it does

—effect as
estoppel.

not create an estoppel, and so preclude the right to inquire

further into its merits, unless the position of the other party has thereby been altered to his prejudice. 1 R. C. L. 217; McNeel v. Baker, 6 W. Va. 153; Camp v. Wilson, 97 Va. 265, 274, 33 S. E. 591.

However, all the accounts growing out of the transactions involved in this litigation were submitted to the commissioner under the order of reference, without limitation or restriction; and as, on

—by court
commissioner—
conclusiveness.

such submission and reference, he has restated all of them, including the

March 20th statement, his report must be deemed and treated as prima facie correct, and on plaintiffs devolved the duty and burden of showing with particularity the respect in which the restated account is incorrect, unfair, or unjust. For, before a judgment based on an ac-

count stated by a commissioner under a reference in an action at law, pursuant to § 10, chap. 129, Code 1913 (§ 4855), can be reversed on writ of error, it must appear that the judgment is without evidentiary support, or is palpably against the decided weight and preponderance of the evidence. Kinsey v. Carr, 60 W. Va. 449, 451, 55 S. E. 1004, and cases cited.

For the most part, plaintiffs complain of the exclusions or deductions made by the commissioner from the March 20th account. But, upon an examination of the evidence relating to these charges, we have reached the conclusion that such alterations properly were made. Many of the items changed were for materials, merchandise, and supplies purchased by plaintiffs at different times anterior to February 1, 1906, and, if a part of the property at that time, they were covered by the consideration paid by defendant and Gilfillan. The item of \$477.63, balance in bank on March 20, 1906, entered into the balance due on that account April 10th, and hence was twice charged to defendant. The plaintiffs also charged defendant with an account against S. E. Slaymaker & Company, amounting to \$1,682.16, out of which defendant realized only \$475.43, due to reduction by freight charges and commissions. Though the evidence as to this item does not definitely show the date of the shipments and the freight charges thereon, the reduction has been approved by the court, and must be treated as correct on this review, in the absence of proof to the contrary. These instances we cite only as illustrations of the various erroneous charges justly eliminated, as seems to us, either as items of debits or credits, from the account claimed by plaintiffs in this action. To cite each one of the many items of the accounts and detail the reasons for nonallowance would unduly prolong this opinion and serve no useful purpose. It suffices to say generally that, instead of being insufficient to

show meritorious cause for the changes and alterations made by the commissioner in the March account, and for his statement of all the accounts arising out of the transactions between the parties, and the judgment based on his report, the evidence, as we view it, tends strongly to show ample justification for such report and for the judgment thereon rendered.

Plaintiffs further contest the right of Neill in this action to use as a set-off against their claims the indebtedness, if any, due from them to Gilfillan, Neill, & Company, a corporation to which the property sold subsequently was conveyed by the purchasers. But by its deed the corporation assigned such indebtedness as existed in its favor against plaintiffs, arising out of the contract of purchase, and authorized him to file and prove any such claims as offsets or counterclaims against the demands stated in plaintiffs' declaration and bill of particulars, and provided therein that, if such indebtedness were filed as an offset or counterclaim, and considered as a part of the matters in litigation, the corporation should thereby be precluded from the prosecution of any action based thereon. This deed seems to have been filed with the commissioner, and by him returned as an exhibit with the depositions taken upon the hearing, and considered by the court upon the trial, without objection or exception, and without bringing it to our attention in any manner, except by their exception No. 8, taken and filed to the commissioner's report, to the effect that Neill is not entitled to the benefit thereof as an offset, because, if, at the time this suit was instituted, there was any balance due from plaintiffs, it was payable to the corporation, and therefore not to Neill individually. The only question raised by the exception obviously relates, not to the authority of the corporation to make the assignment, but the fact that it was made pendente lite. But, "in an action for a

debt, any payment or set-off which is so described in his plea, or in his ac-

Set-off—action
for debt.

count filed therewith, as to give notice of its nature, but not otherwise." Section 4, chap. 126, Code 1913 (§ 4824). This statute has been construed to admit as offsets, when properly filed, pleaded, and approved, any account acquired before the trial, whether its acquisition be before or subsequent to the commencement of the action. *Wheeling Bridge & Terminal R. Co. v. Cochran*, 25 U. S. App. 306, 15 C. A. 321, 68 Fed. 141. Indeed, its language plainly comprehends and recognizes only the necessity of ownership of the account filed prior to or at the time of trial. Such has been the recognized practice in Virginia. 4 Minor, Inst. 789, 790; 5 Rob. Pr. 1000. As early as 1817, it was there held that the defendant had the right to discount plaintiff's claim at the trial by offsets, whensoever they may have been acquired, if not barred by limitation. *Ritchie v. Moore*, 5 Munf. 395, 7 Am. Dec. 688; *Allen v. Hart*, 18 Gratt. 722, 729. In *Trimyer v. Pollard*, 5 Gratt. 460, Judge Daniel, at page 462, says: "By our Statute of Discounts and Set-offs it is enacted that when any suit shall be commenced and prosecuted in any court within this commonwealth, for any debt due by judgment, bond, bill, or otherwise, the defendant shall have liberty, upon trial thereof, to make all the discount he can against such debt; and upon proof thereof the same shall be allowed in court." And, further: "Under this law, the uniform practice is, to allow discounts up to the time of trial. . . . This admission of offsets which have accrued or been acquired since the commencement of the suit, under our law, and their exclusion under the English law, constitute the main feature of difference in the respective systems in relation to this subject."

Hence we think plaintiffs' contention in this particular, though plausible, is without substantial merit.

Though apparently stating a gen-

(Hoover-Dimelling Lumber Co. v. Neill, 77 W. Va. 170, 87 S. E. 855.)

eral proposition applicable alike to all offsets and counterclaims, the third point of the syllabus in Dickey v. Smith, 42 W. Va. 805, 26 S. E. 373, saying, "a defendant is entitled to set off a bona fide claim assigned to him at any time before commencement of suit," is not in conflict with the holding in this case. In the former the court construed § 52, chap. 50, Code 1913 (§ 2606), which expressly provides that the set-off must have belonged to the defendant at the time plaintiff's suit was commenced. However, § 4, chap. 126 (§ 4824), contains no such restrictions or limitations. Moreover, it authorizes judgment in favor of defendant if, upon an ascertainment of the true state of the indebtedness between the parties, a balance remains due him.

Defendant, on cross assignment, complains of the refusal of the trial court to allow interest on the amount due him, as ascertained by commissioner, from April 10, 1906, to the date of the judgment,

and not merely from the date of the report. The correctness of many of the items of these accounts was in dispute, and, until definitely ascertained, neither of the parties knew which was indebted to the other. Generally, where concurrent accounts are unliquidated, the rule is ^{Interest—on unliquidated claim.} not to allow interest except from the date of settlement. Waggoner v. Gray, 2 Hen. & M. 603; M'Connico v. Curzen, 2 Call (Va.) 358, 1 Am. Dec. 540; Stearns v. Mason, 24 Gratt. 484. Nor where the claim, though just, is doubtful or uncertain. Auditor v. Dugger, 3 Leigh, 241.

For the reasons stated, the judgment will be affirmed.

NOTE.

The conclusiveness of an account stated is the subject of the annotation following DODSON v. WATSON, post, 586. Specifically as to impeachment for fraud or mistake, see subdivision I. b.

B. M. McCUE, Appt.,

v.

J. W. HOPE.

Kansas Supreme Court — January 8, 1916.

(97 Kan. 85, 154 Pac. 216.)

Account stated — evidence of correctness — right to open.

Two parties who owned the stock of a corporation agreed that one of them should purchase the stock and interest of the other for a certain price, the purchaser to pay the outstanding liabilities of the company, and a settlement between them was effected on the basis of an account stated, which purported to contain a complete list of all of the assets and liabilities of the company, and was a part of their written agreement. In an action subsequently brought by the purchaser he alleged that the account stated was incorrect, in that it omitted certain specified liabilities of the company of which he had no knowledge, and which he has been compelled to pay; that the account was not only incorrect, but it was fraudulently made so by the seller. Held, that the action is one to reopen the account and settlement and remake it in accordance with the agreement of the parties; that such an account stated is only prima facie evi-

Headnote by JOHNSTON, Ch. J.

dence of its correctness; that it may be opened up for mistake or fraud; that the averments of fraud of the seller as stated in the petition were pertinent and proper; and that the action pleaded is not to be regarded as one for relief on the ground of fraud, and therefore is not barred by the two-year Statute of Limitations.

[See note on this question beginning on page 586.]

APPEAL by plaintiff from a judgment of the District Court for Finney County (Downer, J.) sustaining a motion to strike out allegations of fraud and a demurrer to the first count of plaintiff's amended petition, in an action brought to open up an account and settlement between the parties and to adjust their rights under a written contract for the transfer of corporate stock. *Reversed in part.*

The facts are stated in the opinion of the court.

Mr. F. Dumont Smith for appellant.
Messrs. William Easton Hutchison
and C. E. Vance for appellee.

Johnston, Ch. J., delivered the opinion of the court:

Plaintiff and defendant, who were each the owners of one half of the capital stock of the Garden City Land & Immigration Company, in November, 1910, entered into a written contract whereby defendant was to transfer to plaintiff his stock in the corporation, in consideration of which plaintiff was to cause the corporation to convey certain properties and securities to defendant, and assume and pay all debts and obligations of the corporation and relieve the defendant from any liability on account thereof. Attached to the contract was a statement of the condition of the company, with a guaranty that the same was correct, "errors and omissions excepted." This action for the sum of \$5,557.49 was brought by plaintiff in the year 1914, who alleged in his petition that soon after the transaction above mentioned it was discovered that at the time of the exchange of property the corporation owed certain obligations, totaling \$2,114.98, a half of which was claimed and sued for in plaintiff's action; that said obligations were not shown upon the statement, and that the defendant, conniving with the bookkeeper of the corporation, one Chan B. Campbell, had concealed the existence of these obligations. As a second cause

of action, plaintiff alleged that at the time of the transaction mentioned, defendant had in his possession \$4,500 of the corporate funds, the existence of which fact he also concealed. The court sustained a motion made by defendant to strike out all allegations of fraud, and also sustained a demurrer as to the first count of plaintiff's amended petition, but overruled the same as to the second count.

Upon these rulings plaintiff brings the case here.

It is contended by defendant that the parts stricken out of plaintiff's petition were immaterial, for the reason that the petition showed upon its face that the action was one for relief upon the ground of fraud, and, being brought more than two years from the time the fraud was alleged to have been discovered, it did not state a cause of action. Defendant also complains that the court should have sustained his demurrer as to the second count of plaintiff's petition. The action is based on the account stated, which formed a part of the written agreement. This account purported to contain an itemized list of all the assets and liabilities of the company. The account is an acknowledgment of the statements made therein, as well as of liability, but it is only prima facie evidence of its correctness. It may be opened up for mistake or fraud, and corrected within a reasonable time. *Clark v. Marbourg*, 33 Kan. 471, 6 Pac. 548;

Schmoker v. Miller, 89 Kan. 594, 132 Pac. 158; 1 Cyc. 451. It is alleged that the account in question is not only incorrect, in that a number of liabilities of the company, which the plaintiff has since been compelled to pay, were omitted, but that this was done through the connivance and fraud of the defendant. Fraud being one of the

Account stated—
evidence of cor-
rectness—right
to open.

grounds for opening and correcting the account, the allegations that the settlement and accounting were fraudulently done were pertinent and proper, and the ruling striking out the averments as to the fraud of the defendant cannot, therefore, be sustained. That the account is open to correction is shown further by a provision of the agreement made between the parties. In it is a statement that the account is correct, "errors and omissions excepted," and therefore on its face it does not purport to be a finality.

It is insisted by the defendant that the case should be treated as an action for relief on the ground of fraud, and that, so considered, it was barred after two years from the

time it accrued. It is rather an action to open up an account and settlement between the parties, to make a new settlement, and to adjust the rights of the parties under their written agreement. The mere fact that mistakes occurred, or that there was deception practised in the settlement sought to be set aside so that a new settlement may be made, does not make the action one for relief on the ground of fraud. It is still an accounting under the written agreement, and does not fall within the two-year Statute of Limitations.

The decision of the trial court striking out of the petition the averments of fraud, as well as the one sustaining a demurrer to the first count of the petition, is reversed, and the decision overruling the demurrer to the second count of the petition is affirmed.

NOTE.

The conclusiveness of an account stated is the subject of the annotation following *DODSON v. WATSON*, post, 586. Specifically, as to impeachment for fraud or mistake, see subdivision I. b.

D. S. DODSON, Admr., etc., of Mrs. Pallie Watson, Deceased,
v.
F. M. WATSON.

Texas Supreme Court—April 21, 1920.

(— Tex. —, 220 S. W. 771.)

Account — effect of account stated.

1. An account stated is mere prima facie evidence of the correctness of the balance acknowledged, which the law treats as promised to be paid, casting upon the adverse party the burden of disproving its correctness.

[See note on this question beginning on page 586.]

Evidence — prima facie evidence — what is.

2. Prima facie evidence is merely that which suffices for the proof of a particular fact until contradicted and overcome by other evidence.

Estoppel — stated account as.

3. A stated account does not amount to an estoppel.

[See 1 R. C. L. 217.]

Account — error in stating — necessity of mutual mistake.

4. Mutual mistake need not be

shown to justify the admission of evidence showing the inadvertent omission of items from a stated account.

CERTIFICATION by the Court of Civil Appeals for the determination by the Supreme Court of questions arising upon appeal by plaintiff from a judgment refusing a special instruction requested by him in an action brought to recover the balance alleged to be due on an account stated.

Questions answered.

The facts are stated in the opinion of the court.

Messrs. F. O. McKinsey, J. C. Wilson, and R. L. Stennis for plaintiff.

Messrs. Gross & Gross and Stephens & Miller for defendant.

Phillips, Ch. J., delivered the opinion of the court:

The certificate of the honorable court of civil appeals reflects that the suit was by the administrator of Mrs. Pallie Watson, deceased, against F. M. Watson, in part upon the following instrument in writing, as an account stated, and for the balance thereby shown to be due by the defendant:

Aledo, Texas, October 24, 1890.

This is to certify that I have received for management of Pallie Watson the following amounts of money, and to be loaned at the best of my judgment:

March 25, 1888, to cash	\$800.00
Aug. 20th, 1888, to cash	746.25
April 15, 1889, to cash	1,478.00
Jan. 1, 1890, to cash	2,147.44
May 1, 1890, to cash	1,131.80

Total amount \$6,303.49

and have advanced to her the following amounts:

July 1, 188— bill of grub at old farm	\$12.85
July 9, 1889, cash	566.50
July 20, 1890, cash	2,939.25

Total advanced to Pallie Watson \$3,518.60

This is a correct account except the interest that has accumulated on the money I have.

[Signed] F. M. Watson.

The defendant pleaded that prior to the date of the instrument he purchased certain lands as the agent of Mrs. Watson, at her instance, paying therefor out of her funds in his

hands, in one transaction \$2,600, and an additional sum of \$28.25 as expenses connected with the purchase, and in the other \$800, to which amounts he was entitled to be credited; and that through mistake and oversight, and because of his lack of skill in such matters, these credits were not stated in the instrument of writing. Upon the trial, evidence of the purchase of the lands and payment of such amounts by the defendant was adduced. It is a disputed issue as to whether the omission of these amounts from the credits shown in the written instrument was due to mutual mistake of the parties. In submitting the case to the jury the trial court did not require it to be found that any mistake causing such omission was mutual, and refused a special instruction requested by the plaintiff that the defendant would not be entitled to the credits unless such mistake in their omission from the written instrument was mutual.

The correctness of this action of the trial court is the question certified.

There have been three appeals of the case, besides the pending one. The trial court followed the ruling on the question made by the honorable court of civil appeals for the third district on the third appeal, which was that the defendant was entitled to establish the credits without being required to show that they were omitted from the written instrument through mutual mistake. — Tex. Civ. App. —, 143 S. W. 329. The court of civil appeals, in certifying the question, states that it is not inclined to agree with that holding.

There is possibly some confusion

in our decisions as to the conclusiveness of an account stated.

In *Horan v. Long*, 11 Tex. 231, Judge Lipscomb treated a settlement of accounts between partners, reduced to writing, signed under their respective seals, and long acquiesced in, as not subject to be reopened on account of mistake, unless the mistake was mutual. He dealt with the particular agreement as an ordinary written contract, and hence impeachable only upon the ordinary grounds sanctioned by equity. It is not clear from the opinion that he intended to lay down the ruling as applicable to an "account stated" in its legal definition. The decision is based upon the estoppel created by what it terms the "contract."

It is to be noted that if the agreement there is to be considered as an account, it was an "account settled" rather than an "account stated."

In *H. E. & W. T. R. Co. v. Snelling*, 59 Tex. 116, there had been a settlement of accounts which was pleaded by the defendant, from which the plaintiff claimed various items had been omitted by mistake. The court charged the jury that if these items had, in the settlement, been "forgotten or overlooked by the parties," the settlement, as to them, was not conclusive. Judge Stayton interpreted the charge as informing the jury that, if by mutual mistake the particular items were not brought into the settlement, the plaintiff was entitled to have them considered, and added: "This charge is believed to have stated the rule applicable to the case correctly." Judge Hemphill's opinion in *Neyland v. Neyland*, 19 Tex. 423, was not noted. The charge approved was favorable to the defendant, who was complaining of it. The rule announced in *Story's Equity*, § 523, that "if there has been any mistake, or omission, or accident, or fraud, or undue advantage, by which the account stated is in truth vitiated, and the balance is incorrectly fixed, a court of equity will not suffer it to be conclusive upon the parties, but will allow it to be opened and re-examined," is

quoted in the opinion, and it seems to have been assumed that under such rule a mistake warranting an impeachment of the account must be mutual.

In *Neyland v. Neyland*, Judge Hemphill discusses at length the nature of an account stated, and lays down the rule with respect to its conclusiveness and impeachment as supported generally by the authorities in this country and in England.

After referring to Lord Mansfield's opinion in *Trueman v. Hurst*, 1 T. R. 40, 99 Eng. Reprint, 960, that, while formerly an account stated was conclusive, a greater latitude has "of late" prevailed in order to remedy the errors which may have "crept into" the account, he says that such an account "is now regarded as but presumptive evidence against the party admitting the balance." He quotes with approval the holding in *Perkins v. Hart*, 11 Wheat. 237, 6 L. ed. 463, that a settled account is but prima facie evidence of its correctness; impeachable by proof of either unfairness or mistake; and if confined to particular items, conclusive of nothing in relation to other items not stated in it.

In *Perkins v. Hart*, there had been an account stated by Perkins for moneys advanced for Hart's account, which account Hart had paid. The suit was by Perkins for commissions claimed to have been due before the account was stated, but not included in it. There was no contention that the items for the commissions were omitted from the account by mutual mistake. It was upon such state of case that the ruling was announced, quoted by Judge Hemphill with approval.

Prima facie evidence is merely that which suffices for the proof of a particular fact until contradicted and overcome by other evidence. If, therefore, an account stated is but prima facie evidence of the correctness of the balance acknowledged, which the law treats as promised to be paid, its

Evidence—
prima facie
evidence—
what is.

office is simply to dispense with the proof of the particular items entering into the balance, casting upon the adverse party the burden of disproving its correctness. Such, we think, is essentially its true nature.

Mere presumptive evidence cannot create an estoppel. A stated account does not, therefore, amount to an estoppel. It is open to impeachment, just as other presumptions are subject to be overcome by competent proof. It does not of itself amount to an obligatory agreement—a contract upon a new consideration, having all the sanctity of a written agreement. Its purpose is but to reach an agreed balance between the parties whereby the particular items may be eliminated. When that is done, its office is performed and the character of prima facie correctness in the balance is attained.

The case may be brought within the principles of an estoppel, or of an obligatory agreement between the parties, as when upon a settlement mutual compromises are made; but the mere stating of an account, in its very nature and purpose, precludes giving to the account when stated the character of a binding written contract. In the ordinary affairs of men it is not intended to have that character. In modern business transactions, such, for instance, as between banks and their customers, it would be perilous to state accounts

if the statement of the balance is to be held in all cases as creating a contract binding upon both parties and subject to no correction for errors unless they be due to the fault of both.

It is upon such considerations that the established rule now is that an account stated does not create an estoppel, and is but prima facie evidence of the correctness of the items and the balance reached. 2 Abbott, Trial Ev. 3d ed. pp. 1166–1169; Lockwood v. Thorne, 18 N. Y. 285; Hutchinson v. Market Bank, 48 Barb. 302; Shipman v. Bank of State, 126 N. Y. 318, 12 L.R.A. 791, 22 Am. St. Rep. 821, 27 N. E. 371; Conville v. Shook, 144 N. Y. 686, 39 N. E. 405; Louisville Bkg. Co. v. Asher, 112 Ky. 138, 99 Am. St. Rep. 283, 65 S. W. 133; McKinster v. Hitchcock, 19 Neb. 100, 26 N. W. 705; Samson v. Freedman, 102 N. Y. 699, 7 N. E. 419; Peeples v. Yates, 88 Miss. 289, 40 So. 996; Wharton v. Anderson, 28 Minn. 301, 9 N. W. 860; Vanderveer v. Statesir, 39 N. J. L. 593; Hollenbeck v. Ristine, 105 Iowa, 488, 67 Am. St. Rep. 306, 75 N. W. 355; Rehill v. McTague, 114 Pa. 82, 60 Am. Rep. 341, 7 Atl. 224; Gutshall v. Cooper, 37 Colo. 212, 6 L.R.A.(N.S.) 820, 86 Pac. 125.

In our opinion the trial court did not err in ruling that the defendant was not required to show that the omission from the account of the credits claimed by him was because of a mistake of both parties.

Account—error in stating—necessity of mutual mistake.

ANNOTATION.

Conclusiveness of account stated.

I. Generally:

a. Account as prima facie correct:

1. Rule stated, 586.
2. Illustrations, 591.

b. Impeachment for fraud or mistake:

1. Rule stated, 597.
2. Illustrations, 600.

II. As between partners, 604.

III. As between bank and depositor, 607.

IV. As between persons in fiduciary relation, 609.

I. Generally.

a. Account as prima facie correct.

1. Rule stated.

An account stated is prima facie correct, and in the absence of a show-

ing of fraud or mistake is sufficient to warrant a recovery of the amount thereby agreed on.

United States. — *Chappedelaine v. Dechenaux* (1808) 4 Cranch, 306, 2 L. ed. 629; *Hager v. Thompson* (1861) 1 Black, 80, 17 L. ed. 41; *Goodwin v. Fox* (1889) 129 U. S. 601, 32 L. ed. 805, 9 Sup. Ct. Rep. 367; *Brydie v. Miller* (1809) 1 Brock. 147, Fed. Cas. No. 2,071; *Chapin v. Norton* (1855) 6 McLean, 500, Fed. Cas. No. 2,599; *Dexter v. Arnold* (1834) 2 Sumn. 108, Fed. Cas. No. 3,858; *Marye v. Strouse* (1880) 6 Sawy. 204, 5 Fed. 483, 2 Mor. Min. Rep. 294; *Atkinson v. Allen* (1895) 17 C. C. A. 570, 36 U. S. App. 255, 71 Fed. 58; *Porter v. Price* (1897) 26 C. C. A. 70, 49 U. S. App. 295, 80 Fed. 655; *Long-Bell Lumber Co. v. Stump* (1898) 30 C. C. A. 260, 57 U. S. App. 546, 86 Fed. 574; *Fitzgerald v. First Nat. Bank* (1902) 52 C. C. A. 276, 114 Fed. 474; *Ranald S. S. Co. v. Wesenberg & Co.* (1903) 122 Fed. 969; *Patillo v. Allen-West Commission Co.* (1904) 65 C. C. A. 508, 131 Fed. 680.

Alabama.—*Desha v. Smith* (1852) 20 Ala. 747; *Billingslea v. Ware* (1858) 32 Ala. 415; *Kilpatrick v. Henson* (1886) 81 Ala. 464, 1 So. 188; *South & North Ala. R. Co. v. Louisville & N. R. Co.* (1910) 170 Ala. 265, 53 So. 1016.

Arkansas. — *Roberts v. Totten* (1852) 13 Ark. 609; *Lawrence v. Ellsworth* (1882) 41 Ark. 502; *Moscowitz v. Semp* (1890) — Ark. —, 12 S. W. 781; *Weed v. Dyer* (1890) 53 Ark. 155, 13 S. W. 592; *Lanier v. Union Mortg. Bkg. & T. Co.* (1907) 64 Ark. 39, 40 S. W. 466; *Dunavant v. Fields* (1901) 68 Ark. 534, 60 S. W. 420. See also *Arkansas Fertilizer Co. v. Banks* (1910) 95 Ark. 86, 128 S. W. 566.

California. — *Branger v. Chevalier* (1858) 9 Cal. 353; *Cross v. Sacramento Sav. Bank* (1885) 66 Cal. 462, 6 Pac. 94; *Auzerais v. Naglee* (1887) 74 Cal. 60, 15 Pac. 371; *Hendy v. March* (1888) 75 Cal. 566, 17 Pac. 702; *Downing v. Murray* (1896) 113 Cal. 455, 45 Pac. 869; *Kinley v. Thelen* (1910) 158 Cal. 175, 110 Pac. 513; *Gardner v. Watson* (1915) 170 Cal. 570, 150 Pac. 994 See also *Chandler*

v. People's Sav. Bank (1882) 61 Cal. 401.

Colorado. — *McIntire v. Barnes* (1878) 4 Colo. 285; *Walker v. Steel* (1886) 9 Colo. 388, 12 Pac. 423; *Delta County v. Gunnison County* (1891) 17 Colo. 41, 28 Pac. 476.

District of Columbia.—*Marmion v. McClellan* (1897) 11 App. D. C. 467; *Gordon v. Frazer* (1898) 13 App. D. C. 382; *Riley v. Mattingly* (1914) 42 App. D. C. 290.

Florida.—*White v. Walker* (1854) 5 Fla. 478; *Poppell v. Culpepper* (1908) 56 Fla. 515, 47 So. 351.

Georgia. — *Threlkeld v. Dobbins* (1872) 45 Ga. 144; *Turner v. Pearson* (1893) 93 Ga. 515, 21 S. E. 104.

Hawaii.—*Beauvais v. Porter* (1852) 1 Haw. 68.

Idaho. — *Naylor v. Lewiston S. E. Electric R. Co.* (1908) 14 Idaho, 789, 96 Pac. 578.

Illinois.—*Gage v. Parmelee* (1877) 87 Ill. 329; *Conlin v. Carter* (1879) 93 Ill. 536; *D. M. Osborn & Co. v. Miner* (1892) 46 Ill. App. 133; *Pick v. Slimmer* (1897) 70 Ill. App. 358; *Tollar v. Bohemian Bldg. & L. Asso.* (1914) 187 Ill. App. 405; *Lundquist v. Quist* (1914) 189 Ill. App. 535. See also *Daniels v. Wilber* (1871) 60 Ill. 526, 2 Mor. Min. Rep. 283. Compare *Peddicord v. Connard* (1877) 85 Ill. 102.

Indiana.—*Linville v. State* (1892) 180 Ind. 210, 29 N. E. 1129; *State L. Ins. Co. v. Postal* (1908) 43 Ind. App. 144, 84 N. E. 156, 1093. See also *Bouslog v. Garrett* (1872) 39 Ind. 338.

Iowa.—*Lull & S. Co. v. Kemmerer Vehicle Co.* (1907) 136 Iowa, 549, 114 N. W. 22.

Kansas.—*Dobbs v. Campbell* (1901) 10 Kan. App. 185, 63 Pac. 289; *Knox v. Pearson* (1902) 64 Kan. 711, 68 Pac. 613; *Schmoker v. Miller* (1913) 89 Kan. 594, 132 Pac. 158.

Louisiana. — *Mornay v. Bordelais* (1844) 6 Rob. 318; *Douglass v. Manning* (1869) 21 La. Ann. 231; *Caruth v. Carter* (1874) 26 La. Ann. 331; *Pickens v. Friend* (1874) 26 La. Ann. 585; *Allen v. Nettles* (1887) 39 La. Ann. 788, 2 So. 602; *Flower v. O'Bannon* (1891) 43 La. Ann. 1042, 10 So. 376; *Dannenmann v. Charlton* (1903) 113 La. 276, 36 So. 965; *Hallowell*

Granite Works v. Orleans (1918) 144 La. 419, 80 So. 610.

Maine.—Goodrich v. Coffin (1891) 83 Me. 324, 22 Atl. 217.

Maryland.—Gover v. Hall (1810) 3 Harr. & J. 43; Stiles v. Brown (1843) 1 Gill, 350; Williams v. Savage Mfg. Co. (1848) 1 Md. Ch. 306; Devecmon v. Shaw (1888) 69 Md. 199, 9 Am. St. Rep. 422, 14 Atl. 464.

Massachusetts. — Union Bank v. Knapp (1825) 3 Pick. 96, 15 Am. Dec. 181.

Michigan.—Linn v. Gilman (1881) 46 Mich. 628, 10 N. W. 46. See also American Nat. Bank v. Bushey (1881) 45 Mich. 135, 7 N. W. 725.

Missouri.—Carroll v. Paul (1852) 16 Mo. 226; Pickel v. St. Louis Chamber of Commerce Asso. (1883) 80 Mo. 65, affirming (1881) 10 Mo. App. 191; McCormick v. Interstate Consol. Rapid Transit R. Co. (1900) 154 Mo. 191, 55 S. W. 252; Marmon v. Waller (1893) 53 Mo. App. 610; McKeen v. Boatmen's Bank (1898) 74 Mo. App. 281; Gibson v. Smith (1898) 77 Mo. App. 233; Commercial Electrical Supply Co. v. Kroell (1900) 85 Mo. App. 337; Wonderly v. Christian (1901) 91 Mo. App. 158; Carter v. Carter (1908) 129 Mo. App. 467, 107 S. W. 467.

Montana.—Johnson v. Gallatin Valley Mill. Co. (1909) 38 Mont. 83, 98 Pac. 883.

New Jersey. — Brown v. Vandyke (1853) 8 N. J. Eq. 795, 55 Am. Dec. 250; Swayze v. Swayze (1883) 37 N. J. Eq. 180.

New Mexico.—Brown & M. Co. v. Gise (1907) 14 N. M. 282, 91 Pac. 716.

New York.—Bruen v. Hone (1848) 2 Barb. 586; Gilchrist v. Brooklyn Grocers' Mfg. Asso. (1873) 66 Barb. 390, affirmed in (1875) 59 N. Y. 495; McIntyre v. Warren (1866) 3 Abb. App. Dec. 99, 3 Keyes, 185; Burke v. Isham (1871) 3 Albany L. J. 209; White v. Whiting (1878) 8 Daly, 23; Beach v. Kidder (1889) 55 Hun, 603, 5 Silv. Sup. Ct. 219, 8 N. Y. Supp. 587; Kingsley v. Melcher (1890) 56 Hun, 547, 10 N. Y. Supp. 63; Sherburne v. Taft (1892) 66 Hun, 626, 49 N. Y. S. R. 771, 20 N. Y. Supp. 757, affirmed in (1894) 142 N. Y. 619, 36 N. E. 819;

Comer v. Mackey (1893) 73 Hun, 236, 25 N. Y. Supp. 1023, affirmed in (1895) 147 N. Y. 574, 42 N. E. 29; Stern v. Ladew (1900) 47 App. Div. 331, 30 N. Y. Civ. Proc. Rep. 135, 62 N. Y. Supp. 267; Barlow v. Platt (1909) 133 App. Div. 364, 117 N. Y. Supp. 235; Lockwood v. Thorne (1854) 11 N. Y. 170, 62 Am. Dec. 81, on subsequent appeal (1858) 18 N. Y. 235; Chubbuck v. Vernam (1870) 42 N. Y. 432; Harley v. Eleventh Ward Bank (1879) 76 N. Y. 618; Manchester Paper Co. v. Moore (1887) 104 N. Y. 680, 10 N. E. 861; Wahl v. Barnum (1889) 116 N. Y. 87, 5 L.R.A. 623, 22 N. E. 280; Ruddy v. Person (1885) 20 Jones & S. 329; Martine v. Huyler (1890) 5 Silv. Sup. Ct. 466, 8 N. Y. Supp. 734.

North Carolina.—Harrison v. Bradley (1847) 40 N. C. (5 Ired. Eq.) 136; Costin v. Baxter (1849) 41 N. C. (6 Ired. Eq.) 197; Gooch v. Vaughan (1885) 92 N. C. 610. See also Hawkins v. Long (1876) 74 N. C. 781.

Oregon. — Fleischner v. Kubli (1891) 20 Or. 328, 25 Pac. 1086; Hoyt v. Clarkson (1892) 23 Or. 51, 31 Pac. 198; Fisk v. Basche (1897) 31 Or. 178, 49 Pac. 981.

Pennsylvania. — Ruch v. Fricke (1857) 28 Pa. 241; Shillingford v. Good (1880) 95 Pa. 25; Varner's Appeal (1888) 2 Monaghan, 228, 16 Atl. 98; Anderson v. Best (1896) 176 Pa. 498, 35 Atl. 194; Peter's Estate (1902) 20 Pa. Super. Ct. 223.

Rhode Island. — Seamen v. Burt (1876) 11 R. I. 320.

South Carolina.—Main v. Howland (1831) 9 S. C. Eq. (Rich. Cas.) 352; McDow v. Brown (1870) 2 S. C. 95.

Tennessee.—Matton v. Cone (1878) 1 Lea, 14; Raht v. Union Consol. Min. Co. (1880) 5 Lea, 1; Fourth Nat. Bank v. Stahlman (1915) 132 Tenn. 367, L.R.A.1916A, 568, 178 S. W. 942.

Utah.—Robbins v. Woodhull (1876) 1 Utah, 317.

Vermont. — Hodges v. Hosford (1844) 17 Vt. 615.

Virginia. — Rixey v. Moorehead (1884) 79 Va. 575; Neff v. Wooding (1887) 83 Va. 432, 2 S. E. 731; Camp v. Wilson (1899) 97 Va. 265, 33 S. E. 591.

West Virginia.—*Ruffner v. Hewitt* (1874) 7 W. Va. 585; *Batson v. Findley* (1902) 52 W. Va. 343, 43 S. E. 142.

Wisconsin. — *Martin v. Beckwith* (1855) 4 Wis. 219; *Marsh v. Case* (1872) 30 Wis. 531; *Miller v. Chipewa County* (1883) 58 Wis. 630, 17 N. W. 535; *Freeman v. Bolzell* (1885) 63 Wis. 378, 23 N. W. 708. See also *Orr v. Le Claire* (1882) 55 Wis. 93, 12 N. W. 356; *Hawley v. Harran* (1891) 79 Wis. 379, 48 N. W. 676.

England. — *Pit v. Cholmondeley* (1754) 2 Ves. Sr. 565, 28 Eng. Reprint, 360; *Trueman v. Hurst* (1785) 1 T. R. 40, 99 Eng. Reprint, 960; *Hardwicke v. Vernon* (1798) 4 Ves. Jr. 411, 31 Eng. Reprint, 209, 4 Revised Rep. 244; *Fowler v. Wyatt* (1857) 24 Beav. 232, 53 Eng. Reprint, 347.

"When parties, having mutual matters of account between them growing out of a contract, deliberately account together and state a balance, and the party who, on such accounting, is found indebted to the other, pays the debt or gives a written obligation for its payment, this settlement is so far conclusive between the parties that it cannot be reopened or gone into, either at law or in equity, except upon clear proof of fraud, or mistake, or of an express understanding that certain matters were left open for future adjustment." *McCormick v. Interstate Consol. Rapid Transit R. Co.* (1900) 154 Mo. 191, 55 S. W. 252.

So, in *Stiles v. Brown* (1843) 1 Gill (Md.) 350, the court said: "By the testimony which the record furnishes, we feel ourselves led conclusively to the opinion that the parties settled and adjusted their claims by the note of 13th October, 1832. This, of course, forecloses an inquiry into all antecedent transactions, unless upon the ground of error or fraud, and we perceive no evidence of either in the record."

In *Roberts v. Totten* (1852) 13 Ark. 609, the court, in holding that there was not sufficient evidence of fraud or mistake, said: "From these authorities, we feel warranted in saying that the settlement made between the complainant and defendant should be held as conclusive evidence of the

fact therein stated, unless successfully attacked and overturned, in part or in whole, for some one of the grounds enumerated, or of a like nature; and that, for the purpose of setting such settlement aside (admitting its execution), the answer is not evidence, but it devolves upon the defendant to point out and establish by competent evidence, clearly and satisfactorily, how or in what the fraud, mistake, or omission consists, and if for a cause only reaching particular parts of the settlement, then only as to the particular mistake or omission."

In *Downing v. Murray* (1896) 113 Cal. 455, 45 Pac. 869, the plaintiff sought to open a stated account, and the court, in holding that the *prima facie* evidence of correctness had not been overcome, said: "It abundantly appears that he did not make the settlement ignorantly. On the other hand, it appears that he knew, and for a long time before the settlement had known, what the other parties claimed, and substantially the extent and amounts of their claims; that he was a man of good business capacity; and that, looking over the whole field and considering the advantages and disadvantages of any particular line of action, he concluded to accept the account as stated, settle in accordance with it, and take the money which he could not then have otherwise received. Such an act cannot be set aside at the will of either party. It could be legally set aside only upon a showing of fraud, undue influence, etc., which showing was not made. There were averments of such things, and of a conspiracy against him, but there was no evidence making a *prima facie* case of their existence."

Similarly, in *Dobbs v. Campbell* (1901) 10 Kan. App. 185, 63 Pac. 289, the court, in discussing an account stated, said: "This settlement of account between the parties could be overthrown, or opened, or corrected only upon the ground of fraud, mistake, omission of some item, accident, or undue advantage, and the burden of proving these necessary elements rested upon the defendants seeking to impeach the account, and the rule is,

further, that a stronger case must be made where the statement is in writing, as in this case, without any ambiguity respecting the terms thereof. Now, the effect of this settlement, unimpeached, and the evidence existing in the writing, was for the determination of the court, and ought not to be submitted to the jury. . . . The defendants wholly failed to impeach the settlement by any evidence of fraud, or undue advantage, or accident. The mere matter of what they may have intended was not competent to be proven by parol; that is manifest by the writing, which cannot be so lightly impeached. The submission of this question to the jury, and the admission of evidence of services performed prior to the settlement, were prejudicial error," upon which to predicate an order for a new trial.

Likewise, in *Marsh v. Case* (1872) 30 Wis. 531, it was held that the evidence produced to prove an alleged error in a stated account was not sufficient for that purpose. The court said: "The evidence to surcharge a stated account should be clear and satisfactory, much more so than is the evidence in this case, which tends to show the existence of the alleged mistake. Indeed, upon this subject the testimony is about balanced. Certainly there is not such a preponderance in favor of the theory of the defendant as will justify a court in opening the account and making a new balance."

In *Keller v. Keller* (1885) 18 Neb. 366, 25 N. W. 364, the court, after stating the general rule that an account stated is prima facie evidence between the parties, said: "In this case there is no allegation in the answer of fraud or mistake in the settlement. It is denied that there was a settlement, but in this it is clearly proved to be untrue. The burden of proof is upon the defendant, therefore, to show that his account then due was not taken into consideration in the settlement. If the plaintiff had been indebted to the defendant at that time, as he claims, it is not very probable that he would have executed a promis-

sory note to the plaintiff for the amount found due to him."

Similarly, in *Naylor v. Lewiston & S. E. Electric R. Co.* (1908) 14 Idaho, 789, 96 Pac. 573, the defendant, on the trial of the case, offered certain evidence attempting to impeach and contradict the account as stated, but did not offer to show that there was any mistake or fraud therein. In holding that the account was conclusive unless fraud was alleged and proved, the court said: "The account rendered became an account stated, and when assented to, either expressly or impliedly, it became a new contract, and an action upon it was founded upon such new contract, and not upon the original items entering into the same. The general rule, as we understand it, is that when the stated account is admitted, it can only be avoided on proof of fraud, mistake, etc. . . . The court excluded all evidence which tended to impeach the items entering into the account stated. There was no effort to contradict or show that the account was not stated and admitted by the defendant railway company, except the evidence of Colonel Judson Spofford to the effect that the account was brought to him by Major Manning for the plaintiffs, who stated that the time for filing the lien would expire the next morning, and that he wanted his statement approved and signed up in such a way that he would have something to show for the work. That he made objection that the same was not sufficiently itemized, but he and Mr. Randolph signed the same, with the understanding that no lien would be filed. But fraud and mistake are not pleaded in the answer, nor would the evidence offered prove such defense if pleaded."

So, in *Atkinson v. Allen* (1895) 17 C. C. A. 570, 36 U. S. App. 255, 71 Fed. 53, it was held that an account stated was conclusive between the parties in the absence of fraud, mistake, or undue advantage, the court saying: "There was no fraud or mistake in the settlement. The account between the appellants and the appellees was itemized and stated before the notes and contract were signed, and before the

settlement was made. This account was carefully examined by the appellant Atkinson. There was no concealment of any of the items about which complaint is now made. The appellants knew that these items were included in the amount for which the notes were given when they were made. The proof is plenary that Atkinson agreed to the account stated, and signed and delivered the notes for its balance, and the contract for the commissions, with full knowledge of every defense and objection which the appellants now present. For more than a year after it was made they acquiesced in that settlement. . . . An account stated cannot be set aside in equity, in the absence of fraud, mistake, or undue advantage."

2. Illustrations.

In *Rudolph Wurlitzer Co. v. Dickinson* (1910) 153 Ill. App. 36, affirmed in (1910) 247 Ill. 27, 93 N. E. 132, the court stated its conclusion as follows: "Furthermore, a statement of the account was rendered to defendant each month, and the last statement, showing a balance of \$602.89 to be due, was mailed to the defendant March 1, 1908. The evidence shows that at the time of the trial, June 1, 1908, no objection to the account rendered on March 1, 1908, had been made to the plaintiff. Under the circumstances of this case, this absence of objection for such a length of time made the account rendered an account stated, and made the account, and proof that the account had been so rendered, admissible in evidence upon that theory. When a rendered statement of an account has been retained, without objection to the account or to the items contained therein, for such a length of time that the recipient has had a reasonable time within which to express objections, then he is in law regarded as having waived his objections, if any he had. Thereafter, if an action as upon an account stated be brought upon the claim, the original character or form of the debt, as well as what kind of evidence was necessary to establish the same, is unimportant, for the cause of action is then

not upon the original contract or transaction, but upon the promise, implied by the law where there is none expressed, to pay the balance. *Dick v. Zimmerman* (1904) 207 Ill. 636, 69 N. E. 754. While the recipient of an account rendered, which through lack of objection on his part has ripened into an account stated, is precluded from opening up previous disputes between the parties regarding the various items of the account, he is not precluded from showing fraud or mistake; but if he raises any such issue the burden of proof is upon him to establish it."

Similarly, in *Tollar v. Bohemian Bldg. & L. Asso.* (1914) 187 Ill. App. 405, the plaintiff sought an accounting of money alleged to be due from the defendant. The defense was an account stated. It was held that the defense was good, the abstract of the decision containing the following statement: "While an account stated and settled may be impeached for fraud or mistake in a court of equity, it can only be done upon a bill distinctly and clearly setting forth the specific errors, with distinct averments as to the time when the fraud, mistake, concealment, or misrepresentation that caused such omissions was discovered, and what the discovery is, so that the court may clearly see whether, by the exercise of ordinary diligence, the discovery might not have been earlier made." See to the same effect, *Lundquist v. Quist* (1914) 189 Ill. App. 535.

In *Chappelaine v. Dechenaux* (1808) 4 Cranch (U. S.) 306, 2 L. ed. 629, a bill was filed to set aside or correct for fraud a stated account, which was signed by the parties thereto. The account stated was pleaded in bar of so much of the bill as required that the subject should again be opened. It was held that the court had the power to examine the account stated between the parties, to discover errors or establish fraud. It was said: "That the plea in bar must be sustained, except so far as it may be in the power of the representatives of Chappelaine to show clearly that errors have been committed, is a proposition about which no member of

the court has doubted for an instant. No practice could be more dangerous than that of opening accounts which the parties themselves have adjusted, on suggestion, supported by doubtful or by only probable testimony. But if palpable errors be shown, errors which cannot be misunderstood, the settlement must so far be considered as made upon absolute mistake or imposition, and ought not to be obligatory on the injured party or his representatives, because such items cannot be supposed to have received his assent. The whole labor of proof lies upon the party objecting to the account, and errors which he does not plainly establish cannot be supposed to exist."

In *Marmion v. McClellan* (1897) 11 App. D. C. 467, an action on a note which had been delivered by the defendant to the plaintiff as the result of a course of dealing between the parties, the defendant sought to prove that certain items were not included in the settlement. The court held that the testimony on this subject did not go far enough to impeach the account stated, as it did not tend to show that the items were left out either through a mutual mistake of the parties, or the fraud of one of the parties. It was said: "He knew of those items at the time, and the presumption is that if they were justly due him at the time of those settlements, he would have insisted upon their going in reduction or liquidation of the balance due from him, and this presumption is conclusive upon him until he proves not only that they were not considered in those settlements, but some reasonable grounds why they were not, consistent with their being due him at the time. There was no error, therefore, in the action of the court below in rejecting the claim."

In *Gordon v. Frazer* (1898) 13 App. D. C. 382, it was held that the defense to an action on an account stated must relate to it, and not to matters of anterior liability, except in so far as they constitute a foundation for, or introduction to, the real substantial defense, impeaching the settlement for fraud, or error and mistake. The evi-

dence showed that the plaintiff had an interest in a claim pending before the State Department. This claim was assigned to the defendant, and after a satisfactory settlement was made by the State Department, the parties met, settled their accounts, and struck a balance in favor of the plaintiff. That settlement the defendant accepted and certified to as correct. The defendant sought to prove as a defense that she had otherwise reimbursed the plaintiff for her interest in the claim. It was held that the account as stated was *prima facie* correct, and could not be impeached *saye* for fraud, error, or mistake, and in stating that this *prima facie* evidence of correctness had not been overcome, the court said: "It is clearly no defense to the new cause of action, notwithstanding it may have grown out of the transaction relating to the assignment of the 'Mora claim,' for defendant to say: 'I never promised to give her any other consideration, either orally or in writing, for the assignment she made to me.' Granting the truth of that statement as to the transactions, and as of the time referred to, is no impeachment of the fairness and correctness of the voluntary settlement afterwards made of all matters of claim and counterclaim between the parties." See to the same effect, *MacPherson v. Harding* (1913) 40 App. D. C. 404; *Riley v. Mattingly* (1914) 42 App. D. C. 290.

In *Turner v. Pearson* (1893) 93 Ga. 515, 21 S. E. 104, the court, in discussing the conclusiveness of an account stated, said: "Where a debtor by promissory note, and his creditor, meet and have an accounting and settlement, and the debtor gives a new note for the balance due, in renewal of the old note, we do not think the debtor, when sued thereon, can, without alleging fraud or mistake, set up in a plea of payment alleged credits which ought to have been made upon the first note. If the defendant made the payments to the testator, as alleged, he ought to have known, when the accounting and settlement with the executor were had, whether these payments had been credited or not; he ought really to have known more about

this than the executor did, and he cannot be allowed, after renewing his note to the executor, to say that certain credits for payments made to the testator should be allowed him now, unless he alleges some conduct or representations on the part of the executor, in procuring the new note, amounting to fraud, or that something was said or done by the executor by which he [the defendant] was deceived or misled. There being no such allegation in the plea in question, it was properly stricken."

In *Lull & S. Co. v. Kemmerer Vehicle Co.* (1907) 136 Iowa, 549, 114 N. W. 22, the court said: "In this situation—and having in mind that the relations between the parties were in all respects referable to the one contract—we think the defendant was warranted in concluding that the balance shown by the statement presented from the viewpoint of plaintiff the full measure of its unsettled demand. And the court was warranted in finding that defendant, in putting aside its objections to the account as stated, and in acceding to the balance and making payment, did so upon the understanding that thereby settlement of all matters growing out of the contract had been accomplished. Accordingly, we are agreed that it did not remain for plaintiff to thereafter bring forward its present claim for damages and predicate a suit thereon. It is a well-settled rule that, where an account has been settled, impeachment thereof can be made only on the ground of fraud or mistake."

Bruen v. Hone (1848) 2 Barb. (N. Y.) 586, was an application to open a stated account, the bill charging fraud and error. The court held that the evidence produced was not sufficient to allow the account to be opened, either generally or as to particular items of the account. It was said: "There is no ground, therefore, for opening the whole account. And the only question is whether the plaintiff shall be allowed to surcharge and falsify it. A surcharge is appropriately applied to the balance of the whole account, and supposes credits to be omitted which ought to be al-

lowed; and falsification applies to some item of the debits, supposing it to be wholly false, or in part erroneous. 1 Story, Eq. Jur. § 525. The effect of surcharging and falsifying is to leave the account in full force and vigor, as stated account, except so far as it can be impugned by the opposing party."

The production of a check to show that an item had been paid after an account had been stated is not sufficient to overthrow the prima facie presumption that the account is correct. *Varner's Appeal* (1888) 2 Monaghan (Pa.) 228, 16 Atl. 98.

In *Matton v. Cone* (1878) 1 Lea (Tenn.) 14, the court refused to open an account, which had been closed by a formal settlement and the giving of a note which was secured by a deed of trust. The papers on which the settlement was made had been destroyed by mutual consent, except one paper on which they had made their figures and calculations, and this paper had been lost.

In *Carter v. Carter* (1908) 129 Mo. App. 467, 107 S. W. 467, the evidence showed that one of the parties submitted an account and deposited the amount which he admitted he owed in a bank for the other party, who subsequently accepted it from the bank. In holding that this was conclusive as an account stated, the court said: "If the reception of the amount deposited to plaintiff's credit, and the notes deposited therewith in said bank, was a settlement of the dispute between the parties as to the amount due plaintiff, the plaintiff was not entitled to recover. It is settled law where parties, having mutual matters of account between them, account together and state a balance, and the party who on accounting is found indebted to the other pays the debt, the transaction is conclusive upon the parties, and cannot be reopened or gone into, either at law or in equity, except upon proof of fraud or mistake."

In *Stern v. Ladew* (1900) 47 App. Div. 331, 30 N. Y. Civ. Proc. Rep. 135, 62 N. Y. Supp. 267, it appeared that the parties entered into an agreement, by the terms of which the defendants

were to purchase hides from the plaintiff, paying the highest market price. The defendants rendered weekly accounts to the plaintiff, with a check to cover the amount due him. The plaintiff alleged that these statements were erroneous, in that they did not give the highest market price for the goods furnished. In holding that the accounts were conclusive, the court said: "This testimony conclusively establishes, if the presumption did not already exist, that, during the period of time when the plaintiff was selling his hides to the defendants and their predecessors, he had actual knowledge of the market price of hides, and kept himself posted upon that subject. The means which he adopted to inform himself of the market price were precisely the same means which all other dealers in hides, including the defendants, resorted to for the same purpose during the same period. . . . Disposition has been made of this case upon the theory that there has been a mutual mistake of parties. We think that, upon the testimony, it is too clear for argument that the defendants were not mistaken in anything that they did in respect to this market price. It is not disputed that they made the inquiries, or that, based upon such inquiries, they fixed the market value of the plaintiff's hides. It is equally true, as we have seen, that, had the plaintiff made examination of the weekly statements, if there was any discrepancy between the highest market price and the price set out in the statements, he could immediately have discovered it. It is true that an account stated may be impeached and the account opened and corrected, for errors therein arising either from mistake or fraud."

In *Miller v. Chippewa County* (1883) 58 Wis. 630, 17 N. W. 535, the action was brought to recover of the county of Chippewa for work and labor performed in building a courthouse, and for damages on account of an alleged breach, or breaches, of the contract for building the same by the county. The defendant, by its answer, denied the allegations of the complaint, and further alleged that, after

the performance of all the work claimed to have been done by the respondents, there had been a complete settlement and adjustment of all the matters and things mentioned in the complaint, and that on such settlement the county paid to the plaintiffs a sum of money which was received by them in full satisfaction and discharge of all debts, claims, demands, and liabilities against the county, and that on such settlement mutual receipts were given, each to the other, in full satisfaction and payment thereof. On the trial no evidence was offered to show fraud or mistake in the making of the settlement, and the court, in holding it to be conclusive, said: "It is very clear that the county board construed the contract of settlement as we think it should be construed, and has paid all it agreed to pay, according to the rightful construction of its terms, and if the plaintiffs did not so understand it, it was not the fault of the county board. Having assented to it at the time, they must be held to have agreed to its terms, and they cannot be permitted to avoid the effect of the contract of settlement by alleging that they had a mistaken conception of its effect, without showing, at least, that they were induced to sign the contract by some acts of the county board which would amount to a fraud upon their rights."

In *Hallowell Granite Works v. Orleans* (1918) 144 La. 419, 80 So. 610, the evidence showed that the account between the parties was balanced several times, and closed by the defendant giving his promissory notes for such balances as existed. In an action brought on the notes, it was held that the defendant could not show that the balances were not correct, without alleging fraud or error.

In *Long-Bell Lumber Co. v. Stump* (1898) 30 C. C. A. 260, 57 U. S. App. 546, 86 Fed. 574, it appeared that a contract was entered into by the terms of which the plaintiff was to furnish lumber to the defendant. During the whole period of dealings between the parties after the lumber was shipped, as it came in by carloads it was graded by the defendant, and accounts of

these gradings and shipments were sent to the plaintiff at the beginning of each month. The defendant retained these various accounts, and at no time over a period of several years was the accuracy of any of the statements questioned until this action was brought. The court held that the vendor was estopped from impeaching any of these accounts, except for fraud or mistake.

Similarly, in *Fitzgerald v. First Nat. Bank* (1902) 52 C. C. A. 276, 114 Fed. 474, the evidence showed that the defendants contracted with the plaintiff's assignor to furnish meat for the use of its employees. A separate contract was also entered into between the plaintiff's assignor and certain subcontractors under the defendants. The vendor rendered monthly statements to the defendants of meat furnished to them, but made no reference to any produce furnished to the subcontractors. More than three years after the work was completed, a statement was rendered to the defendants charging them with the meat which had been furnished to the subcontractors. This claim was the basis of the present action. In holding that these accounts were conclusive, there being no evidence of fraud, mistake, or undue advantage, the court said: "There is, indeed, nothing in this record to overcome the conclusive effect of the stated accounts to which reference has been made, and the letters which have been quoted. *Schleuning & Young* delivered twelve accounts to *Fitzgerald & Brother*, during the progress of this work and just subsequent to its completion, none of which contain any claim for beef furnished to *Chamberlain & Skinner* or *Wade & Jones*. At the request of *Fitzgerald & Brother*, they furnished a final account in which they made no claim for the beef furnished *Chamberlain & Skinner*, but which contained a claim for that furnished to *Wade & Jones*, which they immediately afterwards, in writing, conceded was improperly charged against the defendants. It is not claimed that *Schleuning & Young* were induced by fraud, mistake, or by the taking of any undue advantage,

to state these accounts; and in the absence of fraud, mistake, or undue advantage, an account stated is conclusive, and estops the party who presents it from assailing its correctness."

So, in *Ranald S. S. Co. v. Wesenberg & Co.* (1903) 122 Fed. 969, the court said: "All the items now complained of by the libellant were known to the master of the ship before the settlement with the respondent, and most of them had been the subject of a good deal of discussion. In this state of affairs the captain accepted the account, received and afterwards cashed a check for the balance appearing to be due thereon, and gave a receipt in full. There was no fraud, accident, or mistake about the settlement, so far as I can discover. . . . If he had objections to any item, he should have stated them, and stood by them, if he saw proper so to do. But he cannot be permitted to settle them in due form, concealing the objections that he continued to entertain, and concealing also his purpose to attack the settlement, and then to repudiate what was done, although he is unable to prove either fraud, accident, or mistake in the transaction."

Where a monthly report was made of lumber received, and the receiving party failed to object to the quantity stated as having been delivered until the trial of the action, it was held that the objection was made at too late a date, unless fraud or mistake could be shown. *Chapin v. Norton* (1855) 6 McLean, 500, Fed. Cas. No. 2,599.

In *Marye v. Strouse* (1880) 6 Sawy. 204, 5 Fed. 483, 2 Mor. Min. Rep. 294, it was held that a charge of interest computed at a rate greater than the conventional rate, in a statement of an account, was conclusive on the debtor where his conduct had been such as to make the statement an account stated. The court said: "I find, then, that *Strouse* knew the rate of interest charged against him in his account. There was no mistake or fraud about it. Having this knowledge, he not only receives and retains accounts without objection, but even pays them. The method of keeping and rendering

accounts continued so long as to become a regular course of dealing between the parties. Under such circumstances, the authorities are clear that an account stated cannot be opened because an item of interest which went into it could not have been recovered by suit, provided such item is not illegal."

It appeared by *Kilpatrick v. Henson* (1886) 81 Ala. 464, 1 So. 188, that a settlement had been made between the two parties, between whom no confidential relation existed, and a note and mortgage were executed by the party against whom the balance was found. Subsequently a second settlement was made, and closed by a new note and mortgage, and after the lapse of seven years this action was brought to foreclose the mortgage. It was attempted by the mortgagors to impeach the settlement because of errors and omissions in the account. The court held that the account could not be impeached, saying: "While the settlement is not conclusive on the defendants, and does not preclude them to invoke the ample and undoubted power of a court of equity to open it, and to re-examine the accounts and transactions, when there has been fraud, imposition, or undue advantage which vitiates it, and by reason thereof an incorrect and false balance is ascertained, the power is exercised with caution, and with a due regard to the certainty and security of business transactions between parties *sui juris*, when no confidential relation exists."

In *Brydie v. Miller* (1809) 1 Brock. 147, Fed. Cas. No. 2,071, it appeared that a final settlement of the accounts of a firm was made after its dissolution. Subsequent to the making of this settlement one of the members of the firm died, whereupon the plaintiff, as executor of the deceased partner, filed a bill to compel a resettlement, alleging the existence of errors in the original settlement and the inability of the plaintiff's testate fully to understand the nature of the settlement. In holding to the contrary and that the account was conclusive, the court said: "It is a necessary consequence of this right that an individual who

has settled his accounts with another, and arranged the transactions between them in a manner which receives the full and free assent of his mind, has a right to consider those transactions closed, and is consequently bound so to consider them. That which might before have been a matter of controversy is adjusted by mutual consent, and claims which might have been uncertain are reduced to certainty. It is no objection to this adjustment that some sacrifice may have been made. The party had a right to make the sacrifice. He had a right to balance in his own mind the advantages of the settlement against its disadvantages, and, if in his judgment the former preponderated, no other individual has a right to say that he was mistaken, and that therefore transactions which he had closed shall remain open. It follows that an account settled between two individuals, each exercising his own free judgment on every part of it, is binding on both as to all the items of that account. Mistakes may be corrected, omissions may be supplied, impositions may be relieved against, but a principle, understood, considered, and agreed upon by a party in a situation fairly to exercise his own judgment and to act in conformity with that judgment, must bind himself and his representatives, in and out of court."

In *McIntire v. Barnes* (1878) 4 Colo. 285, the evidence showed that an owner and a contractor entered into a settlement of the accounts between them. The court, in discussing its conclusiveness, said: "With a full knowledge of all the circumstances attending the carrying out of the contract, this settlement is had. And although it is true that an account rendered is not necessarily conclusive, it is always admissible in evidence to be weighed by the court or jury as other evidence. That the court treated it in the light of a final settlement between the parties, made for the evident purpose of enabling McIntire to adjust the lien claims against the building, is apparent from the decree. Having in view the concomitant circumstances, we cannot say that, all

the testimony being considered, the finding of the court is unsupported by the weight of evidence. We will not disturb it."

b. Impeachment for fraud or mistake.

1. Rule stated.

An account stated is not absolutely conclusive, but simply furnishes prima facie evidence of its correctness. Hence, it may be impeached by proof of fraud, omission, or mistake.

United States.—*Freeland v. Heron* (1812) 7 Cranch, 147, 3 L. ed. 297; *Perkins v. Hart* (1826) 11 Wheat. 237, 6 L. ed. 463; *United States v. Irving* (1843) 1 How. 250, 11 L. ed. 120; *Wiggins v. Burkham* (1870) 10 Wall. 129, 19 L. ed. 884; *Soule v. United States* (1879) 100 U. S. 8, 25 L. ed. 536; *Standard Oil Co. v. Van Etten* (1882) 107 U. S. 325, 27 L. ed. 319, 1 Sup. Ct. Rep. 178; *McLaughlin v. United States* (*Western P. R. Co. v. United States*) (1888) 107 U. S. 526, 27 L. ed. 621, 2 Sup. Ct. Rep. 862; *Harden v. Gordon* (1823) 2 Mason, 541, Fed. Cas. No. 6,047; *Talcott v. Chew* (1885) 27 Fed. 273; *Baxter v. Card* (1893) 59 Fed. 165; *Burrill v. Crossman* (1898) 33 C. C. A. 663, 62 U. S. App. 368, 91 Fed. 543, reversed in (1900) 179 U. S. 100, 45 L. ed. 106, 21 Sup. Ct. Rep. 38; *The Washtenaw* (1908) 163 Fed. 372; *Murphy v. Springs & Co.* (1912) 45 L.R.A. (N.S.) 539, 118 C. C. A. 524, 200 Fed. 372.

Alabama.—*Langdon v. Roane* (1844) 6 Ala. 518, 41 Am. Dec. 60; *Walker v. Driver* (1845) 7 Ala. 679; *Rembert v. Brown* (1850) 17 Ala. 667; *Cowan v. Jones* (1855) 27 Ala. 317; *Paulling v. Creagh* (1875) 54 Ala. 646; *State ex rel. Lott v. Brewer* (1879) 64 Ala. 287; *Sloan v. Guice* (1884) 77 Ala. 394; *Ware v. Manning* (1888) 86 Ala. 238, 5 So. 682; *Rice v. Schloss* (1890) 90 Ala. 416, 7 So. 802; *Hunt v. Stockton Lumber Co.* (1896) 113 Ala. 387, 21 So. 454; *Cudd v. Cowley* (1919) 203 Ala. 665, 85 So. 13.

Arkansas.—*State v. Jennings* (1850) 10 Ark. 428; *Bertrand v. Taylor* (1877) 32 Ark. 470; *St. Louis Cooperage Co. v. Jackson* (1916) 121 Ark. 633, 182 S. W. 534.

California. — *Green v. Thornton*

(1892) 96 Cal. 67, 30 Pac. 965; *E. W. McLellan Co. v. East San Mateo Land Co.* (1913) 166 Cal. 736, 137 Pac. 1145; *Vance v. Supreme Lodge, F. B.* (1911) 15 Cal. App. 178, 114 Pac. 83; *Union Lumber Co. v. J. W. Schouten & Co.* (1914) 25 Cal. App. 80, 142 Pac. 910; *White v. Thompson* (1919) — Cal. App. —, 180 Pac. 953.

Colorado. — *St. Louis Lager Beer Bottling Co. v. Colorado Nat. Bank* (1884) 8 Colo. 70, 5 Pac. 800; *Gutshall v. Cooper* (1906) 37 Colo. 212, 6 L.R.A. (N.S.) 820, 86 Pac. 125; *Colorado Fuel & Iron Co. v. Chappell* (1898) 12 Colo. App. 385, 55 Pac. 606; *Rosenbaum v. McEwen* (1913) 24 Colo. App. 58, 131 Pac. 780.

Connecticut. — *Compare Cogswell v. Whittlesey* (1792) 1 Root, 384.

Dakota.—*First Nat. Bank v. Honeyman* (1889) 6 Dak. 275, 42 N. W. 771.

Delaware. — *McMullen v. Lockwood* (1892) 4 Del. Ch. 568.

District of Columbia.—*MacPherson v. Harding* (1913) 40 App. D. C. 404; *Riley v. Mattingly* (1914) 42 App. D. C. 290. See also *Gordon v. Frazer* (1898) 13 App. D. C. 382.

Florida. — *La Trobe v. Hayward* (1870) 13 Fla. 190; *Martyn v. Arnold* (1895) 36 Fla. 446, 18 So. 791; *Daytona Bridge Co. v. Bond* (1904) 47 Fla. 136, 36 So. 445; *Poppell v. Culpepper* (1908) 56 Fla. 515, 47 So. 351.

Illinois.—*Washington County v. Parlier* (1848) 10 Ill. 232; *Sutphen v. Cushman* (1864) 35 Ill. 186; *Town v. Wood* (1865) 37 Ill. 512; *Eddie v. Eddie* (1871) 61 Ill. 184; *Cumberland County v. Edwards* (1875) 76 Ill. 544; *Stage v. Gorich* (1883) 107 Ill. 361; *State v. Illinois C. R. Co.* (1910) 246 Ill. 188, 92 N. E. 814; *Gruby v. Smith* (1883) 13 Ill. App. 43; *Hodge v. Boynton* (1885) 16 Ill. App. 524; *Hopkinson v. Jones* (1888) 28 Ill. App. 409; *Pick v. Slimmer* (1897) 70 Ill. App. 358; *McDavid v. Ellis* (1898) 78 Ill. App. 381; *Concord Apartment House Co. v. Alaska Refrigerator Co.* (1898) 78 Ill. App. 682; *Gottfried Brewing Co. v. Szarkowski* (1899) 79 Ill. App. 583; *Poppers v. Schoenfeld* (1901) 97 Ill. App. 477; *Rettig v. Southern Illinois Nat. Bank* (1909) 147 Ill. App. 193; *Rudolph Wurlitzer Co. v. Dickinson*

(1910) 153 Ill. App. 36, affirmed in (1910) 247 Ill. 27, 93 N. E. 132; Employers' Liability Assur. Corp. v. Kelly-Atkinson Constr. Co. (1915) 195 Ill. App. 620. See also Jones v. University Research Extension (1910) 157 Ill. App. 132.

Indiana.—Armstrong Furniture Co. v. Kosure (1879) 66 Ind. 545; Public Savings Co. v. Greenwald (1918) — Ind. App. —, 121 N. E. 47, denying rehearing (1918) — Ind. App. —, 118 N. E. 556.

Iowa.—Plano Mfg. Co. v. Kautenberger (1903) 121 Iowa, 213, 96 N. W. 743; Kirkpatrick v. Tipton (1908) — Iowa, —, 114 N. W. 887. See also Hollenbeck v. Ristine (1898) 105 Iowa, 488, 67 Am. St. Rep. 306, 75 N. W. 355. Compare Schoonover v. Osborne Bros. (1899) 108 Iowa, 453, 79 N. W. 263.

Kansas. — Leavenworth County v. Keller (1870) 6 Kan. 510; Clark v. Marbourg (1885) 33 Kan. 471, 6 Pac. 548; McCUE v. HOPE (reported herewith) ante, 581.

Kentucky. — Wickliffe v. Mosely (1830) 4 J. J. Marsh. 172; Barnett v. Barnett (1831) 6 J. J. Marsh. 499; Waggoner v. Minter (1832) 7 J. J. Marsh. 173; Lee v. Reed (1836) 4 Dana, 109; Louisville Bkg. Co. v. Asher (1901) 112 Ky. 138, 99 Am. St. Rep. 283, 65 S. W. 133, rehearing denied in (1901) 23 Ky. L. Rep. 1661, 65 S. W. 831.

Louisiana. — Green v. Glasscock (1844) 9 Rob. 119; Taylor v. Simon (1859) 14 La. Ann. 351; Oglesby v. Renwick (1874) 26 La. Ann. 668.

Maine.—Holmes v. Morse (1862) 50 Me. 102.

Maryland.—Barger v. Collins (1826) 7 Harr. & J. 213; Brown v. Rowles (1864) 21 Md. 11; Hardy v. Chesapeake Bank (1879) 51 Md. 562, 34 Am. Rep. 325.

Massachusetts. — Farnam v. Brooks (1830) 9 Pick. 212.

Michigan.—Bourke v. James (1856) 4 Mich. 336. See also Stevens v. Saginaw County (1886) 62 Mich. 579, 29 N. W. 492.

Minnesota.—Mower County v. Smith (1875) 22 Minn. 97; Behrens v. Kruse (1916) 132 Minn. 69, 155 N. W. 1065.

See also Wharton v. Anderson (1881) 28 Minn. 301, 9 N. W. 860.

Mississippi. — Peteet v. Crawford (1875) 51 Miss. 43; Peebles v. Yates (1906) 88 Miss. 289, 40 So. 996.

Missouri.—Marion County v. Phillips (1869) 45 Mo. 75; Kronenberger v. Binz (1874) 56 Mo. 121; State use of Carroll County v. Roberts (1876) 62 Mo. 388; St. Louis Gaslight Co. v. St. Louis (1884) 84 Mo. 202; Kenneth Invest. Co. v. National Bank (1902) 96 Mo. App. 125, 70 S. W. 173; Dempsey v. McGinnis (1920) — Mo. App. —, 219 S. W. 148. See also Union Electric Light & P. Co. v. Surgical Supply Co. (1907) 122 Mo. App. 631, 99 S. W. 804.

Nebraska. — Kennedy v. Goodman (1883) 14 Neb. 585, 16 N. W. 834; McKinster v. Hitchcock (1886) 19 Neb. 100, 26 N. W. 705.

New Jersey.—Vanderveer v. State-sir (1877) 39 N. J. L. 593.

New York.—Wilde v. Jenkins (1834) 4 Paige, 481; Hutchinson v. Market Bank (1867) 48 Barb. 302; Barker v. Hoff (1876) 52 How. Pr. 382; Beach v. Kidder (1889) 55 Hun, 603, 5 Silv. Sup. Ct. 219, 8 N. Y. Supp. 587; Bergen v. Hitchings (1897) 22 App. Div. 395, 48 N. Y. Supp. 96, appeal dismissed in (1900) 162 N. Y. 619, 57 N. E. 1120; Sedgwick v. Macy (1897) 24 App. Div. 1, 49 N. Y. Supp. 154; Donald v. Gardner (1899) 44 App. Div. 235, 60 N. Y. Supp. 668; Frothingham v. Satterlee (1902) 70 App. Div. 613, 75 N. Y. Supp. 21; Boyce v. Walker (1909) 130 App. Div. 305, 114 N. Y. Supp. 166; Townsend v. Meyers (1909) 134 App. Div. 540, 119 N. Y. Supp. 478; American Lace Mfg. Co. v. Levy (1915) 92 Misc. 156, 155 N. Y. Supp. 232; Weissner v. Denison (1854) 10 N. Y. 68, 61 Am. Dec. 731; McDougall v. Cooper (1865) 31 N. Y. 498; Champion v. Joslyn (1871) 44 N. Y. 653; Massachusetts Mut. L. Ins. Co. v. Carpenter (1872) 49 N. Y. 668; Stenton v. Jerome (1873) 54 N. Y. 480; Welsh v. German American Bank (1878) 73 N. Y. 424, 29 Am. Rep. 175; Sharkey v. Mansfield (1882) 90 N. Y. 227, 43 Am. Rep. 161; Carpenter v. Kent (1886) 101 N. Y. 591, 5 N. E. 787; Samson v. Freedman (1886) 102 N. Y.

699, 7 N. E. 419; *Shipman v. Bank of State* (1891) 126 N. Y. 318, 12 L.R.A. 791, 22 Am. St. Rep. 821, 27 N. E. 371; *Conville v. Shook* (1895) 144 N. Y. 686, 39 N. E. 405; *Ract v. Duviard-Dime* (1889) 21 N. Y. S. R. 736, 4 N. Y. Supp. 156; *Bradley Fertilizer Co. v. South Pub. Co.* (1892) 44 N. Y. S. R. 119, 17 N. Y. Supp. 587. See also *McFee v. Van Deboe* (1916) 160 N. Y. Supp. 717. Compare *Clark v. Fairchild* (1840) 22 Wend. 576.

North Dakota. — *Montgomery v. Fritz* (1898) 7 N. D. 348, 75 N. W. 266.

Ohio. — *Fowler v. Piatt* (1832) *Wright*, 206.

Oregon. — *Normandin v. Gratton* (1885) 12 Or. 505, 8 Pac. 653.

Pennsylvania. — *Kirkpatrick v. Turnbull* (1795) *Addison* (Pa.) 260; *Payne v. Nicholas* (1857) 2 Phila. 220; *Emmons v. Stahlnecker* (1849) 11 Pa. 366; *Sergeant v. Ewing* (1860) 36 Pa. 156; *Rehill v. McTague* (1886) 114 Pa. 82, 60 Am. Rep. 341, 7 Atl. 224; *Tustin v. Philadelphia & R. Coal & I. Co.* (1915) 250 Pa. 425, 95 Atl. 595; *Allegheny County Light Co. v. Thomas* (1906) 31 Pa. Super. Ct. 102.

South Carolina. — *Pratt v. Weyman* (1825) 6 S. C. Eq. (1 M'Cord) 156; *Porter v. Cain* (1841) 16 S. C. Eq. (M'Mull.) 84; *Murrel v. Murrel* (1848) 21 S. C. Eq. (2 Strobb.) 148, 49 Am. Dec. 664; *M'Crae v. Hollis* (1810) 4 S. C. Eq. (4 Desauss.) 122; *Carrere v. Whaley* (1882) 17 S. C. 595.

Tennessee. — *Bankhead v. Alloway* (1868) 6 Coldw. 56.

Texas. — *Neyland v. Neyland* (1857) 19 Tex. 423; *Fox v. Sturm* (1858) 21 Tex. 406; *Barkley v. Tarrant Co.* (1880) 53 Tex. 251; *H. E. & W. T. R. Co. v. Snelling* (1883) 59 Tex. 116; *McKay v. Overton* (1885) 65 Tex. 82; *Seiber v. Johnson Mercantile Co.* (1905) 40 Tex. Civ. App. 600, 90 S. W. 516. See also *Horan v. Long* (1853) 11 Tex. 230. And see *DODSON v. WATSON* (reported herewith) ante, 583.

Utah. — *Lawlor v. Jennings* (1898) 18 Utah, 35, 55 Pac. 60.

Washington. — *Baxter v. Waite* (1884) 2 Wash. Terr. 228, 6 Pac. 429.

West Virginia. — *Chapman v. Liverpool Salt & Coal Co.* (1905) 57 W. Va. 395, 50 S. E. 601; *HOOVER v. NEILL*

(reported herewith) ante, 575. See also *Harman v. Maddy Bros.* (1905) 57 W. Va. 66, 49 S. E. 1009.

Wisconsin. — *Hill v. Durand* (1883) 58 Wis. 160, 15 N. W. 390; *Segelke & K. Mfg. Co. v. Vincent* (1908) 135 Wis. 237, 115 N. W. 806.

England. — *Rose v. Savory* (1835) 2 Bing. N. C. 145, 132 Eng. Reprint, 57, 1 Hodges, 269, 2 Scott, 199; *Thomas v. Hawkes* (1841) 8 Mees. & W. 140, 151 Eng. Reprint, 983, 1 Dowl. N. S. 346, 11 L. J. Exch. N. S. 54, 5 Jur. 1115; *Arthur v. Dartch* (1845) 9 Jur. 118; *Holgate v. Shutt* (1884) L. R. 28 Ch. Div. 111, 54 L. J. Ch. N. S. 436, 51 L. T. N. S. 673, 49 J. P. 228.

In *Seiber v. Johnson Mercantile Co.* (1905) 40 Tex. Civ. App. 600, 90 S. W. 516, it was said: "It is sought to justify the summary instruction by proof that a settlement had been made between the parties after the payments in controversy had been made. But a settlement would not be conclusive of appellant's rights, if he were at the time in fact ignorant of appellee's failure to give him credits to which he was entitled. It would not conclude him as to a matter not within the contemplation of the parties to the settlement. Nor does the fact that appellee furnished him with statements of his account from time to time, which statements showed that he had never received the credits contended for by him, in any manner estop him to assert this cause of action."

In *Bourke v. James* (1856) 4 Mich. 336, the court said: "While it is true, as a general proposition, that a settlement of accounts between parties is, prima facie, a settlement of all accounts, yet, as there was evidence in this case tending to show that the demand for which this action is brought was expressly excluded from the settlement of the 14th of February, 1854, the circuit judge very properly left it to the jury to determine what was settled, and whether the facts attending the settlement showed a relinquishment of the demand in question by the defendants in error."

So, in *Marion County v. Phillips* (1869) 45 Mo. 75, it was said: "We hold, then, that the defendant in the

case at bar, in making his settlement with the county court of Marion county, settled and adjusted his claims and liabilities with the public agents of the county; that the entry upon the records of the court was not a judgment at law, but the record of the results of that settlement—a statement of his account, as adjusted between him and the county—and that any mistake in that settlement, clearly proved, is open to correction, and in the same manner as though it were made with an individual.”

In *Carpenter v. Kent* (1886) 101 N. Y. 591, 5 N. E. 787, the court said: “There was a dispute as to two or three items, and those disputes were settled to the satisfaction of the parties. There never was any dispute as to the \$1,550. That amount the defendants owed to the plaintiffs on account of the grain which they had sold for them. We do not think that the defendants had the right to have the whole account opened, but that they were bound by the account actually settled, unless they could show some mistake or fraud in the settlement. . . . Where an account has thus been adjusted by the parties, if any mistake is subsequently discovered, the whole account need not be opened and readjusted, but the mistake can be corrected, and the rights of the parties readjusted as to such mistake. Here, leaving everything to stand just as the parties actually adjusted and settled the items of the account, there still remains due to the plaintiffs the sum which they claim in this action, and that sum they were entitled to recover without opening the account.”

In *Green v. Thornton* (1892) 96 Cal. 67, 30 Pac. 965, the court held that an account stated was not conclusive, saying: “The question, then, is, Was the defendant entitled to have the account in suit opened and re-examined? It will be observed that when the account was made out there was no claim by plaintiff that defendant was indebted to the estate in any sum whatever, and he was not in fact so indebted. He held the Bailey note, and was authorized to collect it, but, without

any fault on his part, never succeeded in doing so. It was partnership assets, and, if collected, a portion of the proceeds would have belonged and been payable to the plaintiff; but defendant was under no obligation, legal or equitable, to pay her any part of it, unless and until that event should happen. He then believed, from the statements of Winders, that the note would be paid in full, and, acting on this belief, he seems to have rendered the account in pursuance of the provisions of § 1585 of the Code of Civil Procedure, for the purpose of adjusting the partnership affairs and determining what part of the money due on the note, when paid, would go to the plaintiff. Under these circumstances, it seems neither reasonable nor just that defendant should be made to pay plaintiff money which evidently does not belong to her. We think the defendant was entitled to impeach the account, and that the pleadings were sufficient to enable him to do so.”

In *Cudd v. Cowley* (1919) 203 Ala. 665, 85 So. 13, a settlement between mortgagors and mortgagee, which amounted to an account stated, was held strong presumptive evidence that the amount agreed upon was correct, and that the obligation to pay it was valid, and imposed upon the party who would avoid it the burden of showing its falsity by reason of fraud and mistake; but it was held that the mortgagors would be entitled to make such showing, even in a collateral proceeding at law.

2. Illustrations.

In *Talcott v. Chew* (1885) 27 Fed. 273, an action to recover on an alleged account stated, it appeared that the account, being a general account current, was inclosed in a letter from the plaintiff to the defendants, with the request that the latter remit the balance. On receipt of this statement, the defendants wrote that they were very much pressed with business, but in a few days would examine the statement carefully. At the end of ten days the plaintiff, not having heard from the defendants, drew a sight draft on them for the amount of the balance.

On two different occasions subsequent to drawing the draft, the plaintiff communicated with the defendants, stating that he had received no statement of errors. The court laid down the familiar rule that an account stated was but prima facie evidence of the items contained in it, and that a party thereto might prove fraud, omission, and mistake. Applying this rule, the court said that an auditor appointed to examine the account was justified in correcting an error appearing therein.

In *Washington County v. Parlier* (1848) 10 Ill. 232, a motion was made under a statute by a county to recover a balance in the hands of a collector of revenue, which he had not paid over or accounted for. The defendant gave in evidence an order from the records of the county commissioners' court, showing a settlement with a balance in his favor of \$152.16, and then a subsequent order showing that, upon a re-examination of the accounts, it appeared that he had been allowed too great a credit by \$115.76. These orders were objected to by the plaintiff, but admitted in evidence by the court. The plaintiff offered to prove a mistake in the settlement, by showing that the defendant had been credited with \$300 too much. This the court refused to allow, to which the plaintiff excepted. The court held that the explanatory evidence should have been admitted, saying: "In the case before us, had the mistake been against the defendant, he would think it very hard to be concluded by the order, especially when he has proved that it was agreed at the time that all mistakes should be corrected. In making this settlement, the commissioners act as the agents of the county, and do not adjudicate as a court. They could enter up no judgment against the defendant for the balance found due, nor have they any means of enforcing payment of such balance except by a resort to the ordinary courts of law. As the fiscal agents of the county, their mistakes may be inquired into and corrected, as well as those of an individual acting in his own behalf. The record of this settlement is but a

memorandum of the transaction, and is only prima facie evidence of the correctness of the result stated." See to the same effect, *Cumberland County v. Edwards* (1875) 76 Ill. 544; *Leavenworth County v. Keller* (1870) 6 Kan. 510.

In *Allegheny County Light Co. v. Thomas* (1906) 31 Pa. Super. Ct. 102, the evidence showed that the plaintiff undertook to furnish electricity to the defendant, and the latter to pay therefor the price fixed in the contract. For the purpose of determining the amount of electricity used, it was agreed that a wattmeter should be installed, and that all bills should be calculated on the reading of the meter, such reading to be final and conclusive. It was not alleged by the defendant that the quantity of electricity charged for was not consumed by him. His defense was that monthly statements were made to him from time to time, according to which he made payment, that such settlements constituted accounts stated, and that they were conclusive between the parties. The plaintiff claimed that, while it was true that settlements were made from time to time, a mistake occurred in each of the settlements because of an error of an accountant of the plaintiff in entering the proper charge against the defendant. In holding that the account could be shown to be incorrect, the court said: "It is well settled in this state, both at law and in equity, that a stated account may be opened or falsified on proof of mistake. Such an account is only prima facie evidence of its correctness, and may be impeached by clear, precise, and satisfactory evidence, either of unfairness or mistake. Relief will be granted both at law and in equity, as the circumstances may require, by setting aside the settlement, or permitting the party to surcharge or falsify."

In *Baxter v. Card* (1893) 59 Fed. 165, it was held that the acceptance of an account stated, with a note to cover the amount, by the master of a vessel from the charterer just before the ship left port, was not a bar to the establishment of mistakes in the account

when sufficient proof was presented of the alleged errors.

Where the accounts of a public officer who has collected and received any part of the public revenue are audited by the auditor for the state, the result is placed on the basis of an account stated, and is *prima facie* correct, and when mistake, error, or omission is shown to have vitiated such an account stated, the courts will reopen and rectify it. *State ex rel. Lott v. Brewer* (1879) 64 Ala. 287.

In *Bertrand v. Taylor* (1877) 32 Ark. 470, it was held that, although a party had admitted the correctness of an account when it was shown to him, he was not precluded from proving on the trial that it was not true or that it contained charges that were not correct.

In *White v. Thompson* (1919) — Cal. App. —, 180 Pac. 953, it was held that a party was not estopped from showing other items than those contained in the account stated, where the items were not within the contemplation of the parties when the settlement was made. See to the same effect, *Union Lumber Co. v. J. W. Schouten & Co.* (1914) 25 Cal. App. 80, 142 Pac. 910.

Similarly, in *St. Louis Cooperage Co. v. Jackson* (1916) 121 Ark. 633, 182 S. W. 534, an action was brought to recover for bolts made by the plaintiff for the defendant. The defendant rendered an account, and the plaintiff contended that this became an account stated. The court stated that even though the account had become a stated one, it was subject to attack for fraud or mistake, and, as there were obvious errors in the account as stated, the defendant was entitled to prove these mistakes.

In *Taylor v. Simon* (1859) 14 La. Ann. 351, it was held that balances of an account stated, although *prima facie* evidence between the parties, must yield to the proof of error caused by the omission of a bookkeeper to make a counter entry in an account current, the error being perpetuated by subsequent changes of bookkeepers.

In *DODSON v. WATSON* (reported herewith) ante, 583, an action was brought on an instrument in writing,

alleged to be an account stated. The defendant pleaded that certain amounts which he was entitled to be credited with did not appear in the account, having been omitted through mistake and oversight. It was a disputed issue whether the omission of these amounts from the credits shown in the written instrument was due to the mutual mistake of the parties. In submitting the case to the jury, the trial court did not require it to be found that any mistake causing such an omission was mutual, and refused a special instruction, requested by the plaintiff, that the defendant would not be entitled to the credits unless such mistake in their omission from the written instrument was mutual. On appeal, it is held that this ruling was correct, as the account furnished merely *prima facie* evidence of its correctness, and did not estop the defendant from showing mistakes or errors in the account, although they were not mutual.

Gottfried Brewing Co. v. Szarkowski (1899) 79 Ill. App. 583, was an action of assumpsit for beer sold and delivered. The evidence tended to show that the account between the parties, of beer delivered and the price, was kept in pass books, in which a balance was struck at the end of each month, showing the amount due from the defendant. The amount of the balance remaining unpaid at any time was carried forward to and included in the next balance, and the defendant made payments on the balances so shown. The pass books were in his possession all the time, except when returned to the plaintiff once in each month for the purpose of figuring the amount due, when they were retained by the plaintiff only long enough for that purpose, and then returned to the defendant. The evidence also showed that the defendant knew what was in the pass books, because he testified that he complained of the price which was set down in one of them. At the plaintiff's request the following instruction was given: "You are instructed that if you believe from the evidence that from time to time the officers or agents of the plaintiff and

defendant in this suit met and looked over their accounts together, and settled all matters between them, and struck a balance, and agreed upon that as the amount due from one to the other, then, in the absence of mistake or fraud, neither party will be allowed to go behind that settlement for the purpose of increasing or diminishing the amount so agreed upon."

In *M'Crae v. Hollis* (1810) 4 S. C. Eq. (4 Desauss.) 122, the maker and payee of a note, in the course of a settlement, mutually mistook the amount of the note and also the amount of the payments on it, and the chancellor opened the settlement.

In *H. E. & W. T. R. Co. v. Snelling* (1883) 59 Tex. 116, an account stated was pleaded as a defense to the action. It was alleged by the plaintiff that this settlement was not a full statement of the accounts between the parties, as numerous items had been omitted. After submitting to the jury the question whether there had been such a settlement as was set up by the defendant, the trial court in effect informed the jury that, if by mutual mistake of the parties items of account sued on were not brought into the settlement, then the same could be considered by them. In holding this to be a correct statement of the law, the court on appeal said: "This charge is believed to have stated the rule applicable to the case correctly; for while it is true that a stated account will be held conclusive between parties where no fraud or mistake is shown, 'if there has been any mistake, or omission, or accident, or fraud, or undue advantage by which the account stated is vitiated, and the balance is incorrectly fixed, a court of equity will not suffer it to be conclusive between the parties, but will allow it to be opened and re-examined.' Story, Eq. 523. In this case it does not appear that the condition of the parties had in any manner been so altered by any settlement made, or attempted to be made, as to render it inequitable or oppressive upon either party to consider the accounts between them, as in some cases it is found to be, where vouchers have been surren-

dered, or other evidence of the true state of the accounts has been rendered inaccessible."

In *Conville v. Shook* (1895) 144 N. Y. 686, 39 N. E. 405, an action to recover a certain percentage of the profits of the defendants' business of brewing and selling ales and porter, which the plaintiff claimed to be due to him as part of his compensation for his services as brewer, under a written contract with the defendants, the evidence showed that the plaintiff entered into the defendants' employ as a brewer under a written agreement, by the terms of which he was to receive a monthly salary and 10 per cent of the net profits of the business. The issue in the case was as to the amount of profit of the defendants' business. On the trial before a referee, this issue was found in favor of the defendants. He reported that during the previous years the plaintiff had been overpaid, and that the aggregate of such overpayments exceeded the plaintiff's claim for the last year. In affirming the judgment entered on the report, the court said: "Although the dispute was largely in regard to a question of fact, yet the contention of both sides rested upon what appeared in the defendants' books, so that, unless it can be shown that the learned referee adopted some erroneous legal principle as a basis for the inquiry, the general result at which he arrived ought not to be disturbed. The fundamental objection which the plaintiff makes to the action of the referee rests upon the proposition that it was error to open the settlements made by the parties in the previous years. Those settlements were the result of a mistake on the part of the bookkeeper, which the defendants did not discover until about the time of the commencement of this action. In such a case the rule is well established that a settled account may be impeached and readjusted by proof of unfairness, fraud, or mistake in law or fact."

In *Boyce v. Walker* (1909) 130 App. Div. 305, 114 N. Y. Supp. 166, an action to foreclose a mortgage given to secure a sum due for lumber sold to

the defendant, the court held that it was error to exclude evidence offered by the defendant to the effect that a subsequent investigation of the accounts disclosed evidence of mistakes in the accounts as stated, which would prove that there was no balance due the plaintiff.

The vendor of barrel headings who retains without objection for six months the vendee's account and payment of the amount thereby shown to be due, based on errors of the latter's inspector in counting and computing the number furnished, is not thereby estopped to show such errors in his action for the amount claimed to be due, provided the discrepancy is so great as not reasonably to be accounted for by mere error in the exercise of honest judgment in sorting and matching. *Standard Oil Co. v. Van Etten* (1882) 107 U. S. 325, 27 L. ed. 319, 1 Sup. Ct. Rep. 178.

II. As between partners.

The general rule that an account stated is binding in the absence of proof of fraud or mistake is applicable to accounts stated between partners.

Alabama. — *Desha v. Smith* (1852) 20 Ala. 747; *Billingslea v. Ware* (1858) 32 Ala. 415.

Arkansas. — *Lawrence v. Ellsworth* (1883) 41 Ark. 502.

California. — *Branger v. Chevalier* (1858) 9 Cal. 353.

Illinois. — *Gage v. Parmelee* (1877) 87 Ill. 329.

Kansas. — *Knox v. Pearson* (1902) 64 Kan. 711, 68 Pac. 613; *Schmoker v. Miller* (1913) 89 Kan. 594, 132 Pac. 158.

Louisiana. — *Green v. Glasscock* (1844) 9 Rob. 119.

Mississippi. — *Peteet v. Crawford* (1875) 51 Miss. 43.

New York. — *Wahl v. Barnum* (1889) 116 N. Y. 87, 5 L.R.A. 623, 22 N. E. 280; *Wilde v. Jenkins* (1834) 4 Paige, 481.

In *Desha v. Smith* (Ala.) *supra*, the court, after laying down the general rule as to an account stated being *prima facie* evidence of its correctness, said: "Relying on this rule of law, a majority of the court, after a full and deliberate examination of all

the evidence and the circumstances connected with this cause, have come to the conclusion that the testimony does not establish errors in the account; they think that, at the most, it only creates a doubt whether, by the terms of the partnership agreement, Smith was to pay his partners interest in the manner in which he was charged, and that testimony which only renders it doubtful whether the account is erroneous or not is insufficient to open it, especially after it has been settled and paid."

Where partners have had mutual dealings, and one renders to the other a statement purporting to set forth all the items of indebtedness on the one side and of credit on the other, the account so rendered, if not objected to in a reasonable time, becomes an account stated, and cannot afterwards be impeached except for fraud or mistake. *Lawrence v. Ellsworth* (Ark.) *supra*, wherein the court, in holding that there was not sufficient evidence to prove fraud or mistake, said: "Here no fraud or mistake is shown, nor even errors or omissions of credit. Lawrence, both in his answer and deposition, denies somewhat vehemently that the accounts of the firm of Lawrence, Ellsworth, & Fox were properly adjusted. But they have been once deliberately settled by the parties themselves, at a time when they were of recent occurrence and fresh in their recollection. And it requires something more than bare assertions, or vague suspicions of having been overreached, to overturn such settlements. Dr. Fox, who is shown by the record to have been a man of a fine sense of honor, and who evidently cherishes a warm regard for both of his former associates, testifies that the settlements were fairly, intelligently, and correctly made from the written reports of the several partners, and that they were understood and accepted by all concerned as final. Moreover, Lawrence's own conduct is totally irreconcilable with his present claim that he owes Ellsworth nothing."

In *Knox v. Pearson* (Kan.) *supra*, an action to impeach an account and

open the settlement for mistake and fraud, the evidence showed that the account was entered into between partners, and the balance due from one to the other was agreed on. In the complaint, general averments of mistake, error, and deception were made. The court held that these were insufficient, saying: "To impeach a settlement solemnly made in writing, something must be alleged by way of attack on it more than mere epithetical statements and conclusions. If fraud is relied on, the nature of the fraud must be set forth, together with the circumstances under which it was practised. If mistake or error be charged, the opposite party must be advised how the error entered into the settlement, its extent, and the particulars set forth with certainty. Here no details are given. The reply abounds with generalities. We are not informed how Pettit was misled into the settlement, nor the nature of the deceit practised on him."

Where partners have deliberately accounted, and agreed in good faith on a balance intended to be final, the result should be accepted by a court unless, for some legally sufficient reasons, substantial justice requires that the settlement should be opened or set aside. *Schmoker v. Miller* (Kan.) *supra*.

In *Billingslea v. Ware* (Ala.) *supra*, a bill was filed which sought to open a settlement of partnership accounts between the parties, and to cancel a mortgage given by the complainant to secure the payment of his notes for the balance found against him on the settlement. The alleged grounds of relief against the settlement were the complainant's mental incapacity and physical debility at that time, which rendered him unable properly to conduct the settlement on his part, and of which the other parties took undue advantage, and errors and mistakes to his prejudice, which occurred on the settlement. It was held that the complainant showed no sufficient reason for setting aside the compromise, the court stating that, when a settlement is made between parties dealing at arm's length, it will not be opened in

equity on proof of error or mistakes when it appears that both parties knew of the amount stated, and it was subsequently reduced by compromise in favor of the complaining party.

In *Branger v. Chevalier* (1858) 9 Cal. 353, it appeared that a stated account had been signed by the parties as partners, by which the plaintiffs were shown to be indebted to the defendants. To secure the payment of this indebtedness, the plaintiffs executed to the defendants a mortgage. The bill in the case at bar was filed to have the stated account decreed to be null and void, alleging that certain items therein were incorrect. The trial court set aside the account, and directed an account to be taken *de novo*. On appeal, this was held to be erroneous, the appellate court holding that, while stated accounts could be opened and the whole account taken *de novo* for gross mistake, this could be done only where the gross error affected all the items, and when, as in the case at bar, a mistake affected only a portion of the items, the stated account would be permitted to stand.

In *Gage v. Parmelee* (1877) 87 Ill. 329, a bill in equity filed to set aside a settlement between the parties on the dissolution of the copartnership between them, the general charge was that the defendant took an unjust advantage of the necessitous and distressing circumstances in which the complainant was placed, and demanded imperatively a dissolution of the firm and an immediate settlement between them; that thereupon a hurried and insufficient examination of the books was made, and the defendant presented to the plaintiff a statement of account, showing, as the defendant represented, that the complainant's interest in the concern was about \$15,000; and on the hypothesis that such was the true showing, and on the demand of the defendant that he should immediately do so, the complainant entered into the agreement of dissolution and settlement for the grossly inadequate consideration therein stated. The court below, on final hearing, dismissed the bill, and the complainant appealed. In affirming the decree of

the court, it was said: "If the settlement is to be taken as made upon the basis of a stated account, it must be held conclusive, unless the case be brought by the proof within the doctrine as laid down in 1 Story, Eq. Jur. § 523: 'But if there has been any mistake, or omission, or accident, or fraud, or undue advantage, by which the account stated is in truth vitiated, and the balance is incorrectly fixed, a court of equity will not suffer it to be conclusive upon the parties, but will allow it to be opened and re-examined.' . . . The settlement here, and the agreement in writing, under the hands and seals of the parties, appear to have been fairly and deliberately made. Such transactions should not be lightly set aside. We think no sufficient ground has been shown for setting them aside in this case. The allegations of the bill we do not find to be sustained by the proofs, and the decree dismissing the bill must be affirmed."

Similarly, in *Peteet v. Crawford* (1875) 51 Miss. 43, the parties to the action constituted a copartnership, and on the termination of the partnership the parties mutually adjusted their accounts. The plaintiffs charged fraud in the making of the settlement, and asked to have it annulled. Both parties testified that the business was profitable, yet by the settlement Peteet was a heavy loser and Crawford was a large gainer. According to the record, an item of over \$600 was wholly omitted from the settlement, and this omission was without explanation. All the accounts and statements were so unintelligibly presented as to render a satisfactory balance sheet out of the question. In holding that the settlement should have been reopened and the accounts restated, the court said: "Mere errors alone will not 'always' lead to the opening and restating of accounts (Parson, Partn. 513); but even when there is an agreement that closed accounts shall not be opened for error after the death of the parties, or after a fixed period, a court of equity will open and restate the account for fraud, or great danger of fraud (ibid.); and in case of such

an agreement, even after the death of the parties, or long acquiescence, a settlement would be opened and the account restated, for an important error. Ibid. When there is 'danger' of fraud, or when the accounts have been made up by parties having unrestricted power, and acting under strong personal interest, a long acquiescence will not establish a settlement beyond the reach of inquiry. . . . And the settlement is good for nothing if, either from the collusion of the parties or from the circumstances under which it takes place, it is proved in a court of equity that the transaction was not so fairly and so fully understood between the parties, either from the confusion in which it was involved, or from misrepresentation made on the one side or the other, as it ought to have been, and that injustice has been done on either side. Clearly, in the case at bar, the settlement should have been opened and the accounts restated."

In *Wilde v. Jenkins* (1834) 4 Paige (N. Y.) 481, it was said by the court: "I am also satisfied from the examination of the books, and from the other evidence in the case, that both parties then understood it to be a full and final adjustment of the partnership concerns up to that time. It must, therefore, require very strong and conclusive evidence of error or mistake to induce the court to open the accounts or go back beyond the adjustment thereof in June, 1827. The modes of keeping accounts are so various that it is difficult for third persons to understand them, in many cases, with all the lights which the evidence in a cause can throw upon recent transactions. The practice of opening accounts, therefore, which the parties who could best understand them have themselves adjusted, is not to be encouraged. And it should never be done upon a mere allegation of errors, supported by doubtful, or even by probable testimony only; especially where the parties to the settlement stood upon terms of perfect equality, so that there could be no pretense of fraud or imposition practised by one party upon another."

III. As between bank and depositor.

The statement of account resulting from the balance of a pass book and the retention of the book and canceled checks by the depositor, without objection, is within the general rules heretofore laid down, being subject to be opened for fraud or mistake, but binding unless fraud or mistake is shown.

United States.—*First Nat. Bank v. Whitman* (1877) 94 U. S. 343, 24 L. ed. 229.

Colorado. — *St. Louis Lager Beer Bottling Co. v. Colorado Nat. Bank* (1884) 8 Colo. 70, 5 Pac. 800.

Illinois. — *Peddicord v. Connard* (1877) 85 Ill. 102; *Rettig v. Southern Illinois Nat. Bank* (1909) 147 Ill. App. 193.

Iowa.—*Schoonover v. Osborne Bros.* (1899) 108 Iowa, 453, 79 N. W. 263.

Maryland. — *Hardy v. Chesapeake Bank* (1879) 51 Md. 562, 34 Am. Rep. 325.

Massachusetts.—See *Union Bank v. Knapp* (1826) 3 Pick. 96, 15 Am. Dec. 181.

Missouri. — *Kenneth Invest. Co. v. National Bank* (1902) 96 Mo. App. 125, 70 S. W. 173.

New York. — *Weisser v. Denison* (1854) 10 N. Y. 68, 61 Am. Dec. 731; *Harley v. Eleventh Ward Bank*, 7 Daly, 476; *Hutchinson v. Market Bank* (1867) 48 Barb. 302; *Welsh v. German American Bank* (1878) 73 N. Y. 424, 29 Am. Rep. 175; *Shipman v. Bank of State* (1891) 126 N. Y. 318, 12 L.R.A. 791, 22 Am. St. Rep. 821, 27 N. E. 371.

Pennsylvania. — *Greenhalgh Co. v. Farmers' Nat. Bank* (1910) 226 Pa. 184, 134 Am. St. Rep. 1016, 75 Atl. 260, 18 Ann. Cas. 330.

Tennessee. — *Fourth Nat. Bank v. Stahlman* (1915) 132 Tenn. 367, L.R.A. 1916A, 568, 178 S. W. 942.

Where a depositor fails to examine his pass book within a reasonable time after the same has been balanced by the bank and returned to him, he will not be estopped from showing error in his account, but his neglect will place the burden on him to show that the balance as returned is not correct. *Rettig v. Southern Illinois Nat. Bank* (Ill.) *supra*, wherein the court said: "While we cannot hold that there is no

evidence in this record tending to prove that the balances shown and returned to appellee in her pass book were not correct, it does appear to us that she has fallen quite short of discharging the full burden which the law in such cases imposes upon her, especially as to some of the items embraced in her claim and in the verdict returned by the jury. To our minds the weight of the evidence so greatly preponderates in favor of the correctness of the balances, as stated in the pass book, as to make it our duty to reverse the judgment of the trial court and remand the case."

This rule was applied in *First Nat. Bank v. Whitman* (U. S.) *supra*, an action brought by the payee of a check against the bank on which the check had been drawn. The evidence showed that the indorsement of the payee had been forged and the check paid by the bank to a stranger. Prior to the discovery of the check with the forged indorsement, the bank rendered a statement to the drawer of the check and returned the check in question. It was claimed that this created a privity of contract between the payee and the drawee, as in the statement rendered the check was entered to the credit of the bank. It was held that the statement created no different relation between the bank and the payee, and was not conclusive. The court said: "It comes to this, then, that upon a settlement of accounts between them, a credit was by mistake allowed to the bank to which it was not entitled. The law is that neither party is to be benefited or to be injured by the mistake.

The bank must refund the amount by handing over the sum, or by crediting the same to Mr. Spinner in his next account. Mistakes in bank accounts are not uncommon. They occur both by unauthorized or pretended payments, as well as by the omission to give credit for sums deposited. When discovered, the mistake must be rectified, and an ordinary writing up of a bank book, with a return of vouchers or a statement of accounts, precludes no one from ascertaining the truth and claiming its benefit. . . . We cannot perceive that such a mis-

taken recognition of the validity of the payment of this check can create an additional or different contract between the bank and the owner of the draft."

So, in *Hutchinson v. Market Bank* (1867) 48 Barb. (N. Y.) 302, it was said: "The result is that a stated account never gives to a party claiming under it the benefit of an absolute estoppel, and in practical effect gives him little more than these two advantages: (1) When the question arises upon the pleadings, the court has, in some instances, in granting permission to amend or reply, some equitable control over the power of opening the accounts. (2) When the question arises upon the trial, the party impeaching the account has the affirmative of the issue, and the burden, and sometimes an oppressive burden, of proof. These are considerable advantages, but they come very far short of placing the adverse party under the bar of an absolute estoppel."

In *Shipman v. Bank of State* (1891) 126 N. Y. 318, 12 L.R.A. 791, 22 Am. St. Rep. 821, 27 N. E. 371, it was held that the statement of an account by the defendant to the plaintiffs from time to time, the balancing of the bank pass book, and the return of the same to the plaintiffs with the vouchers, including the checks in controversy with the forged indorsements thereon, constituted no obstacle to the maintenance of an action by the plaintiffs, as they were ignorant of the facts and circumstances under which the checks were issued and put in circulation; that an account thus stated could always be opened on proof of mistake or fraud; and that the only effect of the plaintiffs' silence as to the correctness of the account rendered by the defendant was to put on them, in the case at bar, the burden of showing that the account as stated was the result of fraud or mistake, a burden which they had fully assumed and met.

The omission by a bank from a statement called for by its debtor, of an item of interest, does not estop the bank from enforcing payment of the interest on discovering the mistake.

Fourth Nat. Bank v. Stahlman (1915) 182 Tenn. 367, L.R.A.1916A, 568, 178 S. W. 942.

Weisser v. Denison (1854) 10 N. Y. 68, 61 Am. Dec. 731, was an action to recover an alleged balance of account arising from deposits made by the plaintiff's intestate in the defendant's bank, and the bank sought to charge the amount with a large number of checks which purported to have been drawn by the plaintiff's intestate on the bank. The checks had been forged by the confidential clerk of the depositor, and the forgeries extended through a period of about six months. During this time the bank book of the intestate had been written up several times, and the amounts of the forged checks were debited thereon, and the book and the vouchers were returned by the bank, the clerk transacting the business with the bank, and receiving on each occasion, except one, the book and the canceled vouchers. It was not claimed that the plaintiff's intestate, after he had knowledge of the forgery, did any act making the check his own, but it was claimed that the account between the bank and the depositor became a stated account by the entries in the bank book and striking a balance, and the return of the book with the vouchers; and also that the depositor, by neglecting to examine the checks and the bank account on the return of the bank book, adopted the checks as his own. The court, while admitting that the account became, by the omission of the depositor to examine the bank book and vouchers, an account stated, held that it might be impeached by evidence of fraud or mistake, and that this defense was defeated by proof of the forgery. It was said: "But a stated account is liable to be opened by evidence of fraud or of mistake; and when the payments represented by the checks in question were sworn, by Weisser's representatives, not to have been made to him, or by his order or authority, the proof of payment afforded by the stated account was overthrown, and Weisser's right to the money remained unaffected." See to the same effect, *Welsh v. German American Bank* (1878) 73 N.

Y. 424, 29 Am. Rep. 175; Ruch v. Fricke (1857) 28 Pa. 241.

In *Peddicord v. Connard* (1877) 85 Ill. 102, the evidence showed that the plaintiff opened a deposit account with the defendants, and from time to time, as he required the use of money, checked on the defendants for such sums as he needed. When his deposits were exhausted, he applied to them for permission to overdraw his account, which privilege was always granted as requested. He thus, at various times, overdraw from a few dollars to over seventeen thousand, before making his account good. The defendant charged interest on the sums thus overdrawn until the account was made good, and a balance was then struck, and the bank book of the plaintiff was written up and handed to him, and his checks were surrendered. In the case at bar the plaintiff attempted to raise the question that the interest charged was usurious. In disposing of this point, the court said: "The evidence shows that when he asked and obtained permission to overdraw, he promised to pay when he made sales and received returns, and when he thus received funds he deposited them, and left his bank book to have it written up, and when the bank did so he was charged with the money overdrawn, with the interest, and having treated it as settlement and payment, after such a lapse of time he cannot be permitted to question these settlements, and to claim to recover interest, although it may be usurious, thus voluntarily paid and acquiesced in."

In *Hardy v. Chesapeake Bank* (1879) 51 Md. 562, 34 Am. Rep. 325, it was held that where a bank account was balanced in a bank book, and the bank book and canceled checks were returned to the depositor after the lapse of a reasonable time, without objection being made, the presumption arose that the account was correct. The court added, however, that the presumption was only *prima facie* evidence, and was liable to be rebutted by showing that the error or fraud complained of was not discoverable by the exercise of reasonable care and diligence.

11 A.L.R.—39.

IV. *As between persons in fiduciary relation.*

While the general rule that a stated account is binding except in case of fraud or mistake applies to persons in a fiduciary relation, it has been held that such accounts will be more readily opened than others.

United States. — *Harden v. Gordon* (1823) 2 Mason, 541, Fed. Cas. No. 6,047.

Alabama. — *Rembert v. Brown* (1850) 17 Ala. 667; *Paulling v. Creagh* (1875) 54 Ala. 646; *Moses Bros. v. Noble* (1888) 86 Ala. 407, 5 So. 181.

California. — *Vance v. Supreme Lodge, F. B.* (1911) 15 Cal. App. 178, 114 Pac. 83.

Illinois. — *Gruby v. Smith* (1883) 13 Ill. App. 43; *Hopkinson v. Jones* (1888) 28 Ill. App. 409.

New York. — *Philips v. Belden* (1833) 2 Edw. Ch. 1; *Young v. Hill* (1876) 67 N. Y. 162, 23 Am. Rep. 99.

Oregon. — *Hoyt v. Clarkson* (1892) 23 Or. 51, 31 Pac. 198.

South Carolina. — *McDow v. Brown* (1870) 2 S. C. 95.

In *Hoyt v. Clarkson* (Or.) *supra*, a suit in equity brought against an agent by his principal for an accounting of alleged business transactions covering a period of about eight years, it was shown that the parties entered into an agreement whereby the defendant was to take full charge and control of the plaintiff's stock, consisting of horses, mules, and cattle, and of certain ranches then in possession of the plaintiff, it being understood that the defendant, as such agent, was to sell the increase of the stock and pay the expenses of carrying on the business out of the proceeds of the sale and other money furnished by the plaintiff. For his services in conducting and managing the business, the defendant was to receive the sum of \$40 per month. The plaintiff in his complaint alleged fraudulent transactions and a refusal on the part of the defendant to account. In defense, the defendant pleaded a settlement of all business transactions. The case was tried on the theory that, the defendant having pleaded a settlement, the burden rested on him to establish it

by a preponderance of the evidence. Entertaining this view, the trial court permitted the plaintiff to put the defendant on the stand, and to interrogate him fully as to all business transactions between the parties from the beginning of the defendant's agency, without pointing out or claiming that any particular matter or item had been left out of the settlement by mistake, fraud, or otherwise. The court held that the plaintiff was not entitled to open the account for examination, and could not prove errors and mistakes, without specifying in what such errors or mistakes consisted. It was said: "While it is true that a court of equity will more readily open and examine a settled account between parties standing in fiduciary relation than others, and even sometimes entirely disregard such settlement when such parties are not on an equal footing in settling such account, yet when a settlement of account has been deliberately made, and a note voluntarily given for an ascertained balance, it will not re-examine such accounts and grant relief, except on precise allegations of such errors or mistakes, and clear and satisfactory proof of the same."

In *Gruby v. Smith* (III.) supra, suit was brought by an attorney to recover for legal services. During the course of the trial, the following instruction was given: "The jury are instructed that in an action upon an account stated, the original form or evidence of the debt is immaterial, for the stating of the account changes the character of the cause of action and is in the nature of a new undertaking. The action is founded not upon the original contract, but upon the promise to pay the balance ascertained; if the jury find from the evidence that there were accounts rendered by both parties to this suit, the one to the other, and a balance agreed upon in favor of the plaintiff, and a promise made by the defendant to pay the balance, then you must find for the plaintiff, not exceeding the amount so agreed upon and promised." This instruction was held to be wrong and misleading, first, because it told the jury in effect that

the alleged extortionate character of the plaintiff's charges was entirely immaterial and that the account stated was absolutely conclusive, and, secondly, because, while purporting to give the jury all the elements necessary to a recovery, it wholly omitted any reference to the relation of attorney and client, and the necessity that the client should be fully and fairly informed in respect to the material facts in order to be bound by the account stated. See to the same effect, *Hopkinson v. Jones* (III.) supra.

In *Vance v. Supreme Lodge, F. B.* (1911) 15 Cal. App. 178, 114 Pac. 83, the evidence showed that the plaintiff was employed by the defendant as an organizer, and his compensation was on a percentage basis of fees collected from members of the defendant's organization. During the period of his service, a statement was sent him each month from the office of the supreme secretary, showing what moneys were due him. This action was brought to recover moneys due the plaintiff, he alleging that the statements rendered to him after a certain date were incorrect. It was held that, while the statement furnished by the defendant was an account stated, it was not conclusive as to the plaintiff, since a confidential relation existed between the parties. The court said: "Necessarily, plaintiff was obliged to rely upon the records kept by defendant for his information as to what commissions he was entitled to on account of assessments collected. He might, it is true, as the evidence shows, have examined the books himself, but he was not required so to do, because the defendant proposed by its action in that regard taken to, and it did pretend to, furnish him statements of what its books showed, and these statements plaintiff undoubtedly had the right to assume correctly represented the facts. The case presented is not one where the parties are to be considered as dealing at arm's length, but one where, because of the existence of a confidential relation, neither party could, without incurring liability therefor, misrepresent to the other any

condition which it was important for the other party to be advised of."

Where an account is stated between a principal and agent, a court of equity will interfere and open the account on proof of fraud, or on evidence that the principal has been taken advantage of by his agent. *Rembert v. Brown* (1850) 17 Ala. 667.

In *Harden v. Gordon* (1823) 2 Mason, 541, Fed. Cas. No. 6,047, it appeared that a contract was entered into between the master of a ship and the plaintiff, a seaman. Annexed to an account which had been rendered to the plaintiff was a receipt, admitting the payment of the balance stated. The court held that, while this had the effect of an account stated, such an

instrument was only prima facie evidence of its correctness, and subject to be overthrown by counter proof from the plaintiff. It was said: "Now a stated account is liable to be impeached; and in a fit case the party is admitted to surcharge and falsify it. If errors and mistakes are apparent on the face of it, or the party comes with a strong case, recenti facto, courts dealing in equities are in the constant habit of affording relief. And, what presses with more force on the present occasion, there are situations of peculiar influence and confidence between the parties, in which the opening of settled accounts is very reluctantly refused, and very easily permitted." E. C. B.

YORK MANUFACTURING COMPANY, Plff. in Err.,

v.

V. B. COLLEY et al.

United States Supreme Court — May 20, 1918.

(247 U. S. 21, 62 L. ed. 963, 38 Sup. Ct. Rep. 430.)

Commerce — state regulation — erecting ice plant.

A provision in a contract of sale of an artificial ice plant by which the foreign corporate seller agreed to furnish an engineer who should assemble and erect the machinery at the point of destination, and should make a practical efficiency test before complete delivery, is relevant and appropriate to the interstate sale of the machinery, and, therefore, does not justify the courts of the state to which the machinery was shipped in refusing to enforce payment of the purchase price, on the theory that the corporation was doing local business in the state without having first secured the permit made by a state statute a condition precedent to the right to sue in the local courts.

[See note on this question beginning on page 614.]

(Pitney, J., dissents.)

ERROR to the Court of Civil Appeals for the State of Texas to review a judgment affirming a judgment of the District Court for Wilson County in favor of defendant in an action brought to recover an amount alleged to be due under a contract of sale. *Reversed.*

The facts are stated in the opinion of the court.

Mr. N. C. Abbott, for plaintiff in error:

This case is governed by the principles laid down in *Caldwell v. North*

Carolina, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229; *Rearick v. Pennsylvania*, 203 U. S. 507, 51 L. ed. 295, 27 Sup. Ct. Rep. 159; *Dozier v. Al-*

abama, 218 U. S. 124, 54 L. ed. 965, 28 L.R.A.(N.S.) 264, 30 Sup. Ct. Rep. 649.

The fact that goods are shipped into the state, either direct to the buyer or to agents of the seller for delivery, and such agents come into the state to secure delivery, does not change the nature of an interstate transaction.

Rearick v. Pennsylvania, 203 U. S. 507, 51 L. ed. 295, 27 Sup. Ct. Rep. 159; Caldwell v. North Carolina, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229; Dozier v. Alabama, 218 U. S. 124, 54 L. ed. 965, 28 L.R.A.(N.S.) 264, 30 Sup. Ct. Rep. 649; Butler Bros. Shoe Co. v. United States Rubber Co. 84 C. C. A. 167, 156 Fed. 1, 212 U. S. 577, 53 L. ed. 658, 29 Sup. Ct. Rep. 686; Loverin & B. Co. v. Travis, 135 Wis. 322, 115 N. W. 829; Rock Island Plow Co. v. Peterson, 93 Minn. 356, 101 N. W. 616.

No counsel appeared for defendants in error.

Mr. Chief Justice White delivered the opinion of the court:

The York Manufacturing Company, a Pennsylvania corporation, sued for the amount due upon a contract for the purchase of ice manufacturing machinery and to foreclose a lien upon the same. By answer the defendants alleged that the plaintiff was a foreign corporation, that it maintained an office and transacted business in Texas without having obtained a permit therefor, and was hence, under Texas statutes, not authorized to prosecute the suit in the courts of the state, and a dismissal was prayed. In reply the plaintiff averred that the contract sued on was interstate commerce, and that the state statute, if held to apply, was repugnant to the commerce clause of the Constitution of the United States. At the trial it was shown without dispute that the contract covered an ice plant guaranteed to produce 3 tons of ice a day, consisting of gas compression pumps, a compressor, ammonia condensers, freezing tank and cans, evaporating coils, a brine agitator, and other machinery and accessories, including apparatus for utilizing exhaust steam for making distilled water for filling the ice cans. These parts of machinery, it was provided, were to be shipped from

Pennsylvania to the point of delivery in Texas, and were there to be erected and connected. This work, it was stipulated, was to be done under the supervision of an engineer to be sent by the York Manufacturing Company, for whose services a fixed per diem charge of \$6 was to be paid by the purchasers, and who should have the assistance of mechanics furnished by the purchasers, the supervision to include not only the erection but the submitting of the machinery to a practical test in operation before the obligation to finally receive it would arise. It was, moreover, undisputed that these provisions were carried out; that about three weeks were consumed in erecting the machinery and about a week in practically testing it, when, after a demonstration of its successful operation, it was accepted by the purchasers.

The trial court, not doubting that the contract of sale was interstate commerce, nevertheless concluding that the stipulation as to supervision by an engineer to be sent by the seller was intrastate commerce and wholly separable from the interstate transaction, held that the seller, by carrying out that provision, had engaged in local business in the state, and as the permit required by the state statutes had not been secured, gave effect to the statutes and dismissed the suit. The case is here to review the action of the court below sustaining such conclusion, its judgment being that of the court of last resort of the state, in consequence of the refusal of the supreme court of the state to allow a writ of error.

Referring to a previous ruling (*A. Leschen & Sons Rope Co. v. Moser*, — Tex. Civ. App. —, 159 S. W. 1018) in which it had held that the performance by a contractor of the duty of supervising the construction of a complex system of tramways did not constitute a doing of business within the state because it was relevant to and apart of the main contract for the material from which the road was to be constructed, which was interstate commerce, the

court below concluded that that case had been by it mistakenly decided and therefore should be overruled and not applied in this. The conclusion as to previous error committed, the court said, was persuasively the result of the ruling in *Browning v. Waycross*, 233 U. S. 16, 58 L. ed. 828, 34 Sup. Ct. Rep. 578, which it treated as here conclusively determining that the performance of the contract for the supervision by the engineer was purely intrastate commerce and subject to be treated as such, although it formed a part of the stipulations of the principal contract of sale conceded to be interstate commerce.

But we are of opinion this decision was erroneous, whether it be examined from the point of view of what was assumed to be the controlling effect of the ruling in the *Waycross* Case, or whether it be tested by the elementary doctrines as to what constitutes interstate commerce. In the first place the *Waycross* Case concerned merely the right of the city of *Waycross* to collect a charge against a person who was carrying on a business of erecting lightning rods as the agent of one who had sold the rods in another state and shipped them to *Waycross* under an agreement, after their arrival, to erect them. The case turned exclusively upon the nature and character of the business of erecting lightning rods and the relevant or appropriate relation to interstate commerce of a stipulation in an interstate contract of sale of such rods, providing for their erection when delivery under the sale was made. As it was determined that the business of erecting lightning rods bore no relevant or appropriate relation to the contract made for the sale of such rods, it was decided that the contract for the erection of the rods did not lose its local character simply because it was made a part of an interstate commerce contract for the sale of the rods, any more than would a contract for materials with which to

build a house cause the building of the house to be a transaction of interstate commerce, and not local business. But the broad distinction which is established by the statement just made between what was decided in the *Waycross* Case and the question here presented does not rest alone upon the implication resulting from what was under consideration in that case, but, moreover, expressly results from the fact that in the *Waycross* Case, through abundance of precaution, attention was directed to the fact that the ruling there made was not controlling as to a case where the service to be done in a state as the result of an interstate commerce sale was essentially connected with the subject-matter of the sale; that is, might be made to appropriately inhere in the duty of performance. 233 U. S. 23.

As, in the second place, since the ruling in *M'Culloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579, there has been no doubt that the interstate commerce power embraced that which is relevant or reasonably appropriate to the power granted, so also from such doctrine there can be no doubt that the right to make an interstate commerce contract includes in its very terms the right to incorporate into such contract provisions which are relevant and appropriate to the contract made. The only possible question open, therefore, is, Was the particular provision of the contract for the service of an engineer to assemble and erect the machinery in question at the point of destination and to practically test its efficiency before complete delivery relevant and appropriate to the interstate sale of the machinery? When the controversy is thus brought in last analysis to this issue there would seem to be no room for any but an affirmative answer. Generically this must be unless it can be said that an agreement to direct the assembling and supervision of machinery whose intrinsic value largely depends upon its being united and made operative as a whole is not appropriate to its sale.

Commerce—
state regulation
—erecting ice
plant.

The consequence of such a ruling, if made in this case, would be particularly emphasized by a consideration of the functions of the machinery composing the plant which was sold, of its complexity, of the necessity of its aggregation and unison with mechanical skill and precision in order that the result of the contract of sale—the ice plant purchased—might come into existence. In its essential principle, therefore, the case is governed by *Caldwell v. North Carolina*, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229; *Rea- rick v. Pennsylvania*, 203 U. S. 507, 51 L. ed. 295, 27 Sup. Ct. Rep. 159; and *Dozier v. Alabama*, 218 U. S. 124, 54 L. ed. 965, 28 L.R.A. (N.S.) 264, 30 Sup. Ct. Rep. 649. In fact, those cases were relied upon in the *Waycross Case* as supporting the contention that a mere agreement for the erection of lightning rods in a contract made concerning the shipment of such rods in interstate commerce caused the act of erection to be itself interstate commerce. But the basis upon which the cases were held to be not apposite, that is, the local characteristic of the work of putting up lightning rods, not only demonstrates beyond doubt the mistake concerning the ruling as to the *Waycross Case* which was below committed, but serves unerringly to establish the soundness of the distinction by which the particular question before us is brought within the reach of interstate commerce.

Of course we are concerned only with the case before us; that is, with a contract inherently relating to and

intrinsically dealing with the thing sold,—the machinery and all its parts constituting the ice plant. This view must be borne in mind in order to make it clear that what is here said does not concern the subject passed on in *General R. Signal Co. v. Virginia*, 246 U. S. 500, 62 L. ed. 854, 38 Sup. Ct. Rep. 360, since in that case the work required to be done by the contract over and above its inherent and intrinsic relation to the subject-matter of the interstate commerce contract involved the performance of duties over which the state had a right to exercise control because of their inherent intrastate character. In fact, the case last referred to, when looked at from a broad point of view, is but an illustration of the principle applied in the *Waycross Case* to the effect that that which was inherently intrastate did not lose its essential nature because it formed part of an interstate commerce contract to which it had no necessary relation. And this truth by a negative pregnant states the obverse view that that which is intrinsically interstate and immediately and inherently connected with interstate commerce is entitled to the protection of the Constitution of the United States resulting from that relation.

It follows, therefore, that the judgment must be and it is reversed and the case remanded to the court below for further proceedings not inconsistent with this opinion.

And it is so ordered.

Mr. Justice Pitney dissents.

ANNOTATION.

Effect of agreement by foreign corporation to install article within the state to bring transaction within state control.

This question is, of course, purely a Federal one, arising under the Constitution of the United States, upon which the decisions of the Supreme Court of the United States are final authority. It is well, therefore, to determine just what that court has de-

cided upon the question before attempting to show how far the state courts have followed or departed from those decisions.

The first case coming before that court was *Browning v. Waycross* (1914) 233 U. S. 16, 58 L. ed. 828, 34

Sup. Ct. Rep. 578, in which it was held that the business of erecting lightning rods as the agent of a nonresident manufacturer on whose behalf such agent had solicited orders for the sale of such rods, and from whom he had received the rods when shipped into the state, may be subjected to a license tax by the state, although the contract bound the seller to attach the rods to the buildings. The court says: "We are of the opinion that the court below was right in holding that the business of erecting lightning rods under the circumstances disclosed was within the regulating power of the state, and not the subject of interstate commerce, for the following reasons: (a) Because the affixing of lightning rods to houses was the carrying on of a business of a strictly local character, peculiarly within the exclusive control of state authority. (b) Because, besides, such business was wholly separate from interstate commerce, involved no question of the delivery of property shipped in interstate commerce, or of the right to complete an interstate commerce transaction, but concerned merely the doing of a local act after interstate commerce had completely terminated. It is true that it was shown that the contract under which the rods were shipped bound the seller, at his own expense, to attach the rods to the houses of the persons who ordered rods, but it was not within the power of the parties, by the form of their contract, to convert what was exclusively a local business, subject to state control, into an interstate commerce business, protected by the commerce clause. It is manifest that if the right here asserted were recognized, or the power to accomplish by contract what is here claimed were to be upheld, all lines of demarcation between national and state authority would become obliterated, since it would necessarily follow that every kind or form of material shipped from one state to the other, and intended to be used after delivery in the construction of buildings or in the making of improvements in any form, would or could be made interstate commerce. Of course, we

are not called upon here to consider how far interstate commerce might be held to continue to apply to an article shipped from one state to another, after delivery, and up to and including the time when the article was put together or made operative in the place of destination, in a case where, because of some intrinsic and peculiar quality or inherent complexity of the article, the making of such agreement was essential to the accomplishment of the interstate transaction."

The next case was *General R. Signal Co. v. Virginia* (1918) 246 U. S. 500, 62 L. ed. 854, 38 Sup. Ct. Rep. 360, affirming (1916) 118 Va. 301, 87 S. E. 598, in which it was held that a foreign manufacturing corporation is engaged in local business within the state, so as to be liable to fine for failing to procure the proper certificate of authority, where, in carrying out its contracts for installation within the state of automatic railway signal systems, it necessarily employs in the state labor, skilled and unskilled, to dig the ditches in which conduits for the wire are placed, to construct concrete foundations, and to paint the completed structures. No reason is given for the ruling except that the case is within the principle of *Browning v. Waycross*.

The only other case which has yet been decided by the Supreme Court of the United States on the subject is the one which is reported herewith (*YORK MFG. CO. v. COLLEY*, ante, 611), reversing (1914) — *Tex. Civ. App.* —, 172 S. W. 206, where the court held that the facts show that the corporation contracted to engage in and did engage in the strictly local business of installing an ice manufacturing plant, and said: "When a foreign corporation is not contented with the privilege of having its agents come into this state and take orders for its goods, ship same to our citizens and collect therefor in our courts, but contends that it has the further right to transact the business of installing machinery sold by it, so as to connect it with and make it a part of the property of this state, which was not the subject of interstate commerce, the

burden certainly rests upon it of showing that if it be prohibited from transacting such local business, such prohibition will, on account of the complex character of its machinery, affect the sale thereof to such an extent as to be a restriction or regulation of its right to sell such machinery." That being the position which was overruled by the Supreme Court of the United States, it seems certain that the latter court has adopted the rule which obtained in many of the state courts, that if the installation is merely an incident of the sale, it is protected by the commerce clause of the Federal Constitution.

The cases which have applied the rule of *YORK MFG. CO. v. COLLEY*, to the effect that a mere incidental agreement to assemble a structure sold in interstate commerce did not destroy the nature of the transaction, before and since the decision of that case, are as follows:

United States.—*Davis & R. Bldg. & Mfg. Co. v. Dix* (1894) 64 Fed. 406; *Vulcan Steam Shovel Co. v. Flanders* (1913) 205 Fed. 102.

Alabama. — *Citizens Nat. Bank v. Buckheit* (1915) 14 Ala. App. 511, 71 So. 82, certiorari denied in (1916) 196 Ala. 700, 72 So. 1019; *Puffer Mfg. Co. v. Kelly* (1916) 198 Ala. 131, 73 So. 403.

Colorado. — *Gates Iron Works v. Cohen* (1896) 7 Colo. App. 341, 43 Pac. 667.

Illinois.—*Black-Clawson Co. v. Carlyle Paper Co.* (1907) 133 Ill. App. 61.

Kentucky.—*United Iron Works Co. v. Watterson Hotel Co.* (1918) 182 Ky. 113, 206 S. W. 166.

Missouri. — *State ex rel. Hays v. Robertson* (1917) 271 Mo. 485, 196 S. W. 1132; *Hess Warming & Ventilating Co. v. Burlington Grain Elevator Co.* (1919) — Mo. —, 217 S. W. 493; *Chuse Engine & Mfg. Co. v. Vromania Apartment Co.* (1910) 154 Mo. App. 139, 133 S. W. 624.

New York.—*J. L. White Furnace Co. v. C. W. Miller Transfer Co.* (1909) 131 App. Div. 559, 115 N. Y. Supp. 625.

Pennsylvania.—*Wolff Dryer Co. v. Bigler* (1899) 192 Pa. 466, 43 Atl.

1092; *John Williams v. Golden* (1915) 247 Pa. 397, 93 Atl. 505.

South Dakota.—*Flint & W. Mfg. Co. v. McDonald* (1907) 21 S. D. 526, 14 L.R.A. (N.S.) 673, 130 Am. St. Rep. 735, 114 N. W. 684.

Tennessee.—*Davis & R. Bldg. & Mfg. Co. v. Caigle* (1899) — Tenn. —, 53 S. W. 240; *Milan Mill. & Mfg. Co. v. Gorten* (1894) 93 Tenn. 590, 26 L.R.A. 135, 4 Inters. Com. Rep. 851, 27 S. W. 971.

Texas.—*De Witt v. Berger Mfg. Co.* (1904) — Tex. Civ. App. —, 81 S. W. 334; *A. Leschen & Sons Rope Co. v. Moser* (1913) — Tex. Civ. App. —, 159 S. W. 1018.

Wisconsin. — *Wolf Co. v. Kutch* (1911) 147 Wis. 209, 132 N. W. 981; *S. F. Bowser & Co. v. Schwartz* (1913) 152 Wis. 408, 140 N. W. 51; *S. F. Bowser & Co. v. Savidusky* (1913) 154 Wis. 76, 142 N. W. 182.

Contra:

United States.—*Beach v. Kerr Turbine Co.* (1917) 243 Fed. 706.

Alabama. — *American Amusement Co. v. East Lake Chutes Co.* (1911) 174 Ala. 526, 56 So. 961.

Michigan.—*Power Specialty Co. v. Michigan Power Co.* (1916) 190 Mich. 699, 157 N. W. 408; *B. F. Sturtevant Co. v. Adolph Leitelt Iron Works* (1917) 196 Mich. 552, 163 N. W. 13.

Minnesota.—*Palm Vacuum Cleaner Co. v. Bjornstad* (1917) 136 Minn. 38, L.R.A. 1917C, 1012, 161 N. W. 215.

New York.—*Portland Co. v. Hall & G. Constr. Co.* (1907) 121 App. Div. 779, 106 N. Y. Supp. 649.

Tennessee.—*Peck-Williamson Heating & Ventilation Co. v. McKnight* (1917) 140 Tenn. 563, 205 S. W. 419.

Texas.—*Bryan v. S. F. Bowser & Co.* (1919) — Tex. Civ. App. —, 209 S. W. 189.

It may be that in a few of the cases which seem to be in conflict there may be sufficient difference in the facts to warrant opposite decisions; but in many cases the difference in result is caused by the attempt to follow the successive decisions which have been rendered by the Supreme Court of the United States, without interpreting them as that court itself subsequently did.

Two cases very close to the border line, even if they can be considered as rightly decided, have held that a contract for the construction of a creamery within the state was an interstate one.

Thus, where a contract to sell and construct a creamery was attacked on the ground that the seller had not complied with the local laws, the court, in upholding the contract, gives illustrations of the assembling of mowers and reapers and the putting in order of a furnace, both of which were assumed to be permissible without destroying the interstate character of the transaction. The court says the Federal Constitution interposes an insuperable barrier to the state's interference with the necessary operations of interstate commerce. *Davis & R. Bldg. & Mfg. Co. v. Dix* (1894) 64 Fed. 406.

And a contract between a corporation and a citizen of a different state for the erection of a building, together with the furnishing and installation of machinery therein, constitutes interstate commerce, and not "doing business," within the meaning of such a statute. *Davis & R. Bldg. & Mfg. Co. v. Cagle* (1899) — Tenn. —, 53 S. W. 240.

The mere installation of a furnace sold in another state is not doing business within the state, so as to require compliance with the state laws to enable the seller to enforce the contract. *J. L. White Furnace Co. v. C. W. Miller Transfer Co.* (1909) 131 App. Div. 559, 115 N. Y. Supp. 625.

A contract by a foreign corporation to sell a grain dryer and cooler, and install it in the buyer's building, involves interstate commerce, and may be performed and enforced without complying with the local laws entitling foreign corporations to do business within the state. *Hess Warming & Ventilating Co. v. Burlington Grain Elevator Co.* (1919) — Mo. —, 217 S. W. 493.

A sale of machinery by a foreign corporation, under a contract made in Colorado, whereby it was to furnish a man to superintend the erection and starting thereof, does not constitute

"doing business," within the meaning of a statute prescribing certain conditions upon which a foreign corporation may do business within the state. *Gates Iron Works v. Cohen* (1896) 7 Colo. App. 341, 43 Pac. 667.

In *Wolff Dryer Co. v. Bigler* (1899) 192 Pa. 466, 43 Atl. 1092, there was a contract for the sale of a brick dryer which provided that the buildings were to be erected by buyers under the superintendence of a man to be furnished by the seller. The court overruled the objection that the plaintiff could not maintain the action because a foreign corporation, but makes no ruling on the effect of the provisions for superintendence of construction.

In *John Williams v. Golden* (1915) 247 Pa. 397, 93 Atl. 505, it was held that the undertaking of a foreign corporation engaged in making furnace castings for assembled work in buildings, to put them in place, did not constitute doing business within the state, so as to require compliance with the local laws to enable it to enforce its contracts. The evidence showed that the installation of the work required skill and knowledge not ordinarily to be found among workmen engaged in ordinary building, and the court said: "We are unable to see how the fact that, in addition to sending the material, it sends its skilled employees to set it up, can make any difference."

The fact that a water tank and tower manufactured by a corporation in one state, for use in another, is to be set up by defendant in the latter, does not take the contract out of the protection of the commerce clause of the Federal Constitution, so as to deprive the seller of a lien for work because it has not complied with the local statutes. *Flint & W. Mfg. Co. v. McDonald* (1907) 21 S. D. 526, 14 L.R.A. (N.S.) 673, 130 Am. St. Rep. 735, 114 N. W. 684.

In *De Witt v. Berger Mfg. Co.* (1904) — Tex. Civ. App. —, 81 S. W. 334, the court held that an action could be maintained by a foreign corporation for the price of certain metal ceiling and side walls, which it had

sold to defendant, and the cost of putting up the same, notwithstanding plaintiff had not complied with the local laws so as to be entitled to do business in the state; but there is no discussion of the effect of the installation upon the interstate character of the transaction.

A sale f. o. b. of material for a tramway in a foreign state does not lose its interstate character by the fact that the seller agrees to furnish a competent man to superintend the construction of the tramway at the cost of the buyer. The court says the contract did not provide for the sale and delivery of a tramway after its completion, nor did it call for the sale of a tramway delivered, with an agreement to install the same; but it simply proposed to furnish a competent superintendent in order to facilitate the erection of the machinery. "We do not think this incidental agreement can be given the effect of making the transaction one not involving interstate commerce." *A. Leschen & Sons Rope Co. v. Moser* (1913) — Tex. Civ. App. —, 159 S. W. 1018.

In *Chuse Engine & Mfg. Co. v. Vromania Apartment Co.* (1910) 154 Mo. App. 139, 133 S. W. 624, the sale and delivery and installation by a foreign corporation of two high-speed automatic engines and two electric generators, under a contract therefor, was held to be an interstate commerce transaction, and not a doing of business in the state within the meaning of the statutes regulating the doing of business in the state by foreign corporations.

The sale of a soda fountain transported *membris disiectis*, and set up or installed by the vendor, a foreign corporation, was a transaction not robbed of its interstate character by the installation, as that was a mere incident of the sale. *Puffer Mfg. Co. v. Kelly* (1916) 198 Ala. 131, 73 So. 403. In this connection it was said: "If there is a sale of a chattel, complete in the hands of the vendor, although it may, from convenience or necessity, be transported *membris disiectis*, an agreement to merely set it up ready for use in the vendee's place

of business is, upon its face, but an incident of the sale, which ought not to destroy its character as a single and indivisible act of interstate commerce. This is especially true where the manufacturer of complex machinery or apparatus, the satisfactory operation of which must largely depend upon the nicety or perfection of its adjustments, agrees to deliver it in working order to the purchaser. Such an agreement is a valuable trade inducement, and is a reasonable and legitimate incident of the sale itself. But this conclusion may be defeated by various considerations; viz., by the character of the article as a permanent improvement to the freehold, by the nature and extent of the labor required for its adaptation and preparation for use, and the time and conditions under which it is turned over to the purchaser after its arrival. Upon a very full consideration of the present case, we are constrained to hold that plaintiff's agreement to install the soda fountain and its appurtenances in defendant's place of business at Montgomery was a reasonable incident of its sale, and with it constituted a single act of interstate commerce."

The mere fact that the seller's agent gives some slight assistance in preparing the machinery for work after it has been received in the purchaser's shop does not destroy the interstate character of the transaction. *Citizens Nat. Bank v. Buckheit* (1915) 14 Ala. App. 511, 71 So. 82, certiorari denied in (1916) 196 Ala. 700, 72 So. 1019.

In *Black-Clawson Co. v. Carlyle Paper Co.* (1907) 133 Ill. App. 61, it was held that the sale and delivery by a foreign corporation of machinery for a paper mill, and the furnishing of a man to assist and superintend the erection and installing thereof, did not amount to transacting business in the state, the furnishing of the assistant being regarded as not having made the transaction more than interstate commerce, but rather as merely incidental to the interstate transaction.

And in *Vulcan Steam Shovel Co. v. Flanders* (1913) 205 Fed. 102, it was held that an agreement entered into by

a foreign corporation upon the sale of a steam shovel to install, test, and repair, if necessary, did not strip the transaction of its interstate-commerce character, so as to require compliance with the local statute regulating foreign corporations. In this case the court said that the sale, installation, and test were all one transaction, and that the installation and test and repairing of parts were mere incidents of the contract of sale, and part of the interstate commerce transaction.

A contract by a foreign corporation to sell a refrigeration plant and install it in a hotel is interstate commerce, so that the corporation need not comply with the local laws to enable it to sue on the contract, although the installation requires a period of three months to complete. The court places its ruling on the reported case (*YORK MFG. CO. v. COLLEY*, ante, 611), stating that the only difference between the two cases is that in the *COLLEY CASE* the erecting engineer was to be paid a fixed per diem by the purchaser, and was engaged only about three weeks, while in this case the erecting engineer and his helpers were paid by the year, and were engaged about three months. "But these points of difference are, in our judgment, immaterial, and the differences are simply in the method and time of performance of the same appropriate and relevant part of an interstate sale of machinery which must be assembled 'with skill and precision in order that the result of the contract of sale might come into existence.'" *United Iron Works Co. v. Watterson Hotel Co.* (1918) 182 Ky. 113, 206 S. W. 166.

In *Mergenthaler Linotype Co. v. Hays* (1916) — Mo. App. —, 181 S. W. 1183, a foreign corporation had leased typesetting machines within the state and had undertaken to send experts to set them up, instruct operatives, and make repairs at the expense of the lessee. The court held that this part of the agreement was only incidental to the transaction, and in the nature of inducement to the customer to enter into the contract, and that therefore it came within the operation of the commerce clause of the Federal Con-

stitution. The court affirmed on this point (1914) 182 Mo. App. 113, 168 S. W. 239, where the court had held that the furnishing of the competent machinist was merely an incidental inducement to the making of the contract. The case was, however, reversed in (1917) 271 Mo. 485, 196 S. W. 1135, on the ground that the leasing itself was intrastate commerce, but the reversing court says: "We are of opinion . . . that it can . . . agree to send its skilled workmen and operatives into the state at the expense of the user of its machines, to erect the same and teach the manner of the operation thereof."

In *S. F. Bowser & Co. v. Savidusky* (1913) 154 Wis. 76, 142 N. W. 182, the fact that a dry-cleaning outfit sold by a foreign corporation was to be assembled and installed by the vendor was held not to deprive the transaction of its interstate character, upon the theory that the assembling and installing were mere incidents to the sale, and, therefore, that the contract was valid, even though the vendor corporation had not complied with the local statutes so as to entitle it to do business in the state. The case of *S. F. Bowser & Co. v. Schwartz* (1913) 152 Wis. 408, 140 N. W. 51, involved a similar contract, and a like conclusion was reached.

In *Wolf Co. v. Kutch* (1911) 147 Wis. 209, 132 N. W. 981, it was held that the fact that a vendor foreign corporation agreed to furnish a millwright to assist the vendee of certain flouring mill machinery in putting same in place was a mere incident to the contract of sale, and did not deprive the transaction of its interstate character, so as to require the vendor to obtain a license to do business in the state.

And so the sale and installation of machinery by a foreign corporation in a state where it has no office or agency is an act of interstate commerce, and not the carrying on of business in the state, within the meaning of a statute requiring qualifications for transacting such business. *Milan Mill. & Mfg. Co. v. Gorten* (1894) 93 Tenn. 590, 26 L.R.A. 185, 4 Inters. Com. Rep. 851, 27 S. W. 971.

But in *Beach v. Kerr Turbine Co.* (1917) 243 Fed. 706, it was held that a foreign corporation contracting to supply, set up, and install pumps for a city waterworks department is not engaged in interstate commerce while engaged in the installation of the work. The court says: "During the time it is thus performing these necessary acts, it is entitled to police protection and to the privileges of a citizen of the state of Ohio. In this instance the time necessary to complete the contract may be short, and the amount of business to be done may not be very great. In other cases, to which the same rule must apply, the foreign corporation might remain in the state months, and even years, performing its contract. . . . In our opinion, under such conditions, which are the facts of this case, a foreign corporation is doing business in the state, and the person in charge and chiefly representing it becomes a 'managing agent' for the purpose of being served with process."

So, in *American Amusement Co. v. East Lake Chutes Co.* (1911) 174 Ala. 526, 56 So. 961, it was held that a foreign corporation which executed a contract for the sale of a machine and attachments, to be transported into Alabama and there assembled or built into a structure, was, in the performance of such contract, doing business within the state, as the fruition of the contract was not the delivery of an article of commerce, but the erection of an improvement upon the purchaser's premises, and therefore was not within the protection of the principles that render interstate commerce immune against local regulation. The report of the case does not disclose the character of the machine, but the court emphasized the fact that the labor is not an article of interstate commerce, and ruled that the necessity of its use brought the foreign corporation within the operation of the local statutes.

And in *Portland Co. v. Hall & G. Constr. Co.* (1907) 121 App. Div. 779, 106 N. Y. Supp. 649, rehearing granted because of error as to point of practice in (1908) 123 App. Div. 495, 108 N. Y.

Supp. 821, it was held that a contract by a foreign corporation to manufacture, deliver, and install certain hydraulic elevators in a building in New York was not interstate commerce, but was a carrying on of business in the state, the court saying that a different question would have been presented had the contract related solely to the manufacturing and delivering of the elevators instead of being a contract for the manufacture and installation of the completed elevators, upon which completed contract the cause of action was based.

So, in *B. F. Sturtevant Co. v. Adolph Leitelt Iron Works* (1917) 196 Mich. 552, 163 N. W. 13, the court said with respect to the installation of a ventilating system, that it had no such "intricate or peculiar quality or inherent complexity" as made it necessary for the manufacturer to agree to install in order to effect sales generally. The court concludes that the sale of the apparatus did not depend on seller's agreement to install because of peculiar qualities of the apparatus, and that therefore the contract was not interstate commerce.

A contract to install in boilers superheaters for steam which are manufactured in another state and shipped in a knocked-down condition, ready for installation, is subject to state control if there is nothing to show that installation was necessary to a sale, because of the peculiar character of the apparatus. The court interpreted the *Browning Case* to hold that when material is shipped from one state into another, and there installed, such act is intrastate commerce unless within the exception stated in that case. And because it appeared that there were local machinists who could have installed the superheaters, that case was not brought within the exception. *Power Specialty Co. v. Michigan Power Co.* (1916) 190 Mich. 699, 157 N. W. 408.

A contract by a foreign manufacturer of vacuum cleaners to sell one and install it in a building within the state is not interstate commerce so as to relieve it of the necessity of complying with the local laws in order to

enforce its contract. *Palm Vacuum Cleaner Co. v. Bjornstad* (1917) 136 Minn. 38, L.R.A.1917C, 1012, 161 N. W. 215. The court said that it appeared that the workmen who performed the work were employed in the state, and certain of the supplies were purchased there. There was no evidence that, by reason of the peculiar quality or nature of the machine, the agreement of installation was a necessary part of the contract of sale. For aught that appears to the contrary, any electrician or plumber could perform the work. The court further says that to bring the transaction within the protection of interstate commerce it must appear that the matter of installation is, by reason of some peculiarity of the article or of the machine sold, a necessary and essential part of the transaction. Further, that it adopts this rule to the end that, in view of the *Browning Case* (1914) 233 U. S. 16, 58 L. ed. 828, 34 Sup. Ct. Rep. 578; there may be uniformity in the administration of the law upon this question.

A contract by a foreign corporation to sell and install a heating and ventilating plant in a theater is not, so far as the installation is concerned, interstate commerce, where the latter constituted 42 per cent of the contract price, and the installation was not so complicated that the sale required its performance by the seller, and therefore the seller cannot, without complying with the local statutes, enforce its contract in the local courts. *Peck-Williamson Heating & Ventilating Co. v. McKnight* (1918) 140 Tenn. 563, 205 S. W. 419. The court says the seller's practice was to sell the equipment outright to dealers in the various localities where it sold its goods. In such cases the dealer who had purchased it would install it. The ruling was rested on *Browning v. Waycross*, and the court calls attention to the fact that the transaction in controversy was not an isolated one, but the seller had installed plants in the state on at least five different occasions.

In holding that a contract to sell and install a gasoline pump and tank was not interstate commerce, the court in *Bryan v. S. F. Bowser & Co.* (1919) —

Tex. Civ. App. —, 209 S. W. 189, said: "The shipment and delivery of the machinery agreed to be furnished by appellee alone would not have been a full performance of the contract, entitling appellee to its enforcement. The contractual obligation can be treated in procedure only as an entirety, and nothing less than the delivery of the machinery, and its installation according to the terms of the contract, would have constituted such performance, and matured the right of appellee to recover the amount agreed to be paid therefor by appellant. The facts show that appellee delivered the machinery and installed it, but the installation thereof required the expenditure of considerable time and labor and purchase of material in this state. Indeed, all the labor employed in the installation of the machinery was secured by appellee in this state, and certain material necessary therefor was purchased in this state. The performance of the contract was necessarily to be had in Texas. The employment of state labor and the purchasing of a portion of the material in this state for the installation of the machinery furnished appellant was in line with appellee's business and for pecuniary profit. The price agreed upon was not for the machinery alone or any part of the machinery, but was for the installation of the gasoline tank and pump, including all material and labor and 'was in competition with citizens of this state transacting similar business.'"

Cases in which work and labor within the state, rather than the sale of articles in interstate commerce, were involved.

As shown by the *Browning Case* (U. S.) *supra*, and the *General Railway Signal Co. Case* (1918) 246 U. S. 500, 62 L. ed. 854, 38 Sup. Ct. Rep. 360, there are transactions in which the sale of a foreign-made product may be regarded rather as an incident of a contract for labor within the state, than as the chief incident of the transaction, and when that is the case, the transaction is not protected by the commerce clause of the Federal Constitution.

The planting of shrubs and trees sold by a foreign nurseryman is an intrastate transaction, and cannot be enforced without compliance with the local laws. *Phoenix Nursery Co. v. Trostel* (1917) 166 Wis. 215, L.R.A. 1918B, 311, 164 N. W. 995.

A contract by a foreign corporation to equip a local concern with a sprinkler system which requires the employment of labor for weeks upon structures in the construction of which materials belonging to the purchaser are used, is not interstate commerce, and cannot be enforced unless the corporation complies with the local statute so as to have the right to do business in the state. *United States Constr. Co. v. Hamilton Nat. Bank* (1920) — Ind. App. —, 126 N. E. 866.

A contract by a foreign corporation to equip a local concern with a system of automatic fire sprinklers is, where there is nothing in the contract to indicate that it was intended by either party that any of the labor or materials should be brought into the state from outside, not interstate commerce, so as to relieve the contractor from compliance with the local laws in order to be entitled to do business in the state, and it is immaterial that some of the material used is never brought into the state from outside. The court, in disposing of the case, says it must be borne in mind that the contract in question does not provide for the sale of an article in interstate commerce under an agreement containing a clause to the effect that the seller shall install the article in the state into which it is to be sent. *Re Springfield Realty Co.* (1919) 257 Fed. 785.

A contract by a foreign corporation to furnish and set in place assembled plasterwork is, so far as it pertains to the installation of the material, intrastate, where it appears that there are mechanics in the state entirely competent to erect it. Therefore the contract cannot be enforced without complying with the local laws, so as to be entitled to do business within the state. *Decorators' Supply Co. v. Chaussee* (1920) — Mich. —, 178 N. W. 665.

A contract by a foreign corporation for the construction of a material portion of a local building is not interstate commerce, although the material and laborers are shipped from the corporation's residence in another state. *St. Louis Expanded Metal Fire Proofing Co. v. Beilharz* (1905) — Tex. Civ. App. —, 88 S. W. 512.

The installation by the manufacturer of window and door screens which had been manufactured in another state is within the control of the state. *Buhler v. E. T. Burrowes Co.* (1914) — Tex. Civ. App. —, 171 S. W. 791.

In *Kinnear & G. Mfg. Co. v. Miner* (1916) 89 Vt. 572, 96 Atl. 333, the report of the case does not show the character of plaintiff's product, it merely stating that he was engaged in furnishing certain materials for a building, that the product was manufactured in and forwarded from another state, and, in some instances, it erected and installed the materials so furnished. The court held that the erection and installation of this building material was doing business in the state.

In *George M. Muller Mfg. Co. v. First Nat. Bank* (1912) 176 Ala. 229, 57 So. 762, performance in Alabama of a contract by a foreign corporation to furnish for and install in a bank certain marble trimmings and other fixtures, such as counters, offices, cages, etc., was held to constitute doing business in the state.

In *S. R. Smythe Co. v. Ft. Worth Glass & Sand Co.* (1911) 105 Tex. 8, 142 S. W. 1157, affirming on this point (1910) 61 Tex. Civ. App. 388, 128 S. W. 1136, the building and erection of certain "gas producers with downtakes" in a glass factory by a foreign corporation was held to be transacting business in the state, although the gas producers with downtakes were manufactured in another state, the court agreeing that the transaction had no mark of barter or sale, so as to render it interstate commerce, but was a contract for the construction of gas producers, including labor and material, and to perform which required from six to eight weeks' time and the pur-

chase of much labor and various materials. This decision seems to be based on the form of the contract, which was one merely for construction, with no reference to sale of machines.

In *Haughton Elevator & Mach. Co. v. Detroit Candy Co.* (1909) 156 Mich. 25, 120 N. W. 18, it was held that a single entire contract by a foreign corporation for the sale and installation of an electric freight elevator and the making of repairs upon another elevator was one for the transaction of business within the state, as the repairs could in no sense be regarded as interstate commerce. It was said, however, that had the contract been merely for the installation of a new elevator, the vendor could have urged "with much reason that it was an act of interstate commerce."

In *Nickerson v. Warren City Tank & Boiler Co.* (1915) 223 Fed. 843, a case arising in Pennsylvania, it was held that a foreign corporation engaged in the business of constructing and erect-

ing oil tanks, the practice being, when practicable, to construct same in the home state and then to ship either in entirety or in sections for erection in the place of their location, was doing business in the states where it erected such tanks, the court saying that the corporation was in such state in the performance of its contract, and for the purpose of doing the work it had contracted for, and was therefore in the most emphatic practical sense "doing business" in the district.

It is a question for the jury to determine whether a foreign corporation is "doing business" within a state, within the meaning of such a statute, where it enters into a contract in Michigan to erect a factory building and equip it with machinery, part of the materials and machinery being purchased by it within the state and part without, and part of the machinery being manufactured by it without the state. *Oakland Sugar Mill Co. v. Fred W. Wolf Co.* (1902) 55 C. C. A. 93, 118 Fed. 239. H. P. F.

BELLE NICKELL, Appt.,

v.

R. H. BRADSHAW

and

EFFIE MAY TERRILL, Respt.

Oregon Supreme Court (Dept. No. 1)—July 29, 1919.

(94 Or. 580, 183 Pac. 12.)

Evidence — to vary indorsement of note.

1. Parol evidence is not admissible to vary or contradict the contract which the law writes over a blank indorsement on a promissory note which is made after delivery of the note to the payee.

[See note on this question beginning on page 637.]

Pleading — omission from copy of note — effect on evidence.

2. The mere fact that a clause for acceleration of payment was omitted from the copy of a note set out in the complaint does not make the note offered in evidence a different one from that sued on, if it was correctly copied in the answer, which is admitted to be correct in the reply, so that there is no doubt that the pleadings all refer to

the same instrument which is the one offered in evidence.

Evidence — effect of single answer of witness.

3. Upon the question whether or not a note was in the hands of the bank at which it was payable for collection when it was due, a single answer of a single witness is not controlling, but the fact must be determined from the evidence as a whole.

Bills and notes — sufficiency, of presentment — note in bank.

4. The presence of a note in the bank at which it is payable for collection, when it falls due, together with notice to the maker of the fact and a demand for payment, is a sufficient compliance with a statute providing that presentment for payment must be made to the person primarily liable on the instrument, or, if he is absent or inaccessible, to any person found at the place where the presentment is made, where the statute also provides that, if the note is payable at a bank, a sufficient presentment occurs if the note is in the bank at maturity, ready to be delivered to the person entitled to it on payment of the instrument.

[See 3 R. C. L. 1206.]

— authority to receive payment — evidence.

5. Possession at the time and place of payment of a note properly indorsed, by the bank at which it is payable, is prima facie evidence of the bank's authority to receive payment.

[See 3 R. C. L. 1288.]

— acceleration clause — effect.

6. A note payable on a definite day is not rendered non-negotiable by a conditional promise to pay on an earlier day, unless the earlier day is completely dependent on the caprice of the holder.

[See 3 R. C. L. 906-908.]

— payable when ranch is sold — effect on negotiability.

7. A clause in a note payable a certain time after date, making it due if ranch is sold or mortgaged, does not render it non-negotiable under statutes requiring negotiable instruments to be payable at a fixed or determinable future time which is defined, inter alia, as on or before a fixed or determinable future time specified therein.

[See 3 R. C. L. 908.]

— effect of acceleration clause — option.

8. An acceleration clause in a note is not self-executing, but confers an option upon the holder to treat the note as due.

Pleading — negative — power to act on acceleration clause in note.

9. One suing upon a note containing an acceleration clause which was not acted upon is not bound to plead or prove the fact that the option was not exercised.

Evidence — failure to deliver indorsement contract.

10. The effect of a blank indorsement upon a promissory note cannot be changed upon the theory that the contract implied by such indorsement was never delivered to the indorsee, and that therefore the rule excluding parol evidence to vary written instruments is not applicable if there was in fact a complete delivery of the instrument.

[See 3 R. C. L. 1156.]

— burden of proof — time of mailing notice of dishonor of note.

11. The holder of a promissory note seeking to hold the indorser by notice sent by mail has the burden of showing that the notice was placed in the mail within the time prescribed by the statute.

— failure of proof — nonsuit.

12. The holder of a note seeking to recover from the indorser is subject to nonsuit if he attempted to give notice of dishonor by mail, and merely shows that he deposited notice of the dishonor in the mail on the day following the dishonor, without showing that it was deposited before the leaving of a convenient mail on that day, if the statute requires it to be deposited in time to go by mail on that day.

[See 3 R. C. L. 1249.]

APPEAL by plaintiff from a nonsuit granted by the Circuit Court for Jackson County (Calkins, J.) in favor of defendant Terrill, in an action brought to recover the amount alleged to be due on a promissory note. *Affirmed.*

Statement by Harris, J.:

Belle Nickell brought this action against R. H. Bradshaw, as the maker, and against Effie May Terrill, as an indorser, of a promissory note. Bradshaw made no appearance, and there was a judgment against him

for the amount of the note; but as between Belle Nickell and Effie May Terrill there was an involuntary judgment of nonsuit against Belle Nickell. The plaintiff appealed.

On August 9, 1910, R. H. Bradshaw delivered to Effie May Terrill

his promissory note which reads as follows:

\$2,000.

Medford, Oregon, Aug. 9th, 1910.

Five years from date without grace, I promise to pay to the order of Effie May Terrill for value received, with interest from date, payable annually at the rate of 6 per cent per annum, until paid, principal and interest payable in U. S. gold coin, at Farmers' & Fruit Growers' Bank of Medford, Oregon; and in case suit or action is instituted to collect this note, or any portion thereof, I promise to pay such additional sum of money as the court may adjudge reasonable as attorney's fees in such suit or action.

R. H. Bradshaw.

Due if ranch is sold or mortgaged.

Charles Nickell is the husband of Belle Nickell, and Charles E. Terrill is the husband of Effie May Terrill. On March 26, 1912, Belle Nickell traded 160 acres of land, owned by her, for the note held by Effie May Terrill. The land was valued at \$1,600, and Belle Nickell and her husband executed and delivered to Effie May Terrill a note "for \$400 for the difference." This note, signed by the Nickells, was afterwards paid by them. All the negotiations for the "trade" were conducted by Charles Nickell as the agent of Belle Nickell, and by Charles E. Terrill as the agent of his wife. The inference to be drawn from the record is that all the negotiations for the "trade," as well as the consummation of it, were carried on in Medford. Effie May Terrill resided in Brownsboro, Jackson county, and was not present during any of the negotiations nor at the close of the transaction. When the Bradshaw note was delivered to Charles Nickell, as the agent of his wife, there was an indorsement on the back of the paper showing the payment of interest to August 9, 1911, and immediately beneath that writing the name "Effie May Terrill" was written. The undisputed evidence is that Effie May Terrill placed the note

in her lock box in a Medford bank, and that it remained there until it was delivered to Charles Nickell. The uncontradicted testimony of Effie May Terrill is that, although the name upon the back of the note was her genuine signature, she had written her name on the note some time before the negotiations for the "trade."

On July 24, 1915, Charles Nickell and his wife were in Berkeley, California, and on that date the former, writing from Berkeley, addressed a letter to Charles E. Terrill, inquiring as to the whereabouts of Bradshaw and saying that "his note will soon be due." Nickell returned to Medford shortly after writing to Terrill, and did not receive an answer from Terrill until after he had returned to Medford. Not knowing the whereabouts of Bradshaw, about ten days or two weeks before August 9, 1915, and while still in Berkeley, Nickell wrote two letters to Bradshaw, addressing one to him at Medford and the other to him at Brownsboro, telling him that "the note would become due on a certain date, and to go and pay it." Charles Nickell testified that he did not present the note to Bradshaw personally, but that "I just left it at the bank where he should pay it, and told him about it being there." Charles Nickell stated on direct examination that the note "has been in mine and my wife's" possession since it was received from Charles E. Terrill; and upon being recalled the witness was asked by counsel for plaintiff whether he made demand upon Bradshaw for payment the next day after the note became due; and he answered thus: "Yes, the next day. This note was at the bank (Farmers' & Fruit Growers' Bank) there all of the time, and it was only withdrawn some time afterwards from the bank, and in fact he was notified to appear at the bank and pay it."

Charles Nickell was further asked: "You say this note was at the Farmers' & Fruit Growers' Bank up to the time it became due?" and he answered, "Yes."

On August 10, 1915, Charles Nickell wrote, and Belle Nickell signed, a letter addressed to Effie May Terrill at Brownsboro, as follows:

You are hereby notified that the note drawn in your favor by R. H. Bradshaw under date of August 9, 1910, for \$2,000, payable at the Farmers' & Fruit Growers' Bank at Medford, Oregon, five years after date, with interest at 6 per cent per annum, and subsequently indorsed by you and sold and transferred to me by you before maturity for a valuable consideration, was dishonored and not paid by said R. H. Bradshaw, the maker, at maturity, after due presentation.

I now make demand upon you that you pay said note and accrued interest at the Farmers' & Fruit Growers' Bank at Medford, Oregon, at once.

Belle Nickell.

Dated this 10th day of August, 1915.

This letter was deposited in the postoffice in Medford, and was received by Effie May Terrill at Brownsboro.

The complaint alleges that R. H. Bradshaw gave his promissory note to Effie May Terrill on August 9, 1910, and that afterwards, before the maturity of the note, the latter indorsed it to the plaintiff; that "at the maturity thereof" the note was "duly presented to the said defendant, R. H. Bradshaw, the maker thereof, for payment, and payment thereof demanded; but the same was not paid nor was any portion thereof, of all which due notice was given to the said defendant, Effie May Terrill, the said indorser thereof, and payment thereof demanded of the said defendant, Effie May Terrill, the said indorser." The complaint sets out a purported copy of the note sued upon; but a comparison of the complaint with the promissory note executed by Bradshaw discloses that the recitals in the complaint agree with the original note, except that the complaint omits the words, "due if ranch is sold or mortgaged."

Effie May Terrill denied all the

allegations of the complaint except as "specifically alleged" in the answer. In passing it is proper to add that the denials were based, in part, on the theory that the complaint recited a note different from the one which the respondent had transferred to the plaintiff. The answer recites the execution and delivery of the note from Bradshaw to Effie May Terrill, and this pleading contains an accurate copy of the whole note. The answer also contains two separate defenses. In the first separate defense it is stated, in substance, that the Bradshaw note was delivered to and accepted by the plaintiff upon an agreement by her "to look entirely to the defendant Bradshaw for the payment of the same, without any claim upon this defendant for liability for any portion of said note, principal or interest, or attorney's fees. . . . That in said transaction plaintiff accepted said note as the obligation of the defendant Bradshaw only, relieving this defendant from the liability thereon in the event of nonpayment, and without any other understanding, legal, implied, or otherwise, that this defendant would become the guarantor or indorser thereof."

In the second separate defense it is recited that, when Bradshaw gave the note to Effie May Terrill, he was the owner of a ranch in Jackson county, "of large acreage and of great value, and so long as said ranch remained the property of the said Bradshaw, and was not too largely mortgaged or encumbered, said note was easily collectable out of said ranch; that for said reason it was stipulated as a part of said transaction that if said ranch should be sold or mortgaged said note should mature, so that this defendant might protect herself in the collection of said note."

Effie May Terrill further alleged that, at the time of the transfer of the note to Belle Nickell, the Bradshaw ranch was mortgaged, but that the "encumbrance was small as compared with the value of said ranch, and had been put on by the consent

of this defendant, as this defendant advised plaintiff at the time of the sale of said note."

The second separate defense concludes with the following paragraph: "That thereafter, on or about the 18th day of January, 1913, the defendant Bradshaw sold said ranch to Frederick T. Lewis, of which fact the plaintiff had knowledge, and on or about the time of said transaction, and for more than one year prior to any notice of nonpayment to this defendant, and for more than one year prior to any demand upon this defendant for the payment of said note or any part thereof. By the terms of said note and by reason of said transaction the said note . . . became due and owing more than one year prior to any notice of nonpayment or demand for payment by plaintiff on defendant."

The reply opens by explaining that the words, "due if ranch is sold or mortgaged," were inadvertently omitted from the complaint. The reply denies that the Bradshaw note was transferred to the plaintiff upon an agreement by her to look to Bradshaw only for payment of the note; and this denial is followed by an affirmative allegation that it was agreed that "the plaintiff should not look entirely to the said defendant, R. H. Bradshaw, for the payment of the said note, . . . but that the said defendant, Effie May Terrill, should indorse the last described note unrestrictedly."

The plaintiff admits the sale to Frederick T. Lewis, but attacks the second separate defense by averring that the words, "due if ranch is sold or mortgaged," were intended to give Effie May Terrill "the option only to declare the said note due in the event the said defendant Bradshaw should sell or mortgage the ranch referred to in said promissory note;" that Effie May Terrill waived her right to exercise the option to declare the note due, by consenting on October 8, 1910, to a conveyance of the north half of the ranch from Bradshaw to Mrs. M. D. Harbaugh for \$4,000, and by consenting to the

execution of a mortgage in 1911 on the south half of the ranch for \$3,120 by Bradshaw to H. M. McFarland.

Messrs. James E. Fenton and W. E. Crews, for appellant:

When a promissory note is made payable at a particular bank, it is a sufficient presentment of it if it is in the bank at maturity, ready to be delivered to any party who may be entitled to it in payment of the amount due thereon.

Dan. Neg. Inst. § 656; Parsons, Bills & Notes, p. 434; Randolph, Com. Paper, § 1134; Story, Promissory Notes, § 243; Biggs v. Wood, 2 Manitoba L. R. 272; Sabin v. Burke, 4 Idaho, 28, 37 Pac. 352; Hoffman v. Hollingsworth, 10 Ind. App. 353, 37 N. E. 960; Graham v. Sangston, 1 Md. 60; Berkshire Bank v. Jones, 6 Mass. 524, 4 Am. Dec. 175; Folger v. Chase, 18 Pick. 63; Ogden v. Dobbins, 2 Hall, 112; Woodin v. Foster, 16 Barb. 146; State Bank v. Napier, 6 Humph. 270, 44 Am. Dec. 308; Bank of United States v. Carneal, 2 Pet. 543, 7 L. ed. 513.

Where a promissory note is made payable at a bank, and it is left there for collection, the bank becomes the agent for the owner to receive payment, and it is deemed the holder of the note for the purpose of making demand on the maker for payment.

Warren v. Gilman, 17 Me. 360; Burnham v. Webster, 19 Me. 232; Adams v. Hackensack Improv. Commission, 44 N. J. L. 638, 43 Am. Rep. 406; Blakeslee v. Hewett, 76 Wis. 341, 44 N. W. 1105; Ward v. Smith, 7 Wall. 447, 19 L. ed. 207.

A note payable at a bank, which remains there, is presumed to have been presented there for payment when due, and the officers of the bank are presumed to have done their duty to be at the bank to receive payment during business hours of the last day for payment.

Dykman v. Northridge, 1 App. Div. 26, 36 N. Y. Supp. 962; Folger v. Chase, 18 Pick. 63; Brittain v. Doylestown Bank, 5 Watts & S. 87, 39 Am. Dec. 110.

When a promissory note is payable at a particular bank, the payor must be at the bank at the time it matures, ready and willing to pay it.

Adams v. Rutherford, 13 Or. 78, 8 Pac. 896.

An indorser of a negotiable promis-

sory note cannot plead as a defense to such indorsement that the indorsee was to look entirely to the maker of such note for payment.

Dan. Neg. Inst. § 719; Randolph, Com. Paper, § 779; *Goldman v. Davis*, 23 Cal. 256; *Courtney v. Hogan*, 93 Ill. 101; *Wilson v. Black*, 6 Blackf. 509; *Rodney v. Wilson*, 67 Mo. 123, 29 Am. Rep. 499; *Smith v. Caro & Baum*, 9 Or. 278; *Portland Nat. Bank v. Scott*, 20 Or. 421, 26 Pac. 276; *Carroll v. Nodine*, 41 Or. 412, 93 Am. St. Rep. 743, 69 Pac. 51; *Charles v. Denis*, 42 Wis. 56, 24 Am. Rep. 383; *Martin v. Cole*, 104 U. S. 30, 26 L. ed. 647.

Where a note contains an absolute promise to pay at a time specified, its quality as a negotiable instrument is not destroyed by the fact that it also embodies a conditional promise to pay at an earlier time.

Dan. Neg. Inst. §§ 43, 44; *Kiskadden v. Allen*, 7 Colo. 206, 3 Pac. 221; *Elliott v. Beech*, 3 Manitoba L. R. 213; *Walker v. Woollen*, 54 Ind. 164, 23 Am. Rep. 639; *Charlton v. Reed*, 61 Iowa, 166, 47 Am. Rep. 808, 76 N. W. 64; *Stevens v. Blunt*, 7 Mass. 240; *Dobbins v. Oberman*, 17 Neb. 163, 22 N. W. 356; *Ernst v. Steckman*, 74 Pa. 13, 15 Am. Rep. 542; *Joergenson v. Joergenson*, 28 Wash. 477, 92 Am. St. Rep. 888, 68 Pac. 913; *Chicago R. Equipment Co. v. Merchants' Nat. Bank*, 136 U. S. 268, 34 L. ed. 349, 10 Sup. Ct. Rep. 999; *Smith v. Nelson Land & Cattle Co.* 123 C. C. A. 512, 212 Fed. 56.

The sale or mortgage of the ranch did not render the note due and payable in advance of the time specified on the face of the note, namely, "five years from date," unless the payee or owner elected by some affirmative action, as by suit or otherwise, to treat it as due and payable in consequence of such sale or mortgage.

Elliott v. Beech, 3 Manitoba L. R. 213; *Belloc v. Davis*, 38 Cal. 243; *Mason v. Luce*, 116 Cal. 232, 48 Pac. 72; *Kiskadden v. Allen*, 7 Colo. 206, 3 Pac. 221; *Ernst v. Steckman*, 74 Pa. 13, 15 Am. Rep. 542; *Wall v. Marsh*, 9 Baxt. 439; *First Nat. Bank v. Parker*, 28 Wash. 234, 92 Am. St. Rep. 828, 68 Pac. 756; *Joergenson v. Joergenson*, 28 Wash. 477, 92 Am. St. Rep. 888, 68 Pac. 913; *Keene Five Cent Sav. Bank v. Reid*, 59 C. C. A. 225, 123 Fed. 221; *Gillette v. Hodge*, 95 C. C. A. 205, 170 Fed. 313.

A nonsuit is properly denied when

there is any evidence tending to sustain the plaintiff's case.

Felton v. Millard, 81 Cal. 540, 22 Pac. 750, 21 Pac. 533; *Goldstone v. Merchants' Ice & Cold Storage Co.* 123 Cal. 625, 56 Pac. 776; *Tippin v. Ward*, 5 Or. 450; *Grant v. Baker*, 12 Or. 329, 7 Pac. 318; *Salomon v. Cress*, 22 Or. 177, 29 Pac. 439; *Sovern v. Yoran*, 15 Or. 644, 15 Pac. 395; *Ryberg v. Portland Cable R. Co.* 22 Or. 224, 29 Pac. 614; *Herbert v. Dufur*, 23 Or. 462, 32 Pac. 302; *Feldman v. McGuire*, 34 Or. 309, 55 Pac. 872; *Perkins v. McCullough*, 36 Or. 146, 59 Pac. 182; *Hyber v. Miller*, 41 Or. 103, 68 Pac. 400; *Northern Pacific Lumber Co. v. Spore*, 44 Or. 462, 75 Pac. 890; *Francis v. Mut. L. Ins. Co.* 55 Or. 280, 106 Pac. 323; *Purdy v. Van Keuren*, 60 Or. 263, 119 Pac. 149; *Nutt v. Isensee*, 60 Or. 395, 119 Pac. 722; *Love v. Chambers Lumber Co.* 64 Or. 129, 129 Pac. 492; *Sullivan v. Wakefield*, 65 Or. 523, 133 Pac. 641; *Domurat v. Oregon-Washington R. & Nav. Co.* 66 Or. 135, 134 Pac. 313; *Buchanan v. Lewis A. Hicks Co.* 66 Or. 503, 133 Pac. 780, 134 Pac. 1191; *Woods v. Wikstrom*, 67 Or. 581, 135 Pac. 192.

A motion for nonsuit admits the truth of all plaintiff's evidence and every inference of fact that can be legitimately drawn therefrom; and upon such motion evidence submitted by plaintiff is to be interpreted most favorably for him and most strongly against defendant.

Hanley v. California Bridge & Constr. Co. 127 Cal. 232, 47 L.R.A. 597, 59 Pac. 577; *Ferris v. Baker*, 127 Cal. 520, 59 Pac. 937; *Herbert v. Dufur*, 23 Or. 462, 32 Pac. 302; *Brown v. Oregon Lumber Co.* 24 Or. 315, 33 Pac. 557; *Putnam v. Stalker*, 50 Or. 210, 91 Pac. 363; *Dillard v. Olalla Min. Co.* 52 Or. 126, 94 Pac. 966, 96 Pac. 678; *Patty v. Salem Flouring Mills Co.* 53 Or. 350, 96 Pac. 1106, 98 Pac. 521, 100 Pac. 298; *Palmer v. Portland R. Light & P. Co.* 56 Or. 262, 108 Pac. 211; *Devroe v. Portland R. Light & P. Co.* 64 Or. 547, 131 Pac. 304.

Where the right determination of a cause depends upon the effect or weight to be given to the evidence, it is for the consideration of a jury under proper instructions from the court as to the law.

Anderson v. North Pacific Lumber Co. 21 Or. 281, 28 Pac. 5; *Salomon v. Cress*, 22 Or. 177, 29 Pac. 439; *Herbert v. Dufur*, 23 Or. 462, 32 Pac. 302; *Sta-*

(94 Or. 580, 183 Pac. 12.)

ger v. Troy Laundry Co. 41 Or. 141, 68 Pac. 405; Ringue v. Oregon Coal & Nav. Co. 44 Or. 407, 75 Pac. 703; Pacific Export Co. v. North Pacific Lumber Co. 46 Or. 194, 80 Pac. 105; Galvin v. Brown & McCabe, 53 Or. 598, 101 Pac. 671.

Incompetent evidence admitted without objection in the course of a trial will be treated by the court as competent on motion for nonsuit.

Janson v. Brooks, 29 Cal. 214; Jacobsen v. Siddal, 12 Or. 280, 53 Am. Rep. 360, 7 Pac. 108; Burris v. Whitner, 3 S. C. 510; Latimer v. Trowbridge, 52 S. C. 193, 68 Am. St. Rep. 893, 29 S. E. 634.

In an action on a promissory note, where the complaint is sufficient to warrant recovery, and the defendant does not deny any of the material allegations of the complaint, nor set up new matter constituting a defense, and there is sufficient evidence to support the allegations of the complaint, a judgment should be rendered for plaintiff.

Finley v. Tucson, 7 Ariz. 108, 60 Pac. 872; Felch v. Beaudry, 40 Cal. 439; Steinhauer v. Colmar, 11 Colo. App. 494, 55 Pac. 291; Bertin & Lepori v. Mattison, 80 Or. 354, 5 A.L.R. 590, 157 Pac. 153.

Mr. W. D. Fenton also for appellant.

Mr. A. E. Reames, for respondent:

Since the pleader undertook to set out an exact copy of the note sued upon, the difference in the two instruments does not come within the doctrine of variance.

Kelsay v. Taylor, 56 Or. 19, 107 Pac. 609; Thompson v. Rathbun, 18 Or. 203, 22 Pac. 837.

The note in question is non-negotiable.

Barr v. Mitchell, 7 Or. 354; Moline v. Portland Brewing Co. 73 Or. 532, 144 Pac. 572; Hull v. Angus, 60 Or. 101, 118 Pac. 284.

There was no notice given to the respondent that the note had not been paid at maturity.

Jackson v. McInnis, 33 Or. 530, 43 L.R.A. 128, 72 Am. St. Rep. 755, 54 Pac. 884, 55 Pac. 535; Robinson v. Holmes, 57 Or. 5, 109 Pac. 754; Price v. Warner, 60 Or. 11, 111 Pac. 49, 118 Pac. 173; First Nat. Bank v. Miller, 139 Wis. 126, 131 Am. St. Rep. 1040, 120 N. W. 821; Corbin v. Planters Nat. Bank, 87 Va. 661, 24 Am. St. Rep. 673, 13 S. E. 99.

There was no contract created by the respondent's indorsement of a note.

Moll v. Roth Co. 77 Or. 599, 152 Pac. 235; Jones v. Albee, 70 Ill. 37; 7 Cyc. 1124; Colvin v. Goff, 82 Or. 314, L.R.A. 1917C, 300, 161 Pac. 568; Ware v. Allen, 128 U. S. 590, 32 L. ed. 563, 9 Sup. Ct. Rep. 174.

The complaint does not state a cause of action against the indorser.

Whitney Co. v. Smith, 63 Or. 191, 126 Pac. 1000; Robinson v. Holmes, 57 Or. 7, 109 Pac. 754; Kirkpatrick v. Dallas, 58 Or. 513, 115 Pac. 424; Splonskofsky v. Minto, 62 Or. 566, 126 Pac. 15; Moore v. Fowler, 58 Or. 296, 114 Pac. 472; Seebree Deposit Bank v. Moreland, 96 Ky. 150, 29 L.R.A. 307, 28 S. W. 153.

Where a note is set up in the complaint, and its execution is denied in the answer, no presumptions are indulged to show its due execution or nonpayment.

Sears v. Daly, 43 Or. 350, 73 Pac. 5.

Harris, J., delivered the opinion of the court:

The respondent argues that the note introduced in evidence is not the instrument described in the complaint and upon which the action is brought. The note recited in the complaint is an exact copy of the instrument received in evidence, except that the words, "due if ranch is sold or mortgaged," are omitted from the former. The answer denies all the allegations of the complaint, but this denial is qualified by the words, "except as hereinafter specifically alleged." Immediately following this qualified denial is paragraph 1, in which it is affirmatively alleged that on August 9, 1910, R. H. Bradshaw made and delivered to Effie May Terrill his promissory note. This allegation is then followed by an exact copy of the note which was introduced in evidence. In the reply the plaintiff expressly admits the allegations in paragraph 1 of the answer, and this admission is then followed by an explanation to the effect that through inadvertence the words, "due if ranch is sold or mortgaged," were omitted from "the copy of said promissory note as set out in the complaint of plaintiff here-

in." A mere statement of the facts makes it obvious that the complaint and the reply, on one hand, and the answer, on the other, refer to the same note, and that the note referred to is the instrument received in evidence.

Assuming that the note became due on August 9, 1915, and not before that date, then, in order to make Effie May Terrill liable as an indorser, Belle Nickell, the holder, was obliged to present the note for payment on August 9, 1915, for § 5904, L. O. L., provides that "where the instrument is not payable on demand, presentment must be made on the day it falls due." 8 C. J. 533, 534, 548, 549.

The plaintiff insists that she offered sufficient evidence to warrant a finding that the note was, on August 9, 1915, in the hands of the bank for delivery to the maker upon payment being made by him. Effie May Terrill strenuously contends that there is an utter want of evidence to show that the note was in the hands of the bank for collection, and that the most that can be claimed for the evidence is that the instrument was in the bank in the plaintiff's lock box. It is true that Charles Nickell stated that the note had been "in mine and my wife's possession since it was received from Charles E. Terrill." The quoted answer of the witness cannot in fairness be construed alone and by itself, but it must be interpreted in connection with the remainder of the testimony given by the witness, and when so construed there was sufficient

**Evidence—
effect of single
answer of
witness.**

evidence, if believed by the jury, to sustain a finding that the bank had the note in its actual possession on the date when it became due, with authority to receive payment and surrender the note to the maker. The substance of the testimony of Charles Nickell is that he left the note in the bank; that about ten days or two weeks before the note

became due he wrote to Bradshaw, telling him that the note was in the bank and "to go and pay it." The jury could have fairly and reasonably construed the words of Nickell to mean that the bank had actual possession of the note, with authority to surrender it upon payment.

However, it is argued that, even though it is held that the bank had possession of the note, with authority to surrender it upon payment being made, nevertheless no presentment for payment was made. This argument is based upon the language of § 5905, L. O. L., where it is said: "Presentment for payment, to be sufficient, must be made . . . to the person primarily liable on the instrument, or, if he is absent or inaccessible, to any person found at the place where the presentment is made."

If Belle Nickell had retained actual possession of the note, and if she had gone to the bank with it on August 9, 1915, for the purpose of presenting it, then, if Bradshaw was not present, she would have been obliged to have presented the note to some person at the bank for payment. But it must be remembered that the note was payable at the Farmers' & Fruit Growers' Bank of Medford, and there was evidence to show that the instrument was in the hands of the bank for collection; and consequently it would have been an idle, empty, and vain ceremony if some person connected with the bank had presented the note for payment to some other person connected with the bank, when the person making presentment had as much authority as an agent of the bank to pay the note as the person to whom presentment was made. The Negotiable Instruments Law (L. O. L. §§ 5905 and 5920) simply redeclares the rule, which generally prevailed prior to the adoption of the statute, that when a note is made payable at a bank a sufficient presentment occurs if the instrument is actually in the bank at maturity, ready to be delivered by the bank to any person

**Bills and notes
—sufficiency of
presentment—
note in bank.**

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who is entitled to it upon payment. *De la Vergne v. Globe Printing Co.* 27 Colo. App. 308, 148 Pac. 924; *Stewart v. Soenksen*, 173 Ill. App. 1, 3; *Kewanee Nat. Bank v. Ladd*, 175 Ill. App. 151, 155; *Norwood Nat. Bank v. Piedmont Pub. Co.* 106 S. C. 472, 478, 91 S. E. 866; *Doherty v. First Nat. Bank*, 170 Ky. 810, 813, 186 S. W. 937; *Crawford, Anno. Neg. Inst. Law*, 1916 ed. 150; *Eaton & G. Com. Paper*, 452, 549; 3 R. C. L. 1206. See also *Nelson v. Grondahl*, 13 N. D. 363, 100 N. W. 1093; *Eaton & G. Com. Paper*, 449; *Havlin v. Continental Nat. Bank*, 258 Mo. 292, 301, 161 S. W. 741; 8 C. J. 558.

Section 5905, L. O. L., declares that presentment "must be made by the holder, or by some person authorized to receive payment on his behalf;" and the defendant contends that, even though it be assumed that the note was in the actual possession of the bank, yet there was no evidence that any officer of the bank had authority to receive payment. In addition to the testimony of Charles Nickell, there is the circumstance of the signature of the defendant on the back

-authority to
receive payment
-evidence. of the note. Possession at the time and place of payment, when indorsed as this note was, is prima facie evidence of authority to receive payment. 8 C. J. 565; *Selover, Neg. Inst.* 2d ed. 246.

It is contended that the note sued upon is a non-negotiable instrument. This contention proceeds upon the theory that the words, "due if ranch is sold or mortgaged," made the time of payment so uncertain that it cannot be said that the note was payable "at a fixed or determinable future time." Section 6017, L. O. L., defines a "negotiable promissory note" as "an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand or at a fixed or determinable future time, a sum certain in money to order or to bearer." Speaking of instruments generally, § 5834, L. O. L., declares that an in-

strument, to be negotiable, must, among other things, "be payable on demand, or at a fixed or determinable future time." The meaning of "fixed future time" is expressed in § 5837, L. O. L., thus: "An instrument is payable at a determinable future time, within the meaning of this act, which is expressed to be payable (1) at a fixed period after date or sight; or (2) on or before a fixed or determinable future time specified therein; or (3) on or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain. An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect."

The three sections of our Code to which attention has been directed correspond with §§ 184, 1, and 4 of the Uniform Negotiable Instruments Law which has been adopted by all the states of the Union except Georgia and Texas. *Utah State Nat. Bank v. Smith*, 180 Cal. 1, 179 Pac. 161. The chief object of the Uniform Negotiable Instruments Law was, as its name implies, to accomplish uniformity, so that a citizen of one state could know the law of every state by acquiring a knowledge of the law of his own state. Although in some of the states slight differences in phraseology may occasionally be observed, or sometimes, but rarely, omissions may be noted, or a small number of material changes might be specified, yet for the most part not only the subject-matter, but also the phraseology and the sections of the original draft, are exactly the same in the states which have adopted the Uniform Negotiable Instruments Law. In the main, the Uniform Negotiable Instruments Law is only a legislative declaration of the rules of the law merchant; and, indeed, the concluding section of the statute provides that "in any case not provided for in this act the rules of the law merchant shall govern." L. O. L. § 6025.

While most of the rules of the law merchant were thoroughly estab-

lished and were the same in all American jurisdictions, still the subject of negotiable instruments presented many phases upon which appellate courts differed; and generally, but not always, the Uniform Negotiable Instruments Law solved these differences by adopting whatever rule was supported by the weight of authority; and hence it is accurate to say that the Uniform Negotiable Instruments Law for the most part redeclares all the uniformly accepted rules of the law merchant, and, in most instances where there was a difference of judicial opinion, adopts whatever rule was supported by the weight of authority. 8 C. J. 47. Legislation has succeeded in establishing a substantially uniform code of rules governing negotiable instruments. Uniformity in legislation upon the subject of negotiable instruments may be said to be an accomplished fact, but perfect and exact uniformity in the construction and application of all those same rules is only an iridescent dream. Courts sometimes differ now, just as they sometimes differed before the adoption of the Uniform Negotiable Instruments Act, in the application of a given rule governing negotiable instruments, although the rule itself may be accepted and agreed upon by all. An examination of reported decisions dealing with instruments analogous to the one presented here, and rendered after as well as before the adoption of the Uniform Negotiable Instruments Law, affords concrete illustrations of the variant views sometimes expressed in the application of a given rule.

The provisions of the Negotiable Instruments Law (L. O. L. §§ 6017, 5834, and 5837) are only declaratory of the law merchant as it existed in most jurisdictions; and hence judicial opinions expressed before the enactment of the statute are not without weight in the solution of the problem confronting us. *Rossville State Bank v. Heslet*, 84 Kan. 315, 83 L.R.A.(N.S.) 738, 113 Pac. 1052, 3 R. C. L. 907, 8 C. J. 135; *Eaton & G.*

Com. Paper, 213. If the words, "due if ranch is sold or mortgaged," are omitted from the instrument, it concededly becomes a negotiable promissory note within the meaning of § 6017, L. O. L., because it contains a promise to pay "five years from date," which is, speaking as of the date of the note, a fixed future time. If, on the other hand, the words, "five years from date," are erased, the paper is admittedly transformed into a non-negotiable instrument, because it then becomes payable "if ranch is sold or mortgaged," which, if standing alone and viewed by itself, was, at the time of the execution of the instrument, a "contingency" within the meaning of § 5837, L. O. L. We are not permitted, however, to cancel any word found in the instrument, and hence the whole of the paper must be considered in determining whether the instrument is or is not negotiable. *Finley v. Smith*, 165 Ky. 445, L.R.A.1915F, 777, 780, 177 S. W. 262. It will be observed that the writing does not in express terms say that the debt becomes due if the ranch is sold or mortgaged before "five years from date," and yet such is the obvious intent and meaning of the whole writing. The debt becomes due at all events "five years from date," and the debt cannot extend beyond that fixed, certain, and definite period, because the moment the five-year period ends the debt is due, and any other interpretation of the writing would completely nullify the words "five years from date;" but, if the ranch is sold or mortgaged prior to the expiration of that fixed future time, then the promisor agrees to pay the debt at the time of such sale or mortgage. *Dobbins v. Oberman*, 17 Neb. 163, 22 N. W. 356.

The words, "due if ranch is sold or mortgaged," do not extend the date of payment, but upon the contrary they serve only to accelerate the maturity of the debt. Stated broadly, the overwhelming weight of authority is to the effect that, where a note is made payable on a definite day and

also contains a conditional promise to pay at an earlier time, the instrument is not rendered

—acceleration clause—effect.

non-negotiable by the acceleration clause. *Kiskadden v. Allen*, 7 Colo. 206, 3 Pac. 221; *Walker v. Woollen*, 54 Ind. 164, 23 Am. Rep. 639; *Charlton v. Reed*, 61 Iowa, 166, 47 Am. Rep. 808, 16 N. W. 64; *Dobbins v. Oberman*, supra; *Ernst v. Steckman*, 74 Pa. 13, 15 Am. Rep. 542; *Joergenson v. Joergenson*, 28 Wash. 477, 92 Am. St. Rep. 888, 68 Pac. 913; *Chicago R. Equipment Co. v. Merchants' Nat. Bank*, 136 U. S. 268, 34 L. ed. 349, 10 Sup. Ct. Rep. 999; *Smith v. Nelson Land & Cattle Co.* 128 C. C. A. 512, 212 Fed. 56; *White v. Hatcher*, 135 Tenn. 609, 188 S. W. 61; *Bright v. Offield*, 81 Wash. 442, 143 Pac. 159; *Utah State Nat. Bank v. Smith*, 180 Cal. 1, 179 Pac. 160; *First Nat. Bank v. Barrett*, 52 Mont. 359, 157 Pac. 951; *Siegel, C. & Co. v. Chicago Trust & Sav. Bank*, 131 Ill. 569, 7 L.R.A. 537, 19 Am. St. Rep. 51, 23 N. E. 417; 3 R. C. L. 908; *Selover*, Neg. Inst. 2d ed. 70; *Eaton & G. Com. Paper*, 220. See also *Page v. Ford*, 65 Or. 450, 469, 45 L.R.A. (N.S.) 247, 131 Pac. 1013, Ann. Cas. 1915A, 1048. The books contain a variety of cases involving acceleration clauses. More common illustrations are found in instruments which provide that a default in the payment of interest or in the payment of an instalment shall mature the debt. Other familiar examples are furnished by adjudications where a series of notes have been given for a single debt, with a provision in each note that default in the payment of any one shall mature all the unpaid notes. While nearly all the courts have decided that a default in the payment of interest or in the payment of an instalment, or a failure to pay one of a series of notes, is such an acceleration clause as does not destroy the negotiability of an instrument, yet there are recorded instances where courts have held that acceleration clauses of the kind mentioned impair the negotiability of instruments otherwise negotiable.

As already stated, the general principle has been firmly established, in despite of occasional dissenting voices, that an acceleration clause does not necessarily destroy the negotiability of an instrument. The chief difficulty, however, is encountered whenever an attempt is made to formulate a rule by which to determine the validity of all acceleration provisions; and it is probably impossible to formulate, even in the most general language, any rule which will include all acceleration provisions that have been held sufficient, and at the same time serve as a safe and certain guide in all jurisdictions. This difficulty is neither greater nor less now than it was previous to the adoption of the Negotiable Instruments Law. For example, there is a class of cases dealing with instruments having provisions to the effect that, if at any time the holder of the note deems himself insecure, he may declare the debt due; or to the effect that the holder may, if he deems himself insecure, call upon the maker for additional security when the value of the security given at the time of the execution of the writing becomes impaired, and if the maker fails to respond with additional security the holder may declare the debt due. The adjudications assignable to this class are divided in their views; but the majority of the cases decided under the provisions of the Negotiable Instruments Law, as well as the majority of those decided in jurisdictions where the Negotiable Instruments Law had not yet been adopted, have ruled that this kind of a condition in an acceleration clause renders the instrument non-negotiable. *Reynolds v. Vint*, 73 Or. 528, 144 Pac. 526; *Western Farquhar Mach. Co. v. Burnett*, 82 Or. 174, 178, 161 Pac. 384; *Holliday State Bank v. Hoffman*, 85 Kan. 71, 35 L.R.A. (N.S.) 390, 116 Pac. 239, Ann. Cas. 1912D, 1; *Puget Sound State Bank v. Washington Paving Co.* 94 Wash. 504, 162 Pac. 870; *First Nat. Bank v. Bynum*, 84 N. C. 24, 37 Am. Rep. 604; *Carroll County Sav. Bank v. Strother*, 28 S. C. 504, 6 S. E. 313;

Kimpton v. Studebaker Bros. Co. 14 Idaho, 552, 125 Am. St. Rep. 185, 94 Pac. 1039, 14 Ann. Cas. 1126; *Bright v. Offield*, 81 Wash. 442, 143 Pac. 159; *First Nat. Bank v. Russell*, 124 Tenn. 618, 139 S. W. 734, Ann. Cas. 1913A, 203. Contra: *Empire Nat. Bank v. High Grade Oil Ref. Co.* 260 Pa. 255, 103 Atl. 602; *Finley v. Smith*, 165 Ky. 445, L.R.A.1915F, 777, 177 S. W. 262; *Kennedy v. Broderick*, L.R.A.1915B, 472, 132 C. C. A. 381, 216 Fed. 137. The cases holding that an instrument is not negotiable if it contains a clause giving the holder the right to declare the debt due if he deems himself insecure are based primarily upon the objection that the date of maturity is placed wholly under the control of the holder, is completely dependent upon his whim or caprice, and is independent of any act done or omitted by the maker; and, if there is the further stipulation that the maker will furnish added security when called upon, then there is, of course, an affirmative promise of the maker to do an act in addition to his promise to pay money. *Puget Sound State Bank v. Washington Paving Co.* 94 Wash. 504, 162 Pac. 874; *Holiday State Bank v. Hoffman*, 85 Kan. 71, 35 L.R.A.(N.S.) 390, 116 Pac. 239, Ann. Cas. 1912D, 1; *White v. Hatcher*, 185 Tenn. 609, 612, 188 S. W. 61.

It is apparent from what has already been said that some jurisdictions go further than others in their approval of acceleration clauses; and consequently a rule containing language as broad as the rule in some jurisdictions would be too broad for others, and a formula which is only broad enough for the latter would not be broad enough for the former. In this jurisdiction, the holding in *Reynolds v. Vint*, 73 Or. 528, 144 Pac. 526, and in *Western Farquhar Mach. Co. v. Burnett*, 82 Or. 174, 161 Pac. 384, condemns acceleration clauses which are entirely under the control of the holder, and completely dependent upon his whim or caprice, independent of any act of the maker; but, since neither of those decisions

condemns all acceleration clauses, we have no hesitancy in declaring that we prefer to keep company with the majority of the other jurisdictions by giving approval to certain kinds of acceleration clauses. What we deem to be the better rule is best expressed by language found in *Ernst v. Steckman*, 74 Pa. 13, 15 Am. Rep. 542, where a note, payable "twelve months after date (or before, if made out of the sale of W. S. Coffman's Improved Broadcast Seeding Machine)," was held to be negotiable. In concluding the opinion the court there said: "The principle to be deduced from the authorities is this: To constitute a negotiable promissory note, the time or the event for its ultimate payment must be fixed and certain; yet it may be made subject to contingencies, upon the happening of which, prior to the time of its absolute payment, it shall become due. The contingency depends upon some act done or omitted to be done by the maker, or upon the occurrence of some event indicated in the note; and not upon any act of the payee or holder, whereby the note may become due at an earlier day."

The principle which was expressed in *Ernst v. Steckman* was subsequently reiterated and applied by the Supreme Court of the United States in the leading and oft-cited case of *Chicago R. Equipment Co. v. Merchants' Nat. Bank*, 136 U. S. 268, 34 L. ed. 349, 10 Sup. Ct. Rep. 999. Further exemplification of this principle may be found in the following precedents where the facts in some instances were exactly like and in all instances were analogous to the facts presented here: *Kiskadden v. Allen*, 7 Colo. 206, 3 Pac. 221; *Elliott v. Beech*, 3 Manitoba L. R. 213; *Walker v. Woollen*, 54 Ind. 164, 23 Am. Rep. 639; *Charlton v. Reed*, 61 Iowa, 166, 47 Am. Rep. 808, 16 N. W. 64; *Dobbins v. Oberman*, 17 Neb. 163, 22 N. W. 356; *Joergenson v. Joergenson*, 28 Wash. 477, 92 Am. St. Rep. 888, 68 Pac. 913. The ruling in *Reynolds v. Vint*, 73 Or. 528, 144 Pac. 526, is not inconsistent with the

adoption of the principle stated in *Ernst v. Steckman*, 74 Pa. 13, 15 Am. Rep. 542; *White v. Hatcher*, 135 Tenn. 609, 612, 188 S. W. 61; *First Nat. Bank v. Russell*, 124 Tenn. 618, 139 S. W. 734, Ann. Cas. 1913A, 203; *Bright v. Offield*, 81 Wash. 442, 143 Pac. 161; *Joergenson v. Joergenson*, 28 Wash. 477, 481, 92 Am. St. Rep. 888, 68 Pac. 913; *Holliday State Bank v. Hoffman*, 85 Kan. 71, 35 L.R.A.(N.S.) 390, 395, 116 Pac. 239, Ann. Cas. 1912D, 1; *Clark v. Skeen*, 61 Kan. 526, 49 L.R.A. 190, 78 Am. St. Rep. 337, 60 Pac. 327. The note

—payable when
ranch is sold—
effect on
negotiability.

signed by Bradshaw conforms with the requirements of § 5837, L. O. L., and is a negotiable promissory note. *Utah State Nat. Bank v. Smith*, 180 Cal. 1, 179 Pac. 160; *Bright v. Offield*, 81 Wash. 442, 143 Pac. 159.

The respondent has argued that the debt represented by the note automatically became due when the conveyance was made to Frederick T. Lewis on January 18, 1913; but the answer is that the thoroughly established and indeed almost universal, if not the universal, rule is

—effect of
acceleration
clause—option.

that the acceleration clause is not self-executing, but it merely confers an option upon the holder to treat the debt as due. *Belloc v. Davis*, 38 Cal. 243, 251; *White v. Hatcher*, 135 Tenn. 609, 616, 188 S. W. 61; *Clark v. Skeen*, 61 Kan. 526, 49 L.R.A. 190, 78 Am. St. Rep. 337, 60 Pac. 327; *First Nat. Bank v. Parker*, 28 Wash. 234, 237, 92 Am. St. Rep. 828, 68 Pac. 756; *Keene Five Cent Sav. Bank v. Reid*, 59 C. C. A. 225, 123 Fed. 221; *Gillette v. Hodge*, 95 C. C. A. 205, 170 Fed. 314; *Chicago R. Equipment Co. v. Merchants' Nat. Bank*, 136 U. S. 268, 284, 34 L. ed. 349, 354, 10 Sup. Ct. Rep. 999.

There is no evidence indicating or even intimating that the plaintiff exercised or attempted to exercise the option which the note conferred upon the holder to declare the note due in the event of a sale or mortgage of the ranch. Inasmuch as the plaintiff is relying upon the "gener-

al" date of maturity specified in the instrument, and since the acceleration clause was not self-executing, it was unnecessary for the plaintiff to affirm a negative by pleading or proving it. *Dobbins v. Oberman*, 17 Neb. 163, 165, 22 N. W. 356; *Walker v. Woollen*, 54 Ind. 164, 165, 23 Am. Rep. 639.

Pleading—
negative—
power to act on
acceleration
clause in note.

One of the further and separate defenses interposed by Effie May Terrill is based upon the allegation that the note was delivered to and accepted by the appellant upon an agreement "to look entirely to" Bradshaw for payment, without any claim upon the respondent "for liability for any portion of said note." Through cross-examination of witnesses for the appellant, the respondent succeeded in introducing parol evidence in support of the defense last mentioned. The direct examination justified the cross-examination which was conducted by the respondent and permitted by the court (*Speer v. Smith*, 83 Or. 571, 575, 163 Pac. 979), and consequently the only remaining question arising out of the cross-examination is whether this testimony was competent for any purpose. The appellant insists that the testimony was incompetent because it varied the terms of a written contract. The respondent relies upon an ingenious argument. The respondent endeavors to apply a principle discussed in *Colvin v. Goff*, 82 Or. 314, L.R.A. 1917C, 300, 161 Pac. 568. The argument of the respondent is, in substance, that the note on its face contained two contracts, one between the maker and the payee, and the other between the indorser and indorsee; that, while there was a manual transfer of the paper for the purpose of effecting a delivery of the contract between the maker and payee, nevertheless the seeming contract between the indorser and indorsee "was never delivered, except in the sense of a physical delivery;" and that therefore the respondent is "not seeking to vary the terms of a

written contract, to wit, the contract of the indorser, but to show that this written contract was never delivered."

There is a divergence of judicial opinion as to whether or not the implications and intendments which the law attaches to a blank indorsement of negotiable commercial paper make such blank indorsement the equivalent of a complete written contract which cannot be varied by parol evidence. 8 Cyc. 264; 3 R. C. L. 974; 8 C. J. 1033; Crawford Anno. Neg. Inst. Law (Rev. Uniform ed.) 183. In this jurisdiction, however, it has been the settled rule for nearly forty years that parol evidence cannot be received to vary or contradict the contract which the

**Evidence—to
vary indorse-
ment of note.**

law writes over a blank indorsement, when made after the delivery of a promissory note to the payee. *Smith v. Caro*, 9 Or. 278; *Carroll v. Nodine*, 41 Or. 412, 415, 93 Am. St. Rep. 743, 69 Pac. 51; *Smith v. Bayer*, 46 Or. 143, 147, 114 Am. St. Rep. 858, 79 Pac. 497. To this general rule there are certain exceptions which are specified in *Dale v. Gear*, 38 Conn. 15, 9 Am. Rep. 353. See also *Smith v. Caro*, 9 Or. 278, 287; *Moll v. Roth Co.* 77 Or. 593, 599, 152 Pac. 235; *Jones v. Albee*, 70 Ill. 34. The rule relied upon

**—failure to
deliver indorse-
ment contract.**

by the respondent is not available to her. The facts which she herself admits effectively prevent her from shielding herself with that rule. The manual transfer of the note was in no sense executory, but upon the contrary it was a completed and wholly executed act. There was no stipulation preventing the manual transfer from becoming a completed delivery with all the attending rights and obligations. When placed in the hands of the appellant, the note bore the blank indorsement of the respondent. It is conceded by the respondent that she intended to transfer her ownership in the note. The transfer of ownership was not made contingent upon the happening of some event. The

transfer was a finality. The contract of transfer, whatever the contract may have been, was executed and completed. The appellant says that the terms of the contract are to be found in the signature written on the back of the note; while the respondent argues that, when the ownership of the note was transferred to the appellant, the latter accepted the instrument upon an agreement different from that which the law writes into the blank indorsement of the respondent. In the last analysis, the contention of the respondent is only an effort to vary and contradict the written contract of indorsement, and hence the parol testimony relating to any oral contemporaneous agreement was incompetent. The respondent has not brought herself within either of the first three exceptions noted in *Dale v. Gear*, 38 Conn. 15, 9 Am. Rep. 355; and, if there was an equity bringing the respondent in the fourth class of exceptions, "it must be set up as an equity provable in equity, to bar an apparent legal liability." The defense urged by the respondent does not involve the question of waiver, as did the case of *Moll v. Roth Co.* 77 Or. 593, 600, 152 Pac. 235.

Both Brownsboro and Medford are in Jackson county. The letter which Charles Nickell wrote for the purpose of giving notice of dishonor was deposited in the postoffice at Medford and addressed to the respondent at Brownsboro, where she lived. The postmark on the envelop in which the letter was mailed indicates that it was postmarked at the Medford postoffice at 3:30 P. M. on August 10, 1915. Charles Nickell testified that he deposited the letter in the Medford postoffice, but he did not state the time of the deposit further than to explain that he deposited the letter on the date shown by the envelop. The respondent was called as a witness for the plaintiff, and stated that she received the letter, but she did not remember the date of its receipt. There is not a word of evidence showing the distance between Medford and Browns-

boro. There is not a syllable of testimony telling about the mail service between the two postoffices. The record is utterly barren of any evidence showing whether there were one or more mails or any mail leaving Medford for Brownsboro on August 10th, or, if there was any mail for Brownsboro on that day, whether it was before or after 3:30 P. M. The most that we can say from the record is that the letter was deposited at some time in the Medford postoffice, on August 10th, and postmarked at 3:30 P. M., and that afterwards the respondent received the letter in due course of mail. For aught that we can ascertain from the record, there was a mail leaving Medford for Brownsboro at noon on August 10th, and, if there was a mail leaving at that hour and no other mail leaving on that day, then, in the absence of some excuse sanctioned by the law, the notice of dishonor was not mailed in time. The statute which governs this phase of the controversy provides that "where the person giving and the person to receive notice reside in different places, the notice must be given within the following times: (1) If sent by mail, it must be deposited in the postoffice in time to go by mail the day following the day of dishonor, or if there be no mail at a convenient hour on that day, by the next mail thereafter."

" L. O. L. § 5937.

The Negotiable Instruments Law prescribes a definite time for mailing notice of dishonor. If there was only one mail on August 10th, and if that mail left at a convenient hour prior to 3:30 P. M., the notice mailed by the appellant was too late. If

there was no outgoing mail at all for Brownsboro on that day, then, of course, the letter was deposited in time. The liability of an indorser of a negotiable promissory note is contingent, and, among other things, the liability is conditioned upon giving notice of dishonor within the time specified by the statute. The burden is upon the

holder to prove that the notice was mailed within the time prescribed by law; it is not enough merely to show that the notice was deposited in the postoffice on the day following the day of dishonor, but

it must also be shown that the notice was deposited "in time to go by mail the day following the day of dishonor" if there was a mail at a convenient hour on that day. Strict proof is required. There is an utter want of evidence concerning outgoing mails, and consequently the judgment of involuntary nonsuit was properly rendered. United States v. Barker, Fed. Cas. No. 14,519; First Nat. Bank v. Miller, 139 Wis. 126, 131 Am. St. Rep. 1040, 120 N. W. 821; Downs v. Planters Bank, 1 Smedes & M. 261, 40 Am. Dec. 92; Marks v. Boone, 24 Fla. 177, 4 So. 532; Richardson v. Kulp, 81 N. J. L. 123, 78 Atl. 1062; Commercial Bank v. Strong, 28 Vt. 316, 67 Am. Dec. 714; Corbin v. Planters' Nat. Bank, 87 Va. 661, 24 Am. St. Rep. 673, 13 S. E. 98; 8 C. J. 655, 1016, 1055; Eaton & G. Com. Paper, 507.

—burden of proof
—time of mailing
—notice of dishonor of note.
—failure of proof—nonsuit.

The judgment is affirmed.

McBride, Ch. J., and Benson and Burnett, JJ., concur.

Petition for rehearing denied.

ANNOTATION.

Admissibility of parol evidence to vary or explain the contract implied from the regular indorsement of a bill or note.

The earlier cases on this question are discussed in the note in 4 A.L.R. 764 et seq., where many questions bearing on the subject under annota-

tion are discussed that have not been passed upon since the date of that note, consequently are not found herein. Reference should be had to the

above note for a complete discussion of the question.

Instruments regularly executed and transferred — majority rule — in general.

(Supplementing annotation in 4 A.L.R. p. 765.)

The doctrine followed in the earlier Kansas cases that when an instrument which has had a valid inception in the hands of the payee is by such payee or subsequent indorsee transferred with the intent to pass the property therein, and unqualifiedly indorsed by such transferor to evidence the transfer, the contract implied from such indorsement, whether made in blank or full, cannot, even as between the parties, be varied or explained by parol evidence of a prior or contemporaneous agreement, is followed in the subsequent Kansas case of *Blair v. McQuary* (1920) 106 Kan. 710, 189 Pac. 948, where the court refused to admit parol evidence of a contemporaneous oral agreement that the indorser should not be held liable. An agreement that the indorser was to be held liable for a less amount than the amount of the note was held not available to the indorser in *Tross v. Bills* (1920) — Ky. —, 224 S. W. 660.

It was held in *Cole v. George* (1920) — W. Va. —, 103 S. E. 201, that the indorser of a negotiable promissory note cannot prove that there was a contemporaneous parol understanding or agreement that he would be bound in any different way from that which the contract contained upon the paper imports. This is contrary to the opinion expressed in *Howell v. McCarty* (1916) 77 W. Va. 695, 88 S. E. 181. The facts in the *Cole* Case are not clearly stated, but it seems the defendant was a regular indorser, although not a regular holder of the note. It is said that the defendant, "representing the holder of these notes, for a commission received from such holder, indorsed them to the plaintiff." The indorsement was in blank, made simply by writing the indorser's name across the back of the note.

The decision in the reported case (*NICKELL v. BRADSHAW*, ante, 623),

denying the admissibility of parol evidence to modify the contract implied from the indorsement, is in accord with the earlier case of *Smith v. Caro* (1881) 9 Or. 278, as shown in the earlier note.

Minority rule — in general.

(Supplementing annotation in 4 A.L.R. p. 778.)

Contrary to the earlier Canadian decisions, as shown in the earlier note, it is held in *Yorkshire & C. Trust Co. v. Scott* (1919) 27 B. C. 5, that a payee whose indorsement was made after the maturity of the note might show by parol that his indorsement was made without consideration, and on the understanding that he was not to be liable thereon.

Accommodation indorsers — actions between original parties.

(Supplementing annotation in 4 A.L.R. 790.)

In *Grapes v. Willoughby* (1919) — Vt. —, 108 Atl. 421, the accommodation indorser of a note, who signed the same before delivery to the payee, appeared on the note as a first indorser, the payee having signed it under the signature of the accommodation indorser upon negotiation, but apparently, upon a renewal of the note, the order of the signatures was reversed. In an action by the payee, who had taken up the note against the accommodation indorser, parol evidence was held admissible to show the actual agreement of the parties.

That evidence is competent, as between accommodation indorsers, to show the actual agreement, is stated in *Rawlings v. Galibert* (1919) 59 Can. S. C. 611.

Qualified indorsement — indorsement without recourse.

(Supplementing annotation in 4 A.L.R. 794.)

The case of *Carroll v. Nodine* (1902) 41 Or. 412, 93 Am. St. Rep. 743, 69 Pac. 51, discussed in the earlier note on pages 794 and 795, is said in the recent case of *Smith v. Barner* (1920) 95 Or. 486, 188 Pac. 216, to have arisen before the Negotiable Instruments Law was enacted, and under the law merchant as it then ex-

isted. It is held in the *Barner Case* that under the Negotiable Instruments Law, when a negotiable promissory note is indorsed "without recourse," the contract of the indorser becomes and is a written contract, the statutory terms and provisions being incorporated in and made a part thereof, so that parol evidence is not admissible to explain or vary the indorsement. There is a strong dissent from this position in a concurring opinion by Bennett, J., who affirms the position taken in *Carroll v. Modine*. It is not clear from the statement of facts in *Smith v. Barner* that the above was necessary to the decision in that case, as it seems from a statement in the opinion that because of a failure to make an allegation that the note was negotiable and that it was indorsed "without recourse" in writing, the case did not come within the terms and provisions of the Negotiable Instruments Law. The defense attempted to be set up in the *Barner Case* was that the defendant had acted throughout the transaction, including the indorsement of the note, as a trustee for another, to the knowledge of the plaintiff's indorsee, who attempted to hold the defendant on his warranty of genuineness of the instrument sued upon.

Evidence to show absence of contractual intention or limited contractual intention — indorsement for collection.

(Supplementing annotation in 4 A.L.R. 799.)

As shown in the note supplemented hereby, at page 799, it is a rule that, as between the parties or those having notice, parol evidence is admissible to show that an unqualified indorsement was for collection; but that, as against a holder for value without notice, parol evidence is not admissible. That the indorser of a note may show the indorsement to have been for purposes of collection only is held in the recent case of *Weidenfeld v. Pacific Improv. Co.* (1920) 267 Fed. 699. In *Interstate Trust Co. v. United States Nat. Bank* (1919) — Colo. —, 10 A.L.R. 705, 185 Pac. 260, an action by the drawee bank to recover money paid on checks on which the name of the payee had been altered, from a bank which had indorsed the check, "Pay to the order of any bank or banker—previous indorsement guaranteed," the court, in holding parol evidence inadmissible, refers to the general rule that parol evidence, or evidence of custom in business, is not admissible to vary the contract implied from an unrestricted indorsement of the bill or note. W. A. E.

PHILIP C. FUNK et al., Appts.,

v.

JOHN STEVENS, Grand Master Workman, A. O. U. W., et al.

Nebraska Supreme Court — October 5, 1918.

(102 Neb. 681, 169 N. W. 6.)

Insurance — mutual benefit — increase of rates.

1. A member of a mutual benefit society cannot complain of an increase of rates necessary to enable the society to comply with its contract.

[See note on this question beginning on page 644.]

— duty to pay losses.

2. The mutual promise of every member of such society is to pay the certificate of every other member.

There is no vested right in any provision of the contract, either express or implied, that is not subject to and controlled by the duty of the member to

Headnotes by CORNISH, J.

pay the cost of his own insurance, for under no construction of a mutual contract can he demand more than he is willing to give.

[See 19 R. C. L. 1211, 1256.]

Corporations — power to enact by-laws.

3. The power to enact by-laws is an inherent and continuous one. The duly authorized representatives of the members are alone vested with the power of determining when a change is demanded, and the courts will in-

terfere only when there is an abuse of discretion.

[See 7 R. C. L. 143-145; 19 R. C. L. 1192.]

Insurance — change in rates — experience.

4. A change in assessments, so as to make them conform to the cost of insurance according to age, made in conformity to the law of experience in such matters, is a reasonable change. It is not the fixing of an arbitrary age or class distinction.

[See 19 R. C. L. 1211, 1212.]

(Sedgwick, J., dissents.)

APPEAL by plaintiffs from a judgment of the District Court for Lancaster County (Stewart, J.) in favor of defendants in an action brought to enjoin an increase of rates of assessment in a mutual benefit society. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. J. C. McReynolds, J. L. McPheely, and Charles W. Meeker for appellants.

Messrs. John Stevens, Edward J. Lambe, and Edward F. Leary, for appellees:

The Grand Master Workman was correct in requiring a two-thirds vote to amend § 159 and pass the Sundean rates.

Thomp. Corp. 2d ed. § 1016; National Council, J. O. U. A. M. v. State Council, J. O. U. A. M. 27 App. D. C. 1; Deuble v. Grand Lodge, A. O. U. W. 66 App. Div. 323, 72 N. Y. Supp. 755, 172 N. Y. 665, 65 N. E. 1116; Loewenthal v. Rubber Reclaiming Co. 52 N. J. Eq. 443, 28 Atl. 454; Heintzelman v. Druids' Relief Asso. 38 Minn. 138, 36 N. W. 100; Van Atten v. Modern Brotherhood, 131 Iowa, 232, 108 N. W. 313; Green v. Felton, 42 Ind. App. 675, 84 N. E. 167; Willis v. Lauridson, 161 Cal. 106, 118 Pac. 530; Dick v. General Assembly, O. A. 150 Mich. 215, 113 N. W. 1125; Niblack, Ben. Soc. § 17; Bacon, Life & Acci. Ins. § 115; Scanlan v. Snow, 2 App. D. C. 137; J. P. Lamb & Co. v. Merchants Nat. Mut. F. Ins. Co. 18 N. D. 253, 119 N. W. 1048.

The National Fraternal Congress rates are not arbitrary, oppressive, discriminatory, or unreasonable.

Supreme Lodge, K. P. v. Knight, 117 Ind. 489, 3 L.R.A. 409, 20 N. E. 479; Farmers' Mut. Ins. Co. v. Kinney, 64 Neb. 808, 90 N. W. 926; Wineland v. Knights of Maccabees, 148 Mich. 608, 112 N. W. 696; Mutual Reserve Fund

Life Asso. v. Taylor, 99 Va. 208, 37 S. E. 854; Clarkson v. Supreme Lodge, K. P. 99 S. C. 134, 82 S. E. 1043; Korn v. Mutual Assur. Soc. 6 Cranch, 192, 3 L. ed. 195; Reynolds v. Supreme Council, R. A. 192 Mass. 150, 7 L.R.A. (N.S.) 1154, 78 N. E. 129, 7 Ann. Cas. 776; Supreme Lodge, K. H. v. Bieler, 58 Ind. App. 550, 105 N. E. 244; Uhl v. Life & Annuity Asso. 97 Kan. 422, 155 Pac. 926; Shepperd v. Bankers Union, 77 Neb. 85, 108 N. W. 188, 110 N. W. 1019; Thomas v. Knights of Maccabees, 85 Wash. 665, L.R.A.1916A, 750, 149 Pac. 7, Ann. Cas. 1917B, 804; Supreme Ruling, F. M. C. v. Ericson, — Tex. Civ. App. —, 131 S. W. 92; Moore v. Life & Annuity Asso. 93 Kan. 398, 148 Pac. 981; Wright v. Minnesota Mut. L. Ins. Co. 193 U. S. 657, 48 L. ed. 832, 24 Sup. Ct. Rep. 549; Supreme Lodge, K. P. v. Mims, 241 U. S. 574, 60 L. ed. 1179, L.R.A.1916F, 919, 36 Sup. Ct. Rep. 702.

Cornish, J., delivered the opinion of the court:

The A. O. U. W., a fraternal life insurance company, originally fixed assessments at \$1 each on death of a member, regardless of age. The plan in this particular was imprudential, unscientific. The average age of members increases. Twice in its history during the plaintiffs' membership, and before the change in rates of assessment, which is the subject of this controversy, it be-

came apparent to the membership that the organization could not survive under the old rates. Accordingly, changes in rates of assessment were made, more in consonance with the necessities of the case, making the rate correspond more nearly to the risk carried as affected by the member's age, which changes were acquiesced in by the members, including the plaintiffs. But still it was found that a sufficient increase in rates, adjusting them according to age, had not been made if the obligations of the order were to be kept. The directors rightfully called a session of the Grand Lodge, which amended the law, fixing assessments as the law now reads. Afterwards, at the regular meeting of the Grand Lodge, a majority voted to repeal the previous law as amended. Later the body voted to reconsider this action. A motion to table was lost and a motion to finally adjourn carried. This situation left the law as adopted at the earlier meeting in force, whether or not its repeal required a two-thirds vote, unless it is invalid for other reasons. The objection made to it by plaintiffs is that it fixes the assessment on an aged member so high as to make it unprofitable, and might, in instances, make it financially impossible, for him to remain a member. If past sixty years old, he has to pay \$11.20 per month on a \$2,000 policy. The increase on older members was, in the earlier increases above mentioned, in greater proportion than that on younger members. Is this permissible? The laws of the order have always fixed the rate and contained a provision for their amendment. The member's certificate left

Corporations

—power to enact subject to these by-laws.

the order's obligations. By acquiescing in the previous amendments, the plaintiffs agreed that the contract permitted a burden increasing with age.

Courts will not undertake to direct or control the internal policy of such societies. It is only when there is an abuse of their discretion—

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ary powers—an unreasonable and arbitrary invasion of private rights—that the courts interfere.

Now, if there is any one obligation of the society more binding upon it or its members than another, it is the promise made in the statement of the objects of the order to pay each member's beneficiary \$2,000 upon his death. In morals and in law that promise must, if possible, be kept. The member must not forget that he is an insurer as well as an insured. When the order is faced by inevitable financial ruin for want of funds, impossible to be raised under the existing rule of assessment, no member can disassociate his certificate or contract and insist that the object of the

**Insurance—
mutual benefit
—increase of
rates.**

fraternity is to pay him in full without reference to his fellow members. To increase the number of assessments, or, which is the same thing, to increase assessments proportionate to amount being paid, does not at all reach the difficulty. The original assessments were unscientific and, in fact, inequitable. The members did not appreciate how the average age and cost of insurance would increase, and the infusion of new blood would not prevent it. In its appeal to the young man even fraternal objects must be just as well as generous. The scheme contemplated continuous additions as old members died. If ten men mutually promise to pay each other \$10,000 at death, the \$10,000 must be gathered from the promisors if all are to be paid.

**—duty to pay
losses,**

Under such circumstances, in order to keep the past, to prevent the deficit, and meet the obligation, what proposition could be more equitable than this: Henceforth each member shall pay according

**Insurance—
change in rates
—experience.**

to the cost of his insurance to the society and the value of it to him. This is the proportion which should not be violated: Each pays in proportion to what he is getting. This

is what the National Fraternal Congress rates, based upon actual experience, and adopted by the society, attempt to accomplish. Shall we say that the society ever undertook to insure its members at less than cost? The plaintiff Hallgren joined when thirty-nine years old, and has been a member for twenty-five years. He has had his insurance for 82 cents per month per thousand. This has not been a bad bargain and is not much, if any, above cost of insurance. The same is true of the other plaintiff. Can they complain, even though it is true that when they joined they paid slightly more than cost? If advancing age increases cost of insurance, justice requires this fact to be considered. But, say the plaintiffs, if this is so, then we and others have been grossly deceived. Such extreme rates were never contemplated in the early days of the order. The answer is that this may be true. It was a common blunder. The plaintiffs were deceivers as well as deceived, and so long as the rate of increase is necessary and reasonable and proportionate, the young and the old members contributing according to the risk assumed in carrying each, without arbitrary discrimination, they ought not to make this fact an excuse for taking an attitude which must bring ruin to the order and prevent its meeting its obligations.

If following the rule that each member must pay from year to year according to his age and risk results (as it probably will) in making fraternal insurance less desirable as old-age insurance, it leaves it what has always been its chief attraction,—the more desirable as young men's insurance. The young man, possibly with wife and little children, the calamity of whose death is greatest of all, will still be able to get his insurance at cost, or nearly so, during the youthful period of his life when the cost is trifling compared to what it is in old age. This view, we believe, is in accordance with the prevailing opinion of the courts. *Farmers' Mut. Ins. Co. v. Kinney*, 64

Neb. 808, 90 N. W. 926; *Fisher v. Donovan*, 57 Neb. 361, 44 L.R.A. 383, 77 N. W. 778; *Thomas v. Knights of Maccabees*, L.R.A.1916A, 750, and note (85 Wash. 665, 149 Pac. 7, Ann. Cas. 1917B, 804); *Supreme Lodge, K. P. v. Knight*, 117 Ind. 489, 3 L.R.A. 409, 20 N. E. 479; *Supreme Lodge, K. H. v. Bieler*, 58 Ind. App. 550, 105 N. E. 244; *Reynolds v. Supreme Council, R. A.* 192 Mass. 150, 7 L.R.A. (N.S.) 1154, 78 N. E. 129, 7 Ann. Cas. 776; *Uhl v. Life & Annuity Asso.* 97 Kan. 422, 155 Pac. 926; *Clarkson v. Supreme Lodge, K. P.* 99 S. C. 134, 82 S. E. 1043; *Strauss v. Mutual Reserve Fund Life Asso.* 83 Am. St. Rep. 699, and note (126 N. C. 971, 54 L.R.A. 605, 36 S. E. 352).

The plaintiffs rely somewhat upon the decisions in *Tusant v. Grand Lodge, A. O. U. W.* 183 Iowa, 489, L.R.A.1918F, 452, 163 N. W. 690, and *Wagner v. Supreme Lodge, K. P.* 64 Ind. App. 510, 116 N. E. 91. In the *Tusant* Case the older members were, as that court held, arbitrarily placed in a distinct class and denied the benefit of the insurance carried by other members. Here also the order undertook to reduce the amount of insurance that should be paid to the beneficiary of the owner, so that, for instance, at the age of seventy years the beneficiary would receive only \$366 on a \$1,000 certificate. The court held that the member had a vested right in the amount of his certificate. In the *Wagner* Case the organization undertook to make the aged members pay an increased amount for the cost and expenses of investigating and adjusting death claims, so that, while at the age of twenty-one years this charge would be only \$3.03, at the age of eighty-two it was \$18.17. This, it would seem, was an altogether arbitrary discrimination against the aged member. In the instant case no such attempt is made to classify or penalize according to age.

Affirmed.

Morrissey, Ch. J., not sitting.

Sedgwick, J., dissenting:

That "a member of a mutual benefit society cannot complain of an increase of rates necessary to enable the society to comply with its contract" is a little too strong. This paragraph of the syllabus is the key to the whole opinion. No burden put upon a member or a class of members is too great or too inequitable if it is "necessary to enable the society to comply with its contract." If, as stated in the syllabus, "the mutual promise of every member of such society is to pay the certificate of every other member," and in the opinion, "it became apparent to the membership that the organization could not survive under the old rates," they should have some provision in their agreement by which each member should be bound to do his share to make up the deficiency. This they had. Their by-laws provided: "Whenever the amount in the beneficiary fund uninvested after providing for all reported death losses shall be less than \$4,000, and the finance committee shall by resolution declare it expedient and advisable to levy an additional assessment upon the members, it shall be the duty of the Grand Recorder to call an additional or second assessment for the next month, upon all of the members, notice of which shall be given as provided in § 159 and shall be paid by the members as in these laws provided." Laws of the Grand Lodge of A. O. U. W. 1915, § 158.

This they could have done, and by amending their rates as to new members they would have avoided all danger of insolvency. But, acting upon the principle announced in the syllabus of the present opinion, they concluded that no member could complain of any "increase of rates necessary to enable the society to comply with its contract." They could by a vote say to any member: "You put up enough to enable us to comply with our contracts or we will cancel your policy." They changed their mutual agreement so that a certain class of their members should pay a larger proportion of

this deficiency than their agreement provided. And they were very generous in not putting this burden on one or two members. They put it upon all those over sixty years of age. This they could do because the necessary two-thirds to so act were much under that age and would not be burdened but directly benefited by their action.

The cases cited in the opinion will not justify such a rule. The true rule is that the rates should be arranged so that new members of whatever age should pay in proportion to the benefits received by them, and sufficient to enable a compliance with their mutual agreements as to such new members. But existing members should all pay their agreed proportionate share to make good any deficiency arising from their mutual mistake. They should have levied additional assessments on all existing members in proportions specified in their contracts to enable them to carry out their mutual promises. This above-quoted provision of their laws required that, as well as the ordinary law of contracts and natural justice. The power to "adopt by-laws for the regulation of the business of the Grand Lodge, . . . not in conflict with the provisions of these laws" (§ 182) comes very far short of enabling them to change the contract existing between themselves as to bearing the common burdens which they mutually assumed. To put a larger and disproportionate portion of the common burden which they had mutually contracted upon the minority because the majority had a direct pecuniary interest in so doing was "in conflict with the provisions of these laws," which provided for levying additional assessments on all of the existing membership to make up the deficiency.

The decisions of respectable courts generally are that the power to make laws for the government of the society does not include power to change the contract right among the existing members.

Petition for rehearing denied.

ANNOTATION.

Right of mutual benefit association to raise rates.

The question whether or not mutual benefit insurance companies may raise their rates when they find they have not been made high enough to meet the obligations of the association has presented one of the most difficult problems to the courts which they have had to solve. The effect of holding that they have such power is well illustrated by *Wilson v. Supreme Conclave*, I. O. H. (1917) 174 N. C. 628, 94 S. E. 443, where it appeared that complainant had already paid in more than enough to give him a paid-up policy for the face of his certificate, and yet he was placed in a class which would require him to throw all this away and start anew in a class from which, as the court says, there is no exit but with loss.

And the effect of holding that they have no such power is well disclosed in the opinion of the concurring judge in *Williams v. American Ins. Union* (1920) 107 Kan. 214, 191 Pac. 291, where he says: I do not think increased rates violate the true spirit of the constitutional inhibition against the impairment of contracts. To insist on the cold letter of that inhibition brings to the front the fact of the fraternal society's inherent insolvency, and the same cold letter of the law would require a summary termination of the society's existence by cancelation of its charter, a receivership, and winding-up of its affairs, and a distribution of its fragmentary assets among all its members holding certificates of insurance.

We thus have, on the one hand, the case of the member who, during the most of his lifetime, has met all the calls required by his contract with the understanding that his family would receive a benefit in case of his death, only to find that, although he has aided in providing this benefit for the families of many of his associates, he is now to be deprived of all advantage which he hoped to secure from the meeting of his obligations. On the

other hand, we have a society organized for the relief of the widows and orphans of the members, which, if it cannot raise its rates, must abandon its project and leave all members without protection. In this dilemma, the courts have struggled to find the solution which would work the least harm, and, if possible, have permitted the raising of the rates. In order to do this, however, some of the courts have taken the extreme position that there was no contract between the association and a member, but that the relation was a mutual one, similar to a partnership, and they held that the rights of the individual must yield to promote the general good. The difficulties of the situation are illustrated by the large proportion of reversals which have occurred, the reviewing court often taking a different view from that of the lower one. And there is more or less conflict between courts of equal authority upon states of fact which are not sufficiently different to account for the difference in ruling. In this situation, the most that can be done is to state what is definitely settled, and point out where the conflict lies, and give the reasoning in support of the divergent views, where they exist.

Rule of state of incorporation controls.

The provision of the Federal Constitution requiring each state to accord full faith and credit to the records of the other states goes a long way to prevent conflict in the rules relating to a particular organization. The Royal Arcanum was organized in Massachusetts, and the supreme court of that state, in *Reynolds v. Supreme Council*, R. A. (1906) 192 Mass. 150, 7 L.R.A. (N.S.) 1154, 78 N. E. 129, 7 Ann. Cas. 776, held that it was authorized to raise its rates of assessments. But, when the question came before the courts of New York, the court of appeals of that state held that it had no such right. *Green v. Supreme Council*, R. A. (1912) 206 N. Y. 591,

100 N. E. 411, thereby reversing the appellate division ((1911) 144 App. Div. 761, 129 N. Y. Supp. 791), which had in turn reversed the trial court ((1910) 124 N. Y. Supp. 398), which held that prior cases had settled as the law in that state that an agreement on the part of a member of a mutual benefit society to be governed by the laws, rules, and regulations of the organization in force at the time of his admission, or that might thereafter be enacted, did not authorize an increase in the amount of the assessment on the individual member, fixed in the original contract. The Green Case was then taken to the Supreme Court of the United States, which held that the full faith and credit clause applied, and that the rule established by the Massachusetts court must control. (1915) 237 U. S. 531, 59 L. ed. 1089, L.R.A.1916A, 771, 35 Sup. Ct. Rep. 724. The Supreme Court decision was acted on in Hollingsworth v. Supreme Council, R. A. (1918) 175 N. C. 615, 96 S. E. 81, Ann. Cas. 1918E, 401.

Gaines v. Supreme Council, R. A. (1905) 140 Fed. 978, held that the society's action in changing its system of assessments was not so clearly in violation of the contract rights of its older members, whose rates were thereby increased, as to authorize a court in another jurisdiction to enjoin the association from making such assessments.

In McClement v. Supreme Court, I. O. F. (1918) 222 N. Y. 470, 119 N. E. 99, the court held that a member in New York was bound by a valid change of rates by the legislature of the foreign state in which the society was incorporated. The court thereby affirmed the appellate division ((1915) 169 App. Div. 77, 154 N. Y. Supp. 700), which had reversed the trial court ((1914) 88 Misc. 475, 152 N. Y. Supp. 136), with reference to the decision of the United States Supreme Court in Supreme Council, R. A. v. Green (1915) 237 U. S. 531, 59 L. ed. 1089, L.R.A. 1916A, 771, 35 Sup. Ct. Rep. 724, supra, stating that the reasoning of the opinion supports the view that the law of Canada governs, although the

Green Case involved the full faith and credit clause of the Federal Constitution. The appellate division followed a previous decision,—Simmelink v. Supreme Court, I. O. F. (1912) 152 App. Div. 892, 136 N. Y. Supp. 527, s. c. on second appeal in (1914) 162 App. Div. 934, 147 N. Y. Supp. 1141.

Express authority to change rates.

There can be no question but that, if express authority to change the rates exists, either in the charter of the association or in the contract of the member, he cannot complain if the change is made.

Accordingly, in Gaut v. Mutual Reserve Fund Life Asso. (1902) 121 Fed. 403, it was held that the holder of a policy issued by such society, containing a condition that the member should be bound by by-laws to be passed, could not refuse to pay an assessment thereon and recover damages as for breach of contract, because the company had changed its methods and graduated its assessments according to the age of the policyholder when each assessment was made, instead of basing them upon his age when his policy was issued, where the company's charter gave it the power to change the rate of assessment from time to time, and there was no showing that the increase was fraudulent or unnecessary; even though the change increased the assessments to such an extent as to render them prohibitive as to members of long standing who aimed to continue in the society. Here there were no express words in the contract of insurance giving the insured the right to have any assessment made as of the age when he became a member. Nor was it deemed material that he had been assessed at that age for twelve years; the court declaring it to be the company's right to do that, and to abandon such method at any time. To quote from the opinion: "It was not a construction by the company of their contract with the plaintiff; but it was a method chosen, by which the company hoped to make its business attractive, and so attractive that it might last as a rule of assessment always, no doubt; but when the time

came that it was confronted with changed conditions, and confronted with the fact that it did not have enough money to pay constantly increasing losses, it was within the province of their contract, and strictly within its provisions, and wholly within the competency of the charter, for the company to devise a means by which these assessments could be increased; and then, likewise, under the terms of the contract and the charter, it was permissible to have changed the method or proportion of assessments from the age of entry to the age attained at the time the assessment was made."

Under a constitutional provision that, in the event the dues levied should be found insufficient or inadequate, such further assessments should be made as might be necessary fully to meet the benefits due and payable, an order has power to enforce such increased payment of money by its members, without restriction to any particular mode, as may be necessary to fully meet the benefits due and payable. *Supreme Lodge, F. U. A. v. Ray* (1914) — *Tex. Civ. App.* —, 166 S. W. 46.

In *United Benev. Asso. v. Cass* (1909) 54 *Tex. Civ. App.* 628, 119 S. W. 123, the constitution of the society expressly authorized an increase of rates, and it appeared that the increase made was necessary, and it was, therefore, upheld.

Where, by statute, there was a right to change the by-laws except so far as they relate to the right to assess members, and to the rights and benefits belonging to members, the court held this must be construed to mean that terms of membership expressed in the constitution should not be changed by the amendment of by-laws. The court says in this view the application, certificate, and laws of defendant fix complainant's rate of assessment, and his agreement that the laws thereafter adopted should be the basis of the contract means those laws which defendant had a right to adopt. But there having been a reincorporation which plaintiff assented to, which changed this provision, the

court held that, under the changed provisions of the constitution, the change in assessments, which were less in number, but greater in amount, was valid. *Wineland v. Knights of Maccabees* (1907) 148 *Mich.* 608, 112 N. W. 696.

If the organization has charter authority to amend its by-laws, the insertion in its certificate of the provision that the payments shall continue the same so long as the applicant's membership continues does not constitute a contract which will prevent raising the rates. *Supreme Lodge, K. P. v. Mims* (1916) 241 U. S. 574, 60 L. ed. 1179, L.R.A.1916F, 919, 36 *Sup. Ct. Rep.* 702. The court says: "Persons who join institutions of this sort are not dealing at arm's length with a stranger whose mode of providing for payment does not concern them, but only his promise to pay. They are joining a club the members of which have to pay any benefit that any member can receive. The corporation is simply the machine for collection and distribution. . . . It is manifest, therefore, that it would be a perversion of its purposes if, through some ambiguity of phrase, the necessary source of benefits were closed in favor of certain members, while their right to insist upon payment remained. The essence of the arrangement was that the members took the risk of events, and if the assessments levied at a certain time were insufficient to pay a benefit of a certain amount, whether from diminution of members or any other cause, either they must pay more or the beneficiary take less."

And that case was followed in *Holt v. Supreme Lodge, K. P.* (1916) 149 C. C. A. 197, 235 *Fed.* 885, appeal dismissed in (1918) 248 U. S. 588, 63 L. ed. 434, 39 *Sup. Ct. Rep.* 5.

This seems to have settled the fact that the increases of the Knights of Pythias were authorized by its charter, and that rule was followed in *Supreme Lodge, K. P. v. Smyth* (1918) 245 U. S. 594, 62 L. ed. 492, 38 *Sup. Ct. Rep.* 210, which reversed (1915) 137 C. C. A. 32, 220 *Fed.* 438, affirming (1912) 198 *Fed.* 967, where the court had held that the member having re-

ceived a written statement that his assessments would always remain the same, the association could not raise its rates, notwithstanding he agreed to be bound by subsequent by-laws. The court stated that the right to raise rates must be so explicitly or clearly stated in some part of the contract that the member insured is fully informed that the term of the contract he is entering into may be changed by the insurer in that respect.

But in *Meyer v. Supreme Lodge, K. P.* (1920) — Neb. —, 177 N. W. 828, affirmed on rehearing in (1920) — Neb. —, 180 N. W. 579, the new rates of the Knights of Pythias were held invalid because not authorized by a representative body.

In *Seymour v. Mutual Reserve Fund Life Asso.* (1895) 14 Misc. 151, 35 N. Y. Supp. 793, a preliminary injunction was refused to a member of a co-operative life insurance company to enjoin the enforcement of assessments in excess of the amount named in his certificate of membership, where it appeared that the company's constitution gave its directors power to fix the amount of the assessments, and the assessments objected to were a result of a change of policy suggested by the superintendent of the state insurance department, and the member had paid similar assessments without objection; upon the ground that the plaintiff had not shown that his right was of such a clear character as to entitle him to the relief sought, in advance of a trial upon the merits.

Where the society has the authority to amend its constitution and by-laws and change its rates, and there is nothing in the contract making permanent the rates as announced, a member who agrees to abide by the by-laws then existing, or subsequently adopted, cannot complain of an increase of rates. *Newman v. Supreme Lodge, K. P.* (1915) 110 Miss. 371, L.R.A.1916C, 1051, 70 So. 241.

In *De Graw v. Supreme Court, I. O. F.* (1914) 182 Mich. 366, 148 N. W. 703, the agreement of a member at the time of becoming such that the constitution and by-laws of the order might be changed, special reference

being made to those sections relating to assessments, was held not to be against public policy or an infringement upon vested rights; therefore the company had the right, as authorized by a new charter granted it, to assess against such a member his proportionate share of a deficiency found to exist in the funds of the society applicable to the payment of the benefits of members (of whom the member in question was one) joining prior to a certain date, on account of the low premium paid by such members.

Upon the same principle it was held in *Trisler v. Mutual Reserve Fund Life Asso.* (1907) 128 Mo. App. 497, 106 S. W. 1082, in which it appeared that, by the member's contract of insurance, it was stipulated that the board of directors would have power to fix the amount and rate of assessment, that a readjustment of assessments by such board, based upon the attained age, instead of entrance age, of each member, so as to make the rate of assessment equal to the cost of carrying the insurance according to the experience of the association, was binding on the member, though the assessment had been previously based upon the age of each member at his entrance, in accordance with a table on the back of his policy (not referred to therein, nor expressly made a part thereof).

To the same effect is *Crosby v. Mutual Reserve Fund Life Asso.* (1902) 38 Misc. 708, 78 N. Y. Supp. 237, in which it was held that an assessment insurance association had a right to make an assessment for a death benefit at the rate of the member's attained age, instead of at the rate of his age of entry, where the certificate of membership provided that assessments should be made at such rates, according to age, as the directors might establish, and made the constitution and by-laws a part of the contract, and those instruments provided that assessments should be apportioned among the members in accordance with the rates found in a table annexed to the certificate.

The right of an assessment life insurance association to raise its assess-

ments was sustained in *Schmierer v. Mutual Reserve Fund Life Asso.* (1908) 153 Cal. 208, 94 Pac. 887, where the certificate contained a provision that the "rate of the mortuary premiums may be changed to correspond with the actual mortality experience of the association."

Agreement to be bound by subsequent by-laws.

A majority of the courts hold that an express agreement to be bound by increase of rates is not necessary to justify such increase, but that it is sufficient if the member has bound himself to obey by-laws subsequently to be passed. There are cases which do not agree to this position, however, holding that an agreement to be bound by future by-laws does not extend to consenting to the impairment of the member's contract, but relates simply to by-laws governing, in a general way, the affairs of the association. The cases stating the rule that agreement to be bound by future by-laws will authorize the increase of rates are:

Illinois.—*Fullenwider v. Supreme Council, R. L.* (1899) 180 Ill. 621, 72 Am. St. Rep. 239, 54 N. E. 485; *Pierce v. Bankers' Union* (1908) 140 Ill. App. 495.

Indiana.—*Supreme Lodge, K. H. v. Bidler* (1914) 58 Ind. App. 550, 105 N. E. 244; *Wagner v. Supreme Lodge, K. P.* (1917) 64 Ind. App. 510, 116 N. E. 91.

Kansas.—*Miller v. National Council, K. L. S.* (1904) 69 Kan. 234, 76 Pac. 830; *Moore v. Life & Annuity Asso.* (1914) 93 Kan. 398, 148 Pac. 981.

Massachusetts.—*Messer v. Grand Lodge, A. O. U. W.* (1902) 180 Mass. 321, 62 N. E. 252; *Reynolds v. Supreme Council, R. A.* (1906) 192 Mass. 150, 7 L.R.A. (N.S.) 1154, 78 N. E. 129, 7 Ann. Cas. 776.

Michigan.—*Williams v. Supreme Council, C. M. B. A.* (1908) 152 Mich. 1, 115 N. W. 1060.

Mississippi.—*Butler v. Eminent Household, C. W.* (1917) 116 Miss. 85, 76 So. 830.

New York.—*McClement v. Supreme Court, I. O. F.* (1918) 222 N. Y. 470,

119 N. E. 99; *Mock v. Supreme Council, R. A.* (1907) 121 App. Div. 474, 106 N. Y. Supp. 155.

Tennessee.—*Conner v. Supreme Commandery, G. C.* (1906) 117 Tenn. 549, 97 S. W. 306.

Canada.—*Bartram v. Supreme Council, R. A.* (1905) 6 Ont. Week Rep. 404.

Such an agreement on the part of a member was held in *Fullenwider v. Supreme Council, R. L.* (Ill.) supra, not to deprive him of any vested right to have the rate of assessment remain unchanged as fixed by a by-law in force when he became a member. It was said that the express recognition which the member made in his contract with the society, of the latter's power to make new by-laws, was necessarily a recognition of the right to repeal or amend those theretofore made; and that, while the court strongly disfavored any alteration or change in an insurance contract without the consent of the insured, "yet, where the contract does reserve to the corporation the right, from time to time, to amend its rules or by-laws, and binds the assured to compliance with such rules or by-laws, and such provision is expressly assented to in writing by the assured, it cannot be said that it would be an extraordinary power to make such change, and such a contract would not meet with disfavor from the courts."

Where the rate of assessment was fixed by a by-law, and there was an express provision in the certificate of insurance issued by which the member agreed to abide by laws, rules, and regulations of the order after enacted, it was held that the rate of assessment might be raised. *Supreme Lodge, K. H. v. Bieler* (Ind.) supra. It is stated that there is no averment in the complaint that the amendments of the association's by-laws increasing the rate of assessments were not adopted legally and honestly, nor was there any averment that the increase was not a reasonable one to carry out the purposes and objects of the society, or that there was an abuse of the power reserved to it in the certificate issued to the member. It is then

stated that, in cases such as this, it must appear that there was an abuse of power, or that the by-laws, as amended, were so unreasonable as to be void, to render an amendment unauthorized. It is then stated that it is a question of fact, to be determined from all the circumstances of the case, whether the increases were reasonable and necessary, and therefore binding upon the member.

If the member agrees to be bound by by-laws subsequently enacted, he may be required to continue payments during life, instead of receiving a paid-up policy at the end of a series of years, as provided for in his certificate. *Moore v. Life & Annuity Asso.* (1914) 93 Kan. 398, 148 Pac. 981.

In *Miller v. National Council, K. L. S.* (1904) 69 Kan. 234, 76 Pac. 830, it was held that the change in the by-laws of a fraternal beneficiary association, whereby all level-rate members were required to pay a graduated rate as of the age when admitted, was valid and binding, which increased the rates to such members, where the certificate contained the express condition that the insured should, in every particular, while a member of the order, comply with all the laws, rules, and requirements thereof, and the member, in his application for membership, agreed to abide by all its rules and regulations if accepted as a member; though the certificate of membership in question did not contain the specific provision to abide by all laws to be thereafter enacted. This decision proceeds upon the ground that this condition was equivalent to a consent upon the member's part, not only to comply with the laws then in force, but also to comply with all reasonable rules and regulations which might thereafter be made in the interest of the association. The opinion in this case is a complete reversal of the same court's position upon the first hearing of this same case ((1903) — Kan. —, 73 Pac. 88), where it was held that the by-laws and constitution, as in existence at the time of the application, together with the application and certificate of member-

ship, constituted the contract between the parties, and that the same could not be altered without the consent of both parties; and that therefore the change in question was beyond the power of the society.

The *Miller Case* is approved and followed in the subsequent Kansas case of *Moore v. Life & Annuity Asso.* (Kan.) *supra*, in which some changes in the terms of insurance were made which amounted to an increase in the rates. The certificate in the latter case contained an agreement on the part of the insured to conform to and be governed by subsequently adopted laws and regulations.

Raising the rate of assessment on a member of a mutual benefit society by change of by-laws does not impair his contract, where the by-laws to which he agreed required him to conform to the laws then in force, or which might thereafter be adopted. *Reynolds v. Supreme Council, R. A.* (1906) 192 Mass. 150, 7 L.R.A. (N.S.) 1154, 78 N. E. 129, 7 Ann. Cas. 776.

To the same effect is *Messer v. Grand Lodge, A. O. U. W.* (1902) 180 Mass. 321, 62 N. E. 252, in which it appeared that the certificate of membership was issued on such condition, and was altogether silent in regard to the rates to be paid; and that at the time of its issue the association had no statutory authority to make assessments upon its members at other than a fixed rate, the same for all members, regardless of age. It further appeared that statutes were afterwards enacted which gave the association authority to levy assessments at different rates, according to the age of the member. It was held that the association had the power to collect such assessments from members who had joined before the enactment of such statutes. The court said that the mode of making assessments under the earlier statutes and as provided in the original laws of the society was simply a detail in the management of the business of the order, which it might change at any time.

There is a dictum in *Butler v. Eminent Household, C. W.* (1917) 116 Miss. 85, 76 So. 830, to the effect that

if there is agreement to change of by-laws, the rates may be increased.

Where the reservation of authority to amend a charter, or the constitution or by-laws of a society, is clear, the right to have the rate of assessment continue as originally provided is not vested or fixed beyond the possibility of reasonable changes to meet new conditions. *McClement v. Supreme Court*, 1 O. F. (1918) 222 N. Y. 470, 119 N. E. 99.

In *Conner v. Supreme Commandery*, G. C. (1906) 117 Tenn. 549, 97 S. W. 306, it was held that a change in the society's laws, whereby all members were to be assessed at their attained age instead of on the basis of the age at which they entered the order, was not unreasonable as to the insured, and did not violate his vested rights, nor breach his contract, though it raised his assessment from \$52.08 to \$144 per year, where he had agreed to be bound by by-laws subsequently passed.

In *Bartram v. Supreme Council*, R. A. (1905) 6 Ont. Week. Rep. 404, the court held that since the promise to complainant was conditional on his complying with the laws, rules, and regulations in force from time to time, and the by-laws expressly provided that they might be altered, complainant was in no position to complain of a raise in rates.

On the other hand, in *Covenant Mut. Life Asso. v. Kentner* (1900) 188 Ill. 431, 58 N. E. 966, it was held that, unless there was an express agreement that a member should be bound by future by-laws varying or modifying his contract, he was not so bound, and that therefore an assessment which increased the rate of insurance to him would be invalid without his consent, and that his refusal to pay the same would work no forfeiture of his contract; though the court admitted that the by-laws of the association existing at the time the member entered the association were a part of the contract, and that the contract was to be construed with reference to them. The court said: "As to any other contract, no one would think of saying that one party can annul the agreement and

make another to suit its convenience without the consent of the other party, or that expediency or inability to continue business would warrant repudiating the contract and substituting another. Whatever theories might arise as to duties and obligations not founded upon contract, wherever there is a contract its terms must control the rights of the parties. The law does not undertake to make or modify contracts, whether relating to insurance or to some other subject, but it enforces contracts as the parties themselves have made them. The association had power to make by-laws for the purpose of regulating the transaction of its business and its affairs in general, and Mr. Kentner is presumed to have contemplated such by-laws, but there is no presumption that he contemplated the change in the terms of his contract."

Consent to change of by-laws not sufficient to warrant raise.

The rule that consent to change of by-laws would warrant a change in the rates of assessment has not met with universal approval.

There is a dictum in *Richey v. Sovereign Camp*, W. W. (1918) 184 Iowa, 10, L.R.A.1918F, 1116, 168 N. W. 276, to the effect that mere general consent that the constitution and by-laws may be amended will not authorize a change that destroys the vested rights of the assured under his contract by subjecting him to a greater rate of assessment than the contract called for.

The right of an order to increase the rate payable from its members was denied in *Ericson v. Supreme Ruling*, F. M. C. (1912) 105 Tex. 170, 146 S. W. 160, reversing (1910) — Tex. Civ. App. —, 131 S. W. 92, although the member's policy contained an agreement to comply with the orders and by-laws adopted in the future, the court stating that this agreement had reference only to such regulations as have reference to the members, duties and conduct as a member, and did not embrace an act that would produce a radical change in the member's rights.

In *Pearson v. Knight Templars & M.*

Indemnity Co. (1905) 114 Mo. App. 283, 89 S. W. 588, it was held that a mutual beneficiary life association could not nullify a contract of insurance without the express assent of the member insured; and, if a change was made whereby his assessments were materially increased, contrary to his contract, he could recover the excess, though in his application he agreed to abide by the constitution and rules as they then were, or might thereafter be constitutionally changed. The court said that the cost of the member's insurance was measured chiefly by the number and amount of the assessments that the company might make upon him for the payment of death losses, and that the increase in amount of each of these assessments necessarily increased the cost of his insurance, and that, for this reason, the change objected to materially modified his contract.

The amount of each assessment stipulated in a mutual benefit contract cannot be raised by the association without the consent of the member, although he has agreed to comply with all the laws, rules, and regulations of the order. *Dowdall v. Supreme Council, C. M. B. A.* (1909) 196 N. Y. 405, 81 L.R.A.(N.S.) 417, 89 N. E. 1075.

In *Rockwell v. Knights Templars & M. Mut. Aid Asso.* (1909) 134 App. Div. 736, 119 N. Y. Supp. 515, it was declared that the stipulation that the insured should abide by the rules and regulations of the association "evidently" meant those rules and regulations already in existence, and particularly those which the company had deemed necessary to make a part of the policy; and therefore such stipulation on the part of the member gave the association no power to increase the rates.

To the same effect is *Wright v. Knights of Maccabees* (1905) 48 Misc. 558, 95 N. Y. Supp. 996, where a mutual beneficiary association was denied the right, under the power reserved in the contract of insurance, to amend its laws, and, under the member's agreement to conform to subsequent laws, to increase the amount of a member's assessments, without

his consent, though such proposed increase was necessary to keep the association solvent. This was affirmed on other grounds, on appeal, in *Wright v. Knights of Maccabees* (1909) 196 N. Y. 391, 31 L.R.A.(N.S.) 423, 134 Am. St. Rep. 838, 89 N. E. 1078, where the court held, reversing (1908) 128 App. Div. 883, 112 N. Y. Supp. 1150, which seems to have followed on second appeal the ruling in (1907) 122 App. Div. 904, 106 N. Y. Supp. 1150, which reversed (1905) 48 Misc. 558, 95 N. Y. Supp. 996, that the society cannot, under the contract, reduce the benefits. Judge Vann, who wrote the opinion, said that he was personally of opinion that it could not raise the rates. The plaintiff had agreed that the laws then in force, or that should thereafter be adopted, should form a part of the contract, and it was agreed between the parties that he should pay the same rate of assessment thereafter as long as he remained in good standing in the order. The judge says: "I can see no difference in principle between reducing benefits and increasing the amount to be paid for benefits. . . . The certificate states that 'he is entitled to all the rights, benefits, and privileges' provided by the laws of the order, which are thus made a part of the certificate. Hence the right to pay at the old rate was one of the rights provided for, and that he contracted for. It was a vested right, immune from change by amendment, in the absence of a specific reservation of power to amend in that particular. On the average, such contracts would be impaired by doubling assessments to the same extent as by cutting off one half of the benefit. The price to be paid by the plaintiff for insurance is as essential a part of his contract as the amount of insurance to be paid to him by the defendant on the maturity of the policy. Whether the one is increased or the other proportionately decreased makes no difference in principle, or in the final result. By either method the pecuniary value of the contract, which is property, would be reduced one half."

But the way in which a mutual ben-

eft certificate is regarded in some courts is indicated in *Reynolds v. Supreme Council, R. A.* (1906) 192 Mass. 150, 7 L.R.A.(N.S.) 1154, 78 N. E. 129, 7 Ann. Cas. 776, where the court says that since there is no express stipulation in regard to the by-laws in the application for membership or in the certificate, all members of such a corporation will be bound by by-laws regularly made or amended. The court rules that a mutual benefit society has power to amend its by-laws so as to increase the assessments on its members, where the existing rate has proved inadequate, under charter authority to provide for the payment of a certain death benefit, to be secured by assessment, and to provide for the amendment of its by-laws. The court says: "Plainly, the statute contemplates that such corporations shall have power to establish by their by-laws a system of giving death benefits which shall be sound and equitable, and founded on principles which can reasonably be expected to furnish proper security for the performance of their contracts with members." A similar attitude is taken by the reported case (*FUNK v. STEVENS*, ante, 639).

In *Tusant v. Grand Lodge, A. O. U. W.* (1917) 183 Iowa, 489, L.R.A.1918F, 452, 163 N. W. 690, the court says that the only way open to mutual assessment associations to meet the cost of insurance is by assessment of its members. This implies authority in the corporation to increase rates in a fair and reasonable way when reasonably necessary. "This is certainly so, in the absence of a contract limiting authority."

Effect of contract provisions.

The provisions of the contract have in some cases been such that the courts have held that they precluded any change of rates.

A policy containing a definite agreement as to benefits, and a fixed amount and terms of payment of premiums, and no reservation of any authority to vary the terms, was held, in *Edwards v. American Patriots* (1912) 162 Mo. App. 231, 144 S. W. 1117, to be a regular life insurance contract. Accord-

ingly the right to raise rates was denied.

In *Poole v. Supreme Circle, B. A.* (1911) — N. J. Eq. —, 85 Atl. 821, the by-laws of the order fixed the dues at a stated sum, and then provided that when "the receipts are not sufficient to pay the liabilities . . . the trustees shall increase the monthly dues" to another stated sum "until the income and cash in hand shall equal the liabilities." The trustees attempted to increase the dues above the sum so stated in the proviso, justifying this action under a provision of the laws of the order that "alterations and amendments to these laws can be made after such alterations and amendments shall have been proposed in writing." The right to make this increase was denied, the court stating that the fact that when the complaining member became a member of the order, the death benefit laws provided that his dues might be increased a stated amount, affords some reason for the proposition that they could not be increased beyond that figure without his consent, and that therefore they could not be increased at all under the general reserve power to alter or amend the laws of the order. It is then stated that the order had no power to increase the dues to the extent to which it attempted to do. This decision was affirmed in the court of errors and appeals (1912) 80 N. J. Eq. 259, 87 Atl. 1118.

So, in *Covenant Mut. Life Asso. v. Tuttle* (1900) 87 Ill. App. 309, it was held that a provision in a certificate that the application for membership and the certificate should constitute the complete and only contract between the certificate holder and the association excluded any idea that the by-laws of the association were to be looked to as a part of the contract, and that, even if it were conceded that the by-laws in force when the certificate was issued entered into and became a part of the contract, it was only those then in existence, and the society had no right, by amending or repealing any of them without the consent of the certificate holder, and in the absence of any such right reserved in the con-

tract, to impose new conditions or burdens affecting the contract to his injury, or, by a new provision passed after making the contract, to forfeit his rights under it; and that the refusal of a certificate holder to pay an assessment largely in excess of any previous assessment would not avoid his certificate, even though such holder had paid former assessments which were also in excess of the original contract rate.

If the certificate of membership provides that insured shall be liable for assessments according to the table in the by-laws, that rate becomes part of the contract and cannot be increased under the new by-laws. *Old Colony L. Ins. Co. v. Graves* (1915) 200 Ill. App. 71.

But in *Barbot v. Mutual Reserve Fund Life Asso.* (1897) 100 Ga. 681, 28 S. E. 498, it was held that it was not the purpose of a table of assessment rates to fix a limitation upon the amount of the gross assessment that might be levied against a member, but only to afford a guide, after such gross amount had been ascertained, for its equitable and fair apportionment among the members, graduated according to age. Here the constitution and by-laws of the association were expressly made a part of the contract of insurance, and those instruments provided that assessments should be made for such sum as the executive committee might deem sufficient to meet existing death claims, and that the same was to be apportioned among the members according to the age of each.

So, in *Haydel v. Mutual Reserve Fund Life Asso.* (1900) 44 C. C. A. 169, 104 Fed. 718, affirming (1899) 98 Fed. 200, it was held that such table was merely a memorandum showing how assessments were to be apportioned as between persons of different ages, and the probable amount of the assessments as then foreseen and estimated, and was not an agreement between the insured and the insurer, binding the latter not to make assessments in a sum greater than therein shown, which, in the opinion of the court, would divest the company's

directors of the power plainly conferred upon them by the company's charter, to make such assessments as might at any time be found necessary to meet death losses. The reasons given by the court for its conclusion were as follows: First, the company was a mutual one, operating on the assessment plan; second, the rate indicated by the table was so far below the usual cost of insurance as to compel the court to believe that the insured did not himself regard the table as a binding contract on the part of the company to furnish insurance at the rate therein specified, regardless of its actual experience; third, that, if a fixed or level rate of assessment was contemplated, it was more likely to be embraced as a stipulation in the body of the contract, instead of being indorsed in the form of a memorandum on the back of the policy; lastly, the policyholder had paid numerous assessments in excess of that shown by the table, and his final refusal to pay the one in question was based on grounds other than that the company lacked the power to make such assessments.

In *Thomas v. Knights of Maccabees* (1915) 85 Wash. 665, L.R.A.1916A, 750, 149 Pac. 7, Ann. Cas. 1917B, 804, the contention was that, notwithstanding the provision that certificate holders would comply with laws of the order in force and to be subsequently adopted, the publication of rates, fixing them by the by-laws, and the assurance of officers that they would not be changed, had made the rates a part of the contract, which could not be abrogated by a change of rates. The court held that the relation between a mutual benefit society and its members is not one of contract, but a mere mutual promise to pay each other's certificate; and therefore no member has a vested right in the rate named in the constitution and by-laws at the time he became a member, but the rate may be changed as may become necessary to provide for payment of certificates as they mature. The court says: "There being no contract in the commercial sense, but a mutual promise of every member to pay the

certificate of every other member, there can be no vested right in any provision of the contract, either express or implied, that is not subject to and controlled by the duty of the member to pay the cost of his own insurance, for under no construction of a mutual contract can he demand more than he is willing to give. . . . A member cannot throw his brothers overboard under the guise of contract and vested right. He must share his life belt with all. If it is not strong enough to sustain him, he is in duty bound to sink to the same level with his fellow members; for whatever the words of his contract may imply, it is to be measured by the object of the society which he has bound himself to support. . . . When [the object of the society] is considered it cannot be said that any one member or any number of members who have joined the society upon a misconception of the ability of the members to meet their mutual obligations by the assessments agreed upon can disassociate his own certificate or contract, and insist that the object of the fraternity or society is to pay him in full, without reference to his fellow members."

Unreasonable raise.

In *Uhl v. Life & Annuity Asso.* (1916) 97 Kan. 422, 155 Pac. 926, it was held that the change must be reasonable, even though insured had assented to be bound by changes in by-laws. And this was interpreted as meaning necessary to the continuance of the association. And it was held that a change was not unreasonable which required payments which enabled the society to accumulate a fund from the payments of the members which would provide for death loss at the termination of life expectancy.

Authority to raise rates will not permit the adoption of rates that are unnecessary to carry out the objects of the society, or which are inequitable, or unjustly discriminate against some members of the society. *Wagner v. Supreme Lodge, K. P.* (1917) 64 Ind. App. 510, 116 N. E. 91.

And in *Hicks v. Northwestern Aid Asso.* (1906) 117 Tenn. 203, 96 S. W.

962, in which it appeared that the policy of insurance issued by the association provided that, if any unexpected emergency should arise whereby the mortuary and reserve fund should become exhausted, "then, and in such case only," the policyholder should be liable for such further assessment as might be necessary to meet such emergency and maintain the solvency of the company, it was held that the company had no power, under the contract, to increase the rate of existing insurance except in the case of the specified emergency, and that the insured's refusal to pay an assessment at a higher rate than the maximum called for by his policy, arbitrarily made by the company without his consent, would not work a forfeiture of his policy.

And in *Margesson v. Massachusetts Ben. Asso.* (1896) 165 Mass. 262, 42 N. E. 1132, it was held that the failure on the part of a member of a beneficiary association to pay an assessment of an amount larger than the maximum amount specified in his contract of insurance under a call for "mortuary and disability purposes" and for "contingent liabilities" worked no forfeiture of the contract, where the contract itself required the member to pay a specified sum annually, and, upon the death of a brother member, an additional assessment of another specified sum if required, and no more; though the member had paid earlier calls "for mortuary and disability purposes."

So, in *Mutual Reserve Fund Life Asso. v. Taylor* (1901) 99 Va. 208, 37 S. E. 854, it was held, under a policy providing that the rate of assessment might be changed each five years to correspond with the actual mortality experience of the insurer, a beneficiary association could change its rates as to different ages in accordance with the results of its experience; but that an increase in the rate of assessments which did not correspond with such experience was unauthorized, and a member's failure to pay an increased assessment under such circumstances would not forfeit his rights under his policy.

The same principles were applied in *Covenant Mut. Ben. Asso. v. Baldwin* (1893) 49 Ill. App. 203, in which it was held that, so long as assessments were made according to the certificate of membership, the certificate holder was bound to pay them, and that a failure to do so would work a forfeiture; but that the directors of the association issuing the same could not, without the member's consent, change his contract of insurance; and that if, in making assessments, more was called for and collected than was authorized by the contract, the excess would stand to his credit, and his failure to pay an assessment would not avoid his certificate if the amount overpaid by him on previous assessments was more than the amount of the unpaid assessment. Here the certificate provided that the application for membership and the certificate itself constituted the complete and only contract between the member and the society, and that the certificate holder should pay such assessments, not exceeding a specified sum, as were necessary to meet death claims; and the directors adopted a by-law under which assessments were made in excess of the amount required for such purposes, and the insured paid all of them except the one assessed just before his death.

The question whether or not an increase in the rate is reasonable is, if the facts are undisputed, for the court; but where it is admitted that the order has power to increase the rate, and the only question is whether or not the increase made is reasonable, the court will not substitute its judgment for that of the individual body in whom the discretion has been vested, but in such case the only inquiry is, Does the action under consideration fail to measure up to any fair test of reason? If the facts and circumstances are such that reasonable men may differ as to the wisdom and expediency thereof, the judgment and discretion of those vested with authority to decide must be upheld. A very clear case of abuse of discretion, therefore, must be made out to warrant judicial interference. *Clarkson v.*

Supreme Lodge, K. P. (1914) 99 S. C. 134, 82 S. E. 1043. Consequently, where it is shown that the order could not have adopted a less rate without endangering its own existence as an insurance society, and the safety of the protection upon which its members rely, the rate will not be held unreasonable. *Ibid.*

Classification.

In some instances, the raising of the rates has been attended with or formed a part of a classification of the members of the association by which the older members were put in a class by themselves, and compelled to carry their own insurance. This effort has almost uniformly failed.

In *Ebert v. Mutual Reserve Fund Life Asso.* (1900) 81 Minn. 116, 83 N. W. 506, 834, 84 N. W. 457, it was held that, while the board of directors of a corporation organized for the purpose of conducting life insurance upon the co-operative or assessment plan had authority to change the rates of assessments from time to time to meet the death losses and expenses, if the apportionment was equitable, they could not, in the absence of any authority in the contract of insurance, arbitrarily place all members who joined prior to a certain year in a class by themselves, and advance the ages of their assessments from year to year, while all members joining after that date were assessed as of the age of their entry; that such discrimination against the old and in favor of the new members was not an equitable distribution of the increasing cost of carrying the older members, and was not contemplated by the terms of their contracts.

It was held in *Benjamin v. Mutual Reserve Fund Life Asso.* (1905) 146 Cal. 34, 79 Pac. 517, that assessments levied by a co-operative life insurance association were void, and imposed no liability upon a member for payment thereof, and could not affect his rights under his policy, where it appeared that he was one of the older members, whom the association placed in a class by themselves, by which arrangement they were required to pay according to the attained age of each at the date

of the assessment, while of the other members other classes were established who were to be assessed as of the age of their entry into the association; upon the ground that such classification, being solely for the purpose of levying an increased rate of assessment upon such older members, was an inequitable and arbitrary discrimination against them. Here it appeared that the certificate of membership and policy of insurance provided that assessments should be made upon the entire membership of the association, the same to be apportioned among the members according to the age of each member, and that the contract should be subject to all the provisions and stipulations contained in the constitution and by-laws of the association and the amendments thereto, and these provided that the apportionment should be according to the rates shown in the certificate, though they also empowered the board of directors to adopt such other rules and regulations as they might deem for the interest of the association, and were by their express terms subject to revision and amendment.

In *Strauss v. Mutual Reserve Fund Life Asso.* (1900) 126 N. C. 971, 54 L.R.A. 605, 83 Am. St. Rep. 699, 36 S. E. 352 (1901) 128 N. C. 465, 54 L.R.A. 609, 83 Am. St. Rep. 703, 39 S. E. 55, it appeared that the certificate of membership provided that assessments should be made upon the entire membership for such sum as the executive committee might deem sufficient, the same to be apportioned among the members according to the age of each member, as set out in a table indorsed on the certificate. Afterwards the association placed in a separate class all members who entered prior to a certain date, and required them to pay on the basis of the age attained by each at the date of each assessment, while other members continued to be assessed as of their age of entry, with the result that such older members were assessed at a higher amount than if the entire membership were assessed at the rates of their attained ages. The call which

the plaintiff refused to pay was larger in amount than it would have been had all the members been assessed at their full attained ages. It was held that such assessment was in violation of the association's constitution, and excessive and invalid. Here it was evident that, if this change was binding upon the older members, they would eventually be forced out of the company by the constantly increasing assessments.

In *Tusant v. Grand Lodge, A. O. U. W.* (1917) 183 Iowa, 489, L.R.A.1918F. 452, 163 N. W. 690, the court, in holding that the society has not, for the purpose of rendering itself solvent, power to divide the membership into classes, one of which shall pay its own losses until extinct or transferred to another class at prohibitive rates, says: "This course furnishes a sure door of escape from the very substance of insurance liability. It is the door of repudiation, and nothing less. What is the life of the order worth if its insurance fails? When a human being makes the saving of his life the chief end of his existence, he has already lost it. 'Whoso will save his life shall lose it.' If the past officials of this order had directed their solicitude less to the saving of the life of the order and more to the faithful performance of its obligations, the life of the order would probably have been secure. No reason is apparent in this record why it should not have prospered indefinitely. The life-saving proceedings which are herein considered form the greatest menace which it has ever confronted. If they shall prove fatal, it must be charged up as a life-saving fatality. If the order can be saved, its honor must be reasserted and redeemed. No insurance company can live in the dishonor of any form of repudiation."

A by-law putting all who join the society before a certain date in a class by themselves, to carry their own insurance, which greatly raised the rate, is unreasonable and void. *Wilson v. Supreme Conclave, I. O. H.* (1917) 174 N. C. 628, 94 S. E. 443. The court says that though a member of a beneficial

society may be bound by adopted by-laws or changes in a constitution, this is subject to the proviso that the society cannot thereby impair the contract rights of its member as the owner of the policy, which is a certificate of indebtedness, issued by the corporation to the member. The court, however, states that the defendant had a right to increase its rates.

Although the member has consented that the constitution and by-laws may be changed, if the society issued a pamphlet containing tables of assessments, and a provision that the amount paid by the applicant remains his assessment for life, the assessment cannot be raised by members joining the society before a certain date, in a class by themselves, to carry their own insurance. The court says this is not a case of increase of assessments, but it is a discrimination between members. The certificate held by plaintiff is a contract of insurance. *Williams v. Supreme Conclave, I. O. H.* (1916) 172 N. C. 787, 90 S. E. 888.

But a by-law fixing rates for a mutual benefit society is not invalid as forcing members over a specified age into a class to take care of themselves, by the fact that the rate from that age on is much greater in proportion than below that age, if experience has shown that the rate fixed is necessary to meet the danger of defaults to members who have attained the age specified. *Thomas v. Knights of Maccabees*

(1915) 85 Wash. 665, L.R.A.1916A, 750, 149 Pac. 7, Ann. Cas. 1917B, 804.

Miscellaneous.

In *Fort v. Iowa Legion of Honor* (1909) 146 Iowa, 183, 123 N. W. 224, the court, after discussing the question of the power of a mutual benefit insurance society to raise its rates, finally declared that it did not need to pass "upon this troublesome question now."

In *Shepperd v. Bankers Union* (1906) 77 Neb. 85, 108 N. W. 188, 110 N. W. 1019, the form of insurance provided that in case of the death of a member before he had lived out his expectancy according to mortality tables, there should be deducted from the death benefit payable on his policy a sum equal to the amount of one payment at the rate paid by the member for each assessment period for the unexpired period of such life expectancy, with interest on the unpaid balance. The company raised the assessments, but provided that, as to existing members, the increase should not be collected, but should be charged against the policy, to be collected at death. In case of a member who died prior to the expiration of her life expectancy, this increase was held valid in so far as it related to the assessments falling due during the life of such member, but invalid as to the assessments to be deducted for the remainder of the life expectancy.

H. P. F.

J. L. CHAFIN

v.

MAIN ISLAND CREEK COAL COMPANY, Plff. in Err.

West Virginia Supreme Court of Appeals — February 3, 1920.

(— W. Va. —, 102 S. E. 291.)

Definition — "fifty-fifty."

1. Where one who is desirous of purchasing certain property expresses a willingness to pay a certain price therefor, and agrees with another to give him "fifty-fifty" on what is saved if he can purchase the property at a less price, and through the efforts of such other party it is purchased at

Headnotes 1-3 by RITZ, J.
11 A.L.R.—42.

a less price than that named, such second party will be entitled to receive one half of the difference between the price at which the purchaser was willing to purchase and the price at which the property was actually secured.

[See note on this question beginning on page 661.]

Estoppel — to set up ultra vires.

2. Where the rights of the public are not involved, a purely private corporation entering into a contract in excess of its powers, and receiving benefits thereunder, is estopped from setting up the defense that it was without power to make it, so far as such estoppel is necessary to do justice between the parties, unless such contract is in violation of some positive law or well-settled rule of public policy.

[See 10 R. C. L. 728, 729.]

Corporation — accepting benefits — waiver of excess of authority.

3. Where a private corporation accepts the benefits of a contract made

on its behalf by an unauthorized agent, it thereby ratifies the contract in its entirety and will be bound to perform the obligations provided by the contract to be performed on its part.

[See 7 R. C. L. 665; 21 R. C. L. 932; see also note in 7 A.L.R. 1446.]

Contracts — construction — object.

4. The object of the construction of contracts is to give effect to the agreement of the parties so far as it can be ascertained from the language used, and it matters not that the agreement may be expressed in the vernacular of the street.

[See 6 R. C. L. 835, 836, 843.]

ERROR to the Circuit Court for Logan County to review a judgment in favor of plaintiff in an action brought to recover upon a contract for services alleged to have been performed by him for defendant. Affirmed.

The facts are stated in the opinion of the court.

Messrs. E. T. England and Chafin & Bland for plaintiff in error.

Mr. E. L. Hogsett, for defendant in error:

The conversation between Carson and Laing and the plaintiff, making the contract, is concise, definite, and certain, and could mean nothing except a contract.

Elliott, Contr. §§ 1508-1510, 1520; Bettman v. Harness, 42 W. Va. 443, 36 L.R.A. 566, 26 S. E. 271, 18 Mor. Min. Rep. 500; Williams v. South Penn Oil Co. 52 W. Va. 181, 60 L.R.A. 795, 43 S. E. 214; Young v. Ellis, 91 Va. 297, 21 S. E. 480.

If the employment of the plaintiff as agent to buy land for the defendant was an ultra vires act, that fact must be shown in defense. It will not be presumed by the court, and the defendant, having accepted and retained the benefits of the contract, is estopped to deny its validity.

News-Register Co. v. Rockingham Pub. Co. 118 Va. 140, 86 S. E. 874; Neil v. Flynn Lumber Co. 71 W. Va. 708, 77 S. E. 324.

Defendant cannot accept the benefits of the contract and repudiate its obligations.

Varney v. Hutchinson Lumber &

Mfg. Co. 70 W. Va. 169, — A.L.R. —, 73 S. E. 321.

Ritz, J., delivered the opinion of the court:

The plaintiff brought this suit to recover upon a contract for services which he claims he performed for the defendant. At the conclusion of the plaintiff's evidence a motion was made to exclude the same and direct a verdict for the defendant, which motion being overruled, and the defendant electing to stand thereon, the case was submitted to the jury upon the plaintiff's evidence alone, resulting in a verdict in his favor, upon which the judgment complained of was rendered.

The plaintiff testified in his own behalf, and his testimony was all that was introduced. In so far as his evidence is material, it establishes the following state of facts: The defendant is a corporation engaged in the mining business in Logan county, and at the time of the transaction involved in this litigation John Laing was its president, and a man by the name of Carson its

general manager. The Browning Land Company, controlled by Sidney and Thomas Browning, owned a tract of land which the defendant's president and general manager informed plaintiff it desired to secure by purchase, as well also as another tract owned by Claude and Ray Browning. Plaintiff remarked that the latter tract ought to be acquired for \$20,000 to \$25,000, and plaintiff's general manager replied: "If you will buy it for that, we will give you \$500." On the next morning the defendant's president sent for plaintiff to come to his office. Upon his arrival he was informed by the president that he wanted plaintiff to see the Brownings with a view to purchasing both pieces of land. Plaintiff stated that he had no information as to what the land could be purchased for; that he did not want it understood that his remarks of the previous day were authorized by the Brownings. Pursuant to his request, plaintiff saw the owners of the Browning Land Company land and got a price of \$4,700 on it. He also saw Claude and Ray Browning, and they made him a price of \$25,000 on their land. He reported this to the defendant's president and general manager, and was informed by the president that the price of \$4,700 for the Browning Land Company land was all right, but the president desired him to see Claude and Ray Browning again and make them an offer of \$20,000 for their land. This the plaintiff did, but the offer was declined. A counter offer was, however, made to sell at \$22,500. The result of this conference was given to the defendant's president and general manager, and the president advised the plaintiff to close for both pieces of land on that basis, that is, \$4,700 for the Browning Land Company tract, and \$22,500 for the Claude and Ray Browning land, or \$27,200 for both tracts. Plaintiff advised against this, and stated that he believed he could secure both tracts for \$25,000. The general manager of the defendant, in the

presence of the president, thereupon advised the plaintiff that if he secured the land at that price he would give him "fifty-fifty" on what was thereby saved from the price of \$27,200, which the defendant's president was willing to pay. Acting upon this, the plaintiff went back to Logan and got all four of the Brownings together and informed them that the defendant desired to purchase both tracts of land, and would give \$25,000 therefor. The Brownings did not accept this, but stated that they believed that if they could see Mr. Laing, the defendant's president, he would give them the price they asked. Plaintiff says he knew from Mr. Laing that he would be in Logan that evening, and he so informed the Brownings and advised them to see him personally. In the meantime he got into communication with Laing and informed him what had been done, and also advised him that, if he would "stand pat" on the \$25,000 offer, he was sure the Brownings would accept it. Laing came to Logan that evening, and was approached by the Brownings in regard to purchasing the land. He informed them that he would give \$25,000 for both tracts, and if they accepted he would draw a draft for the purchase money and leave it for delivery to them upon the title being passed to the defendant. The Brownings retired, and, after conferring over this proposition, returned and accepted the same. Whereupon Laing, who was going away, drew a draft for the purchase money and arranged for its delivery to the Brownings. The land was taken over under this arrangement at the price of \$25,000. Plaintiff claimed one half of the difference between \$25,000, the price at which the land was purchased, and \$27,200, the price Laing had expressed a willingness to pay, because of the proposition of the general manager to give him "fifty-fifty" on the amount he saved the company. The judgment was for the amount thus claimed.

The defendant says the judgment should be reversed:

(1) Because the compensation to be paid is so indefinitely expressed, the term "fifty-fifty" not having any certain meaning, that no recovery could be had except on the quantum meruit, and there is no evidence upon which to base such a recovery.

(2) Because it does not appear that the defendant had authority under its charter to make such a contract.

(3) Because the president and general manager of the company are not shown to have been authorized to make such a contract on behalf of the defendant, and they have no such implied power.

(4) Because it does not appear that the plaintiff was the efficient agent in securing the property at the price at which it was purchased.

We will take these propositions up in their order. The defendant's contention is that the promise of the general manager to give plaintiff "fifty-fifty" on what was saved does not mean anything. That this expression has a well-defined meaning cannot be doubted. It conveys to the mind immediately the division of the subject of discussion into halves, and we are not willing to admit that we are so ignorant of terms in common usage as not to know the meaning of this phrase. The object of construction of contracts is to give

**Contracts—
construction—
object.**

effect to the agreement of the parties, so far as it can be ascertained from the language used, and it matters not that the agreement may be expressed in the vernacular of the street. It is clear that the court below gave the proper construction to the agreement of the parties; that is, that each side would get the benefit of one half of the difference between \$27,200, at which Mr. Laing was willing to close, and such less sum as they might succeed in purchasing the property for.

Can the defendant be allowed to say that this act is ultra vires? It

is a purely private corporation, so far as the record shows, and it does not appear that this contract would violate any principle of public policy, nor does it violate any law. It is true there is no showing as to what corporate powers are possessed by the defendant, but, if it relies upon the contract being ultra vires to defeat recovery, it must show that it is not within its corporate powers. But, even if it were ultra vires, the defendant could not set up that defense here. It has taken the benefit of the contract, and that estops it from ^{Estoppel—to set up ultra vires.} saying that it did

not have power to make it. Where the rights of the public are not involved, a private corporation entering into a contract in excess of its powers, but which is not in violation of law or any settled rule of public policy, and receiving benefits thereunder, is estopped from setting up the defense that it was without power to make it, so far as such estoppel is necessary to do justice between the parties. *News-Register Co. v. Rockingham Pub. Co.* 118 Va. 140, 86 S. E. 874; *Linkauf v. Lombard*, 137 N. Y. 417, 20 L.R.A. 48, 33 Am. St. Rep. 743, 33 N. E. 472; *Nims v. Mt. Hermon Boys' School*, 160 Mass. 177, 22 L.R.A. 364, 39 Am. St. Rep. 467, 35 N. E. 776.

There is no evidence in this case as to the authority possessed by the defendant's president or its general manager with which officers the plaintiff's contract was made. The president of a corporation has no implied power to make such a contract as this (*Varney & Evans v. Hutchinson Lumber & Mfg. Co.* 70 W. Va. 169, — A.L.R. —, 73 S. E. 321), nor has the general manager any such implied power, in the absence of a showing that such a contract comes within the scope of its ordinary business (*Carroll-Cross Coal Co. v. Abrams Creek Coal & Coke Co.* 83 W. Va. 205, 98 S. E. 148). But the plaintiff contends that, regardless of whether these officers had authority to make the contract or not, the defendant subsequently accepted the

benefit of it, and, having done so, it is bound to perform its obligations. It is quite true that the evidence shows that the defendant took over the land under the contract procured for it by the plaintiff, and it cannot,

after taking the benefit of the plaintiff's efforts in its behalf, deny his right to recover the compensation agreed upon. 21 R. C. L. title "Principal and Agent," § 111; Mechem, Agency, §§ 464 and 501; Wheeler v. McGuire, 86 Ala. 398, 2 L.R.A. 808, 5 So. 190; Mayer v. Dean, 115 N. Y. 556, 5 L.R.A. 540, 22 N. E. 261; Eastman v. Provident Mut. Relief Asso. 65 N. H. 176, 5 L.R.A. 712, 23 Am. St. Rep. 29, 18 Atl. 745; Great Lakes Towing Co. v. Mills Transp. Co. 22 L.R.A.(N.S.) 769, 83 C. C. A. 607, 155 Fed. 11; Matzger v. Arcade Bldg. & Realty Co. 80 Wash. 401, L.R.A.1915A, 288, 141 Pac. 900; Despatch Line of Packets v. Bellamy Mfg. Co. 12 N. H. 205,

37 Am. Dec. 203; Gulick v. Grover, 33 N. J. L. 463, 97 Am. Dec. 728; Meyer v. Morgan, 51 Miss. 21, 24 Am. Rep. 617; Sherrod v. Duffy, 160 Mich. 488, 136 Am. St. Rep. 451, 125 N. W. 366.

The only question remaining is: Did the plaintiff secure the property for a less sum than \$27,200? The defendant says that it was through the efforts of its president, Laing, that this result was obtained. From what we have heretofore said it sufficiently appears that the plaintiff's efforts resulted in securing the property for \$25,000. It is true that Laing co-operated with him, but surely it was contemplated that he would have the assistance of the defendant's officers in his efforts to secure the land for it at the most favorable price.

We find no error in the judgment, and the same is affirmed.

Petition for rehearing denied March 24, 1920.

ANNOTATION.

Slang or colloquial phrases in the law of contracts.

The court in the reported case (CHAFIN v. MAIN ISLAND CREEK COAL Co. ante, 657) held that an agreement by which one desirous of purchasing certain land agreed to give an agent "fifty-fifty" on what was saved from a designated price was sufficiently definite to permit recovery on the contract, stating that this expression had a well-defined meaning; that it "conveys to the mind immediately the division of the subject of discussion into halves, and we are not willing to admit that we are so ignorant of terms in common usage as not to know the meaning of this phrase. The object of construction of contracts is to give effect to the agreement of the parties, so far as it can be ascertained from the language used, and it matters not that the agreement may be expressed in the vernacular of the street."

The decision in the above case appears to be in accord with the rules

laid down by the authorities generally on the question of judicial notice and interpretation of contracts, although no case precisely similar has been found.

There are many cases dealing with judicial notice and construction of trade terms in contracts, and these shade into terms which are in a sense colloquial, or have only a local meaning. In view of this, and of the further fact that the question of judicial notice of the meaning of words and phrases is governed by broad general rules as to definiteness in meaning, notoriety, etc., of the language used, and that the matter is one depending so largely upon the particular words or phrases, it seems sufficient to call attention, in connection with the ruling in the CHAFIN CASE, to a few authorities discussing and illustrating the principle involved.

In Wigmore on Evidence, § 2582, in

discussing the question of judicial notice, the author says that so much of special usage in commerce, religion, industry, and social life in general, is involved in the meaning of words, that no generalizations are practicable; that the rulings must depend upon good sense rather than upon precedent.

The general proposition is well settled that courts will take judicial notice of the meaning of English words and phrases, and of the idioms of the vernacular language. See 15 R. C. L. § 29, and cases cited. Courts will take notice, it was said in *Brown v. Piper* (1875) 91 U. S. 37, 23 L. ed. 200, of whatever is generally known within the limits of their jurisdiction. And of all words in our own tongue, it was said in *Nix v. Hedden* (1893) 149 U. S. 304, 37 L. ed. 745, 13 Sup. Ct. Rep. 881, the court takes judicial notice.

It seems that judicial notice may be taken of words which have a well-understood meaning, although they are too vulgar to be printed in a dictionary. See *Linck v. Kelley* (1865) 25 Ind. 278, 87 Am. Dec. 362, and *Edgar v. McCutchen* (1846) 9 Mo. 768, which were actions for slander.

The contention that the terms "deal" and "stock cattle," in an agreement not to "deal in stock cattle," were so uncertain and ambiguous as to render the contract unenforceable, was overruled in *Wilson v. Delaney* (1907) 137 Iowa, 636, 113 N. W. 842.

And the description of the property in a mortgage as "300 head of yearlings" was held in *Barron v. San Angelo Nat. Bank* (1911) — Tex. Civ. App. —, 138 S. W. 142, not vague and uncertain as failing to show whether the property was cattle, horses, or sheep, the court saying it would take judicial knowledge of the ordinary meaning which words have attached to them by general usage, and that in the vernacular of that state "yearlings" meant animals of the cattle species.

An agreement by a guardian to "stand good" for the board of her ward was held in *McNabb v. Clipp* (1892) 5 Ind. App. 204, 31 N. E. 858, not necessarily to imply a contract of guaranty or suretyship, and therefore

not inconsistent necessarily with a verdict based on the theory that the guardian incurred an original and not a merely secondary obligation. See also *Elkin v. Timlin* (1892) 151 Pa. 491, 25 Atl. 139, where a parol promise to "stand good" for all judgment against a third party was construed as an original undertaking to indemnify, based on a sufficient consideration, and not a promise to pay the debt of another within the Statute of Frauds.

Libel and slander or criminal cases are not within the title of the annotation, but there are several cases of this class perusal of which may be of value in this connection.

The court in *Bailey v. Kalamazoo Pub. Co.* (1879) 40 Mich. 251, a libel case, held that judicial notice would be taken of current phrases, generally understood, and that the term "pettifoggish shyster" needed no definition by witnesses.

And the term "squatter riot" was held in *Clarke v. Fitch* (1871) 41 Cal. 472, also a libel case, to be a term of such general and notorious meaning in the state that the court would take judicial notice of it.

Under the rule that courts will understand words in general use in the sense in which they are usually understood by the masses of men, and that no allegation or proof of such meaning is necessary, the court in *Edwards v. San Jose Printing & Pub. Soc.* (1893) 99 Cal. 431, 37 Am. St. Rep. 70, 34 Pac. 128, held, in a libel case, that no evidence was required on the part of the plaintiff to prove the meaning of the word "sack," where the publication was that such company would put a large amount of money into the fight to corrupt voters, and that the plaintiff was to have "charge of the sack." The court said: "As thus used, it signifies a fund in hand to be used for purposes of corruption; and to say that a person has charge of such a fund to be used on a given occasion is, in effect, to say that such person is to disburse the fund for the purposes of corruption. This meaning was doubtless first given to the word by vile and corrupt persons, engaged in distributing and receiving

such funds, and, when first used in that sense, might well have been regarded as a slang expression, of the meaning of which courts would not then have taken judicial notice; but it is now so frequently used to convey this particular meaning that it can hardly be considered, when employed for that purpose, as simply the language of slang and understood only by the vulgar."

We take judicial notice, said the court in *State v. Russell* (1885) 17 Mo. App. 16, of the ordinary meaning of the words of the English language; but we do not take judicial notice of the slang used among gamblers. In this case, on a criminal charge, it was held that the court would not take judicial notice that "playing policy" was playing at a game of chance.

And in *State v. Bruner* (1885) 17 Mo. App. 274, a criminal case, it was held that the court would not judicially know that the "Kentucky drawing" was a lottery.

As before stated, there are, of course, many cases on the question of judicial notice of trade terms; and the same is true as regards abbreviations. One of the most common of the

latter class which has come to have a definite meaning, of which the courts, it appears, will take judicial notice, is the term "O. K." Regarding this term, the court in *Getchell & M. Lumber & Mfg. Co. v. Peterson* (1904) 124 Iowa, 599, 100 N. W. 550, said that although it might have no title to be classed as elegant English, in the business life of the country it had for many years been in common use, and had acquired a meaning which was not at all obscure or uncertain.

That the courts will take judicial knowledge of trade terms which have been in general use for such a length of time that they have acquired a definite well-understood meaning is seen from the following authorities, among others, which have construed such terms as "c. i. f." (*Smith Co. v. Moscahlades* (1920) 193 App. Div. 126, 183 N. Y. Supp. 500); "f. o. b." (*Vogt v. Schienebeck* (1904) 122 Wis. 491, 67 L.R.A. 756, 106 Am. St. Rep. 989, 100 N. W. 820, 12 Ann. Cas. 814); "C. O. D." (*State v. Mullin* (1908) 78 Ohio St. 358, 18 L.R.A. (N.S.) 609, 125 Am. St. Rep. 710, 85 N. E. 556).

R. E. H.

IDA BARNETT, Appt.,

v.

FLORENCE PHELPS, Respt.

Oregon Supreme Court (Dept. No. 1)—July 27, 1920.

(— Or. —, 191 Pac. 502.)

Libel — calling woman a prostitute.

1. It is not, in the absence of statute, actionable per se to speak of an unmarried woman as a whore or prostitute.

[See note on this question beginning on page 669.]

— spoken words — actionable per se.

2. Spoken words actionable per se are those which impute a crime involving moral turpitude or subjecting one to infamous punishment; which impute a contagious disease which would exclude him from society; which impute unfitness for office, or prejudice him in his trade or profession.

[See 17 R. C. L. 265, 294, 305.]

Common law — prostitution.

3. Prostitution was not a crime at common law.

[See 17 R. C. L. 281.]

Libel — construction of words.

4. Words alleged to be slanderous must be taken in their ordinary sense as they would naturally be understood by those to whom they were addressed.

[See 17 R. C. L. 312.]

— effect of innuendoes.

5. Innuendoes cannot extend the meaning of words alleged to be slanderous beyond their natural import.

[See 17 R. C. L. 396.]

— nuisance — punishment — charging prostitution.

6. Since private acts of incontinence are not punishable as public

nuisances under a statute providing punishment for acts which openly outrage public decency or are injurious to public morals, it is not actionable per se as charging a crime to speak of an unmarried woman as a whore or prostitute, with nothing to show the conditions under which her delicts were committed.

[See 17 R. C. L. 280-282.]

APPEAL by plaintiff from a judgment of the Circuit Court for Tillamook County (Bagley, J.) granting an involuntary judgment of nonsuit in an action brought to recover damages for an alleged slander. *Affirmed.*

Statement by Harris, J.:

Ida Barnett, an unmarried woman, sued Florence Phelps for damages, alleging that on one occasion, in the presence of Mrs. Harry Mitchell, the defendant spoke of the plaintiff as a "whore," and that on another occasion, and in the presence of George H. Benson, the defendant characterized the plaintiff as a "prostitute." The evidence concerning the first occasion strictly conformed with the allegation; and although the evidence as to the second occasion did not exactly agree with the language of the complaint, we shall assume that the evidence was sufficient to sustain the charge that the defendant spoke of the plaintiff as a prostitute.

There was neither allegation nor proof of special damage. At the close of the plaintiff's case, the trial court, upon the motion of the defendant, granted an involuntary judgment of nonsuit. The plaintiff appealed.

Messrs. Oliver M. Hickey and H. T. Botts, for appellant:

Oral words imputing to a woman, whether married or single, want of chastity and an indictable offense, are actionable per se.

25 Cyc. 317; Quigley v. McKee, 12 Or. 22, 53 Am. Rep. 320, 5 Pac. 347; Davis v. Sladden, 17 Or. 259, 21 Pac. 140.

A whore or prostitute, in the generally accepted term, is a woman, married or single, who will hold illicit sexual intercourse with various persons, for gain.

Davis v. Sladden, *supra*; State v. Rice, 56 Iowa, 431, 9 N. W. 343; Peter-

son v. Murray, 13 Ind. App. 420, 41 N. E. 836.

It is actionable per se, in Oregon, to speak of and concerning an unmarried woman, to a third person, that she is a "whore," or "prostitute," as the practice of whoredom, or prostitution, is a public nuisance and an indictable offense.

State v. Atwood, 54 Or. 526, 102 Pac. 295, 104 Pac. 195, 21 Ann. Cas. 516; State v. Waymire, 52 Or. 281, 21 L.R.A. (N.S.) 56, 132 Am. St. Rep. 699, 97 Pac. 46.

If the slanderous statements alleged in the complaint and supported by the evidence of plaintiff are actionable per se, the case should have been submitted to the jury, on the issues presented.

Aikens v. Bjerkvig, 77 Or. 397, 150 Pac. 278; Jackson v. Sumpter Valley R. Co. 50 Or. 455, 93 Pac. 356; Brown v. Oregon Lumber Co. 24 Or. 315, 33 Pac. 557; Grant v. Baker, 12 Or. 331, 7 Pac. 318.

Messrs. Johnson & Handley, for respondent:

At common law spoken words are not actionable as in themselves imputing unchastity or immorality, or by reason of the existence of extraneous facts and circumstances tending to prove that they were spoken for the purpose of imputing a want of chastity, because unchastity as a subject of ecclesiastical cognizance was not punishable in common-law courts. The test is, do the words "impute an offense to which the law attaches a disgraceful or infamous punishment, or impute a punishable offense of a disgraceful or infamous character?"

25 Cyc. 313; Quigley v. McKee, 12 Or. 24, 53 Am. Rep. 320, 5 Pac. 347; Davis v. Sladden, 17 Or. 259, 21 Pac.

140; Hubbard v. Scott, 85 Or. 10, 166 Pac. 33; Clark v. Morrison, 80 Or. 244, 156 Pac. 429; Williams v. Riddle, 145 Ky. 459, 36 L.R.A. (N.S.) 974, 140 S. W. 661, Ann. Cas. 1913B, 1151.

Harris, J., delivered the opinion of the court:

The only question for decision is whether the court erred in entering an involuntary judgment of nonsuit. If the words employed by the defendant are not actionable per se in this jurisdiction, then the inescapable conclusion is that the trial court ruled correctly.

Spoken words are either actionable or not actionable. Actionable words are divided into two classes: (1) Those which are actionable in themselves, or per se; and (2) those which are actionable only upon allegation and proof of special damage, or per quod. Defamatory words, where spoken, may or may not be actionable per se, depending upon whether or not they may properly be assigned to one or more of the several classes of cases which the rules of the common law have designated as actionable per se. If defamatory words are not actionable per se the complainant must allege and prove special damage. Words of both classes are actionable on the same ground and for the same reason. 17 R. C. L. 264. "The material element," this court has said, "which lies at the foundation of the action of slander, is social disgrace, or damages to character in the opinion of other men." Quigley v. McKee, 12 Or. 22, 53 Am. Rep. 320, 5 Pac. 347.

Both classes of words are the natural and proximate causes of pecuniary damage. Words actionable per se are classified as such on the theory that their injurious character is admitted by all men, and that on that account they are conclusively presumed to result in damage; but other words are actionable only upon allegation and proof of their injurious effect. Words actionable per se are usually divided into four classes, as follows: (1) Words which im-

pute a charge which, if true, will subject the party charged to an indictment for a crime involving moral tur-

Libel—spoken
words—
actionable per
se.

pitute, or subject him to an infamous punishment; (2) words falsely spoken of a person which impute that the party is infected with some contagious disease, where, if the charge is true, it would exclude the party from society; (3) defamatory words, falsely spoken of a person, which impute to the party unfitness to perform the duties of an office or employment of profit, or the want of integrity in the discharge of the duties of such an office or employment; and (4) defamatory words, falsely spoken of a party, which prejudice such party in his or her profession or trade. Pollard v. Lyon, 91 U. S. 225, 23 L. ed. 308; Williams v. Riddle, 145 Ky. 459, 36 L.R.A. (N.S.) 974, 140 S. W. 661, Ann. Cas. 1913B, 1151.

Obviously, the words spoken by the defendant cannot be assigned to any of the four classes, unless it be to the first one mentioned; hence we shall seek to discover whether the words uttered by the defendant are, in the present state of the law in this jurisdiction, included in the first class of cases. It is apparent that this classification made of actionable words is based upon an arbitrary rule rather than upon the result of inquiries concerning proximate cause and natural effect, because, if the rule were framed and governed by considerations of cause and effect, it would necessarily include many cases now excluded. Quigley v. McKee, 12 Or. 22, 53 Am. Rep. 320, 5 Pac. 347; Williams v. Riddle, supra.

An examination of the authorities will disclose the fact, as illustrated in State v. Conklin, 47 Or. 509, 516, 84 Pac. 482, that statements may be found to the effect that spoken words are actionable per se if they impute the commission of an offense liable to indictment and punishment, without any qualifying expressions concerning the element of moral tur-

pitute, or the character of the penalty prescribed for the crime. The precedent last mentioned must, however, be read in the light of the facts there under investigation, and, when so read, it becomes manifest that the court was not called upon to decide, and did not attempt to decide, whether words were actionable per se if imputing a crime for which an indictment would lie, regardless of the presence or absence of moral turpitude, and regardless of the nature of the prescribed punishment. Perhaps it is not now important, except in the interest of accuracy, to determine whether the single fact that the imputed offense is indictable is alone sufficient, without the presence of either the element of moral turpitude or the element of infamous punishment; for the reason that, although it may be difficult to phrase a satisfactory definition of moral turpitude (*Ex parte Mason*, 29 Or. 18, 22, 54 Am. St. Rep. 772, 43 Pac. 651), the words uttered by the defendant impute a charge which, if true and constituting a crime, unquestionably involve moral turpitude. *Pollard v. Lyon*, supra. In *Brooker v. Coffin*, 5 Johns. 188, 4 Am. Dec. 337, the following rule was given as the test: "In case the charge, if true, will subject the party charged to an indictment for a crime involving moral turpitude, or subject him to an infamous punishment, then the words will be in themselves actionable."

This test has been so often applied that it may be accepted as a correct statement of the law. *Pollard v. Lyon*, supra; *Davis v. Sladden*, 17 Or. 259, 21 Pac. 140; *Clark v. Morrison*, 80 Or. 240, 244, 156 Pac. 429.

Under the custom of London, a whore was "carted," and, on that account, to characterize a woman as such was actionable per se in London; but with this exception a private act of incontinence, whether fornication or adultery, was cognizable only in the ecclesiastical courts. 1 Bishop, New Crim. Law, §§ 38, 501; *State v. Moore*, 1 Swan, 136;

State v. Smith, 32 Tex. 167; 2 Whart. Crim. Law, 10th ed. §§ 117, 1741; 1 Am. & Eng. Enc. Law, 2d ed. 747; 13 Am. & Eng. Enc. Law, 2d ed. 1119. Nor did repeated acts of fornication or adultery constitute a crime, even though committed with many persons. 1 Bishop, New Crim. Law, § 501; *State v. Evans*, 27 N. C. (5 Ired. L.) 603; *Reg. v. Pierson*, 1 Salk. 382, 91 Eng. Reprint, 333.

"A 'whore' is a woman given to promiscuous commerce with men, usually for hire." Bishop, *Statutory Crimes*, 2d ed. § 715; 40 Cyc. 933.

A prostitute is often defined as a female given to indiscriminate lewdness for gain (*Davis v. Sladden*, 17 Or. 259, 264, 21 Pac. 140; Bishop, *Statutory Crimes*, § 641), although it has been held that gain is not necessary (32 Cyc. 732). The word "prostitution" has no common-law meaning (*People v. Cummons*, 56 Mich. 544, 23 N. W. 215, 6 Am. Crim. Rep. 221), and to be a common prostitute was not, at common law, indictable as a distinct and substantive offense (32 Cyc. 732).

It makes no difference, then, whether we construe the words used by the defendant to mean the acts of incontinence, or the condition produced by those acts; for in neither event do the words import a crime at Common law—prostitution. common law, since neither a private act of incontinence, even though repeated with many men, nor the condition of being a prostitute, constitute a crime; and therefore, under the common law, to say of a woman she is a whore, or a prostitute, or by other language to impute unchastity to her, was not actionable per se. *Boyd v. Brent*, 5 S. C. L. (3 Brev.) 241; *Underhill v. Welton*, 32 Vt. 40; *Linney v. Maton*, 13 Tex. 449; *Reg. v. Pierson*, 1 Salk. 382, 91 Eng. Reprint, 333; *Douglas v. Douglas*, 4 Idaho, 293, 38 Pac. 934; *Battles v. Tyson*, 77 Neb. 563, 24 L.R.A. (N.S.) 577, 110 N. W. 299, 15 Ann. Cas. 1241; *Pollard v. Lyon*, 91 U. S. 225, 23 L. ed. 308; *Davis v. Sladden*, 17 Or. 259, 261, 21 Pac. 140; 17 R. C. L. 281.

This rule of the common law that spoken words imputing unchastity to a female are not actionable per se, because not imputing a crime, is gradually, but surely, undergoing a change. This change is being brought about both by statute and by judicial decision. In England, a change was wrought by the Slander of Women Act 1891, Stat. 54 & 55 Vict. chap. 51, which enacts that words imputing unchastity or adultery to a woman or girl shall be actionable without proof of special damage. In America, similar statutes have been passed in a number of the states, while in other states the courts, declaring the old rule to be a reproach upon the law, have repudiated the arbitrary and harsh rule of the common law, and held that words imputing unchastity to a female are actionable per se, even though not involving a criminal offense. If the question were *res integra*, the writer would take the view that this court should adopt the better and by far the more logical rule that words imputing unchastity are actionable per se, even though they do not involve a criminal offense; but in this jurisdiction the question is foreclosed by the holding in *Davis v. Sladden*, 17 Or. 259, 21 Pac. 140, where it was squarely decided that the common-law rule controlled; and consequently relief from the harsh rule now governing in this jurisdiction must come, and, as it seems to the writer, should come, from the legislature.

Libel—calling
woman a
prostitute.

In many and probably most of the states of the Union, an act of incontinence in some or many of its different forms is made punishable criminally, with the result that in such jurisdictions words imputing unchastity are in many instances actionable per se, for the reason that in such instances they impute a crime involving moral turpitude. In some American jurisdictions, the common law has been followed without objection; but in others, although adhering to the old rule, the

courts have not done so without protesting loudly and bitterly. *Williams v. Riddle*, 145 Ky. 459, 36 L.R.A.(N.S.) 974, 140 S. W. 661, Ann. Cas. 1913B, 1151; *Linney v. Maton*, 13 Tex. 449; *Battles v. Tyson*, 77 Neb. 563, 24 L.R.A.(N.S.) 577, 110 N. W. 299, 15 Ann. Cas. 1241; *Jones v. Herne*, 2 Wils. 87, 95 Eng. Reprint, 701; *Lynch v. Knight*, 9 H. L. Cas. 577, 11 Eng. Reprint, 854, 8 Jur. N. S. 724, 5 L. T. N. S. 291, 8 Eng. Rul. Cas. 382; *Smith v. Silence*, 4 Iowa, 321, 66 Am. Dec. 137; *Landerback v. Moore*, *Tappan* (Ohio) 295, Appx. A; 17 R. C. L. 280, 282.

In this state the act of fornication is not made a substantive offense punishable criminally, and an act of incontinence becomes a crime only when there is some accompanying element, as, for example, marriage of one of the parties. In this state adultery is a crime, and therefore to speak of a married woman as a prostitute is to charge the commission of a crime. *Davis v. Sladden*, *supra*. In the instant case, however, the plaintiff is an unmarried woman.

The defendant argues that the words spoken by the defendant impute a violation of § 2087, L. O. L., which reads thus: "If any person shall wilfully and wrongfully commit any act which grossly injures the person or property of another, or which grossly disturbs the public peace or health, or which openly outrages the public decency and is injurious to public morals, such person, if no punishment is expressly prescribed therefor by this Code, upon conviction thereof, shall be punished. . . ."

This statute was designed to cover offenses against the public peace, the public health, and the public morals, not elsewhere made punishable by the Code, and which were known at common law as "indictable nuisances." *State v. Waymire*, 52 Or. 281, 285, 21 L.R.A.(N.S.) 56, 132 Am. St. Rep. 699, 97 Pac. 46. We must therefore look to the common law to ascertain what acts openly outrage the public decency and are

injurious to public morals. 29 Cyc. 1279.

Before inquiring about the nature of acts which were indictable nuisances under the common law, we should remind ourselves that the

—construction
of words.

words used by the defendant are to be taken in their ordinary sense, and as they would naturally be understood by those to whom they were addressed; and it

—effect of
innuendoes.

must also be remembered that innuendoes cannot extend the meaning of words beyond their natural import. An innuendo can only serve to explain some matter already expressed. It may show the application, but it cannot add to, or enlarge, or change the sense of words. *Davis v. Sladden*, 17 Or. 259, 21 Pac. 140; *Battles v. Tyson*, 77 Neb. 563, 24 L.R.A.(N.S.) 577, 110 N. W. 299, 15 Ann. Cas. 1241; 17 R. C. L. 312; *Feast v. Auer*, 28 Ky. L. Rep. 794, 4 L.R.A.(N.S.) 560, 90 S. W. 564; *State v. Conklin*, 47 Or. 509, 516, 84 Pac. 482. With these rules of construction in mind we may again turn to § 2087, L. O. L.

Although at common law a single act of private incontinence was not indictable, one in a public place and witnessed by people was indictable (*Bishop*, *Statutory Crimes*, 2d. ed. § 711), and although at common law the mere cohabitation of a man and woman between whom the bond of marriage did not exist was not a crime, yet it was a crime if something publicly indecent existed in the manner of association (20 R. C. L. 406; *Adams v. Com.* 162 Ky. 76, L.R.A.1916C, 651, 171 S. W. 1006). In the absence of legislation, fornication and adultery were not crimes under the common law, unless accompanied by such circumstances as per se constituted a misdemeanor, as, for example, when it was open or notorious, amounting to a public nuisance. 1 *Bishop*, *New Crim. Law*,

38; 1 R. C. L. 632; *Richey v. State*, 172 Ind. 134, 139 Am. St. Rep. 362, 87 N. E. 1032, 19 Ann. Cas. 654. Generally, all acts of gross and open lewdness are indictable at common law. 1 *Bishop*, *New Crim. Law*, § 500; 2 *Whart. Crim. Law*, 10th ed. § 1432. Again noticing § 2087, L. O. L., it will be observed that, as said in *State v. Nease*, 46 Or. 433, 443, 80 Pac. 899, the legislature embodied "in the statute, as a description of the offenses prohibited, the essential ingredients of a common-law nuisance."

To say of an unmarried woman that she is a prostitute, or a whore, is merely to ascribe to her a condition brought about by acts of incontinence, without regard to whether there was or was not, in any one or more of the acts of incontinence producing the results or condition of being a prostitute or a whore, any accompanying element, as for example, marriage of one of the parties, making the act adultery in this state, or blood relationship of the parties within a certain degree, making the act incest. The statute make it an offense to use profane language upon any grounds used as a watering place outside of any incorporated city; and yet to say of a man that he is profane would not ordinarily be understood to mean that he used profane language at the place prohibited by law. It is true that it is unlawful to keep a bwdyhouse, but it is also true that the condition ascribed to the plaintiff by the defendant does not necessarily imply the keeping of a bawdyhouse; nor, indeed, does it necessarily imply that the plaintiff was an inmate of such a house. A female may gain for herself the condition named by the defendant, by performing the acts privately and in as many different places as there are acts. The words used by the defendant do not imply public and open acts of incontinence, any more than they imply private acts of incontinence. The words do imply acts of incon-

tinence for hire, but no more. In brief, an act of incontinence, or repeated acts of incontinence, may or may not be punishable criminally, depending upon the accompanying circumstances. There are different circumstances, which, if accompanying an act of incontinence, make the act a crime; and there are as many different classes of sexual offenses as there are different classes of circumstances producing criminality. When, therefore, words, such as those used by the defendants, are spoken of a person, one can only conjecture whether there was or was not an accompanying element of criminality.

The words spoken by the defend-

ant, when given the meaning which they are ordinarily understood to carry, cannot be said to impute the commission of a crime, and therefore are not actionable per se; and although the words uttered by the defendant do impute unchastity to the plaintiff, that circumstance does not render them actionable per se, but the plaintiff must, before she can recover, allege and prove special damage. The plaintiff did not allege, nor did she attempt to prove, special damage, and therefore the judgment must be affirmed.

McBride, Ch. J., and Benson and Burnett, JJ., concur.

ANNOTATION.

Orally charging a woman with being a whore or prostitute as actionable per se.

I. Introductory, 669.

II. At common law:

- a. English cases, 670.
- b. Scotch cases, 670.
- c. American cases:

- (1) Old rule, 671.
- (2) New rule, 671.

III. Custom of London, 672.

IV. Charging plaintiff with keeping a bawdyhouse, 672.

V. Charging statutory crimes of adultery, fornication, etc., 674.

I. Introductory.

This note is confined to cases of slander where the charge imputed a professional or usual practice, as distinguished from a single act of unchastity; but it does not attempt to include cases where there was doubt as to whether a professional or usual habit was intended. It excludes privileged communications.

At common law it was not actionable per se orally to impute a want of chastity to a woman, nor to call her a whore, nor orally to impute to her professional or habitual unchastity. The law was otherwise in Scotland.

The usual reason given for the lack of the action at common law was that to impute unchastity to a woman was punishable in the spiritual court. But there are some cases in the old books

VI. Statutory actions:

- a. Under statutes making it slanderous per se to impute a want of chastity, 675.
- b. Under statutes making it slanderous per se to charge adultery, fornication, etc., 676.
- c. Under miscellaneous statutes, 677.

VII. Criminal prosecutions, 677.

holding the word "whore" to be a word of mere heat and passion. Thus, in 1 Freem. C. L. Rep. 296, 89 Eng. Reprint, 214, it is reported that in 1678 the court granted a prohibition against a proceeding in the spiritual court for calling a woman a whore, as it was only a word of heat and passion. So, even during the Commonwealth act against adultery, there were cases holding "whore" not actionable, as it was only a word of heat and choler, or of passion. *Dekin v. Turner* (1653) Style, 387, 82 Eng. Reprint, 800; *Freeman v. Childeress* (1651) Style, 299, 82 Eng. Reprint, 725. See also *Colswood v. Chandler* (1657) 2 Sid. 34, 82 Eng. Reprint, 1241. And in *Osborn v. Wright* (1688) 2 Mod. 296, 86 Eng. Reprint, 1082, it was held to be mere scolding to call a woman a whore. See also *Oxford v. Cross*

(1599) 4 Coke, 18, 76 Eng. Reprint, 902, referring to it as a "brabbling" word.

Under the so-called custom of London, it came to be held that to call a woman a whore in London was actionable, as there a whore was liable to be "carted," and a similar rule obtained as to Southwark and Bristol. For a short time under the Commonwealth it was actionable to impute adultery to a woman, by reason of a statute punishing adultery. It was, however, actionable at common law to say of a woman that she kept a bawdy-house, as that was a punishable offense.

On the other hand, it is now generally actionable to call a woman a whore, or to impute to her professional or habitual unchastity. This result has been reached by one of three ways, viz.: (1) By the court overthrowing the rule of the common law; (2) by holding that the defamatory matter charged the crimes of adultery or fornication, and that to charge these crimes is actionable per se; or (3) by special statutes making it actionable to charge fornication, or adultery, or unchastity, etc.

It may be noted that there are a few cases which in effect deny that the word "whore" necessarily means a woman of promiscuous lewdness. *Claypool v. Claypool* (1894) 56 Ill. App. 21; *Alcorn v. Hooker* (1843) 7 Blackf. (Ind.) 58; *Rodebaugh v. Hollingsworth* (1855) 6 Ind. 339. But the above Indiana cases were doubted in *Peterson v. Murray* (1895) 13 Ind. App. 420, 41 N. E. 836. The usual meaning of the word is sustained in *Sheehey v. Cokley* (1876) 43 Iowa, 183, 22 Am. Rep. 236; *Rutherford v. Paddock* (1902) 180 Mass. 289, 91 Am. St. Rep. 282, 62 N. E. 381; *Zimmerman v. McMakin* (1884) 22 S. C. 372, 53 Am. Rep. 720.

In *Rowe v. Myers* (1918) 204 Mich. 374, 169 N. W. 823, in reversing a case on another ground, the court thought the trial judge might better have charged as requested, instead of eliminating the last clause in the following request: "I further charge you that a whore is a woman who practises

illicit sexual intercourse, either for hire or reward, or to gratify a depraved passion."

II. At common law.

a. English cases.

At common law, oral imputation upon a woman's chastity was punishable in the spiritual court. Consequently, orally to call a woman a whore, or orally to impute to her professional or habitual unchastity, was not actionable per se. *Pollard v. Armshaw* (1597) Cro. Eliz. pt. 2, p. 582, 78 Eng. Reprint, 825; *Oxford v. Cross* (1599) 4 Coke, 18, 76 Eng. Reprint, 902; *Holwood v. Hopkins* (1600) Cro. Eliz. pt. 2, p. 787, 78 Eng. Reprint, 1017; *Colabyn v. Viner* (1613) W. Jones, 356, 82 Eng. Reprint, 187; *Hart's Case* (1634) Cro. Car. 350, 79 Eng. Reprint, 907; *Gardiner v. Parker* (1658) Hardr. 107, 145 Eng. Reprint, 404; *Wallis v. —* (1661) 1 Sid. 61, 82 Eng. Reprint, 970; *Bois v. Bois* (1664) 1 Keble, 758, 83 Eng. Reprint, 1228; *Wharton v. Brook* (1669) 1 Vent. 21, 86 Eng. Reprint, 15; (obiter); *Tuckey v. Flower* (1686) Comb. 26, 28, 90 Eng. Reprint, 321, 323; *Byron v. Elmes* (1696) 2 Salk. 693, 91 Eng. Reprint, 587, Comb. 392, 90 Eng. Reprint, 548, 12 Mod. 106, 88 Eng. Reprint, 1197; *Graves v. Blanchet* (1704) 2 Salk. 696, 91 Eng. Reprint, 589; *Reg. v. Pierson* (1704) 1 Salk. 382, 91 Eng. Reprint, 333 (obiter); *Gascoigne v. Ambler* (1704) 2 Ld. Raym. 1004, 92 Eng. Reprint, 168; *Saville v. Sweeny* (1833) 4 Barn. & Ad. 515, 110 Eng. Reprint, 549; *Wilby v. Elston* (1849) 8 C. B. 141, 137 Eng. Reprint, 462; *Parkins v. Scott* (1862) 1 Hurlst. & C. 153, 158 Eng. Reprint, 839, 81 L. J. Exch. N. S. 331, 8 Jur. N. S. 593, 6 L. T. N. S. 394, 10 Week. Rep. 562.

Contra: *Baldwin v. Flower* (1688) 3 Mod. 120, 87 Eng. Reprint, 77.

b. Scotch cases.

In Scotland, words which lower the character or hurt the feelings were actionable per se. Thus, it was held actionable to call a woman a whore. *Muirhead v. Cuthbert* (1868) 13 Journal of Jurisprudence, 102.

Where a music-hall regulation required the exclusion of improper persons, an employee requested a visitor to leave, calling her a prostitute; it was held that the manager would be liable if malice were proved, but otherwise it would be privileged. *Finburgh v. Moss's Empires* [1908] 45 Scot. L. R. 792, Ct. of Sess. set out in *Butterworth's Dig.* (1908) Col. 349.

c. American cases.

(1) *Old rule.*

Some of the American cases have held, following the rule of the common law, that it is not actionable orally to impute to a woman professional or habitual unchastity.

Delaware. — *Pleasanton v. Krone-meier* (1916) 6 Boyce, 81, 97 Atl. 11.

Idaho. — *Douglas v. Douglas* (1895) 4 Idaho, 293, 38 Pac. 934.

Maryland. — *Griffin v. Moore* (1895) 43 Md. 246.

Montana. — *Ledlie v. Wallen* (1895) 17 Mont. 150, 42 Pac. 289.

New Hampshire. — *Woodbury v. Thompson* (1825) 3 N. H. 194.

New York. — *Brooker v. Coffin* (1809) 5 Johns. 188, 4 Am. Dec. 337; *Bassell v. Elmore* (1872) 48 N. Y. 561.

Oregon. — *Davis v. Sladden* (1889) 17 Or. 259, 21 Pac. 140 (obiter); *BARNETT v. PHELPS* (reported herewith) ante, 663.

South Carolina. — *Boyd v. Brent* (1812) 5 S. C. L. (3 Brev.) 241.

Texas. — *Linney v. Maton* (1855) 13 Tex. 449.

Vermont. — *Underhill v. Welton* (1859) 32 Vt. 40.

To call a woman a public prostitute is not actionable, where neither prostitution, adultery, nor fornication, as such, is punishable as a crime. *Douglas v. Douglas* (Idaho) supra.

To charge a married woman with being a whore is not slanderous because it charges her with adultery, as the penalty for adultery is only a fine, and to make the words actionable per se they must impute to the plaintiff an actionable offense for which corporal punishment is the penalty. *Griffin v. Moore* (Md.) supra.

In *Brooker v. Coffin* (N. Y.) supra, where a woman was called a common

prostitute, it was held that the words were not actionable, although a common prostitute was by statute punishable as a disorderly person, the court laying down the rule that where "the charge, if true, will subject the party charged to an indictment for a crime involving moral turpitude, or subject him to an infamous punishment, then the words will be in themselves actionable."

So it was held not actionable per se to call a woman a common prostitute simply because the statute, "in defining who are vagrants, declares, inter alia, that 'every common prostitute . . . is a vagrant, and is punishable by imprisonment in the county jail not exceeding ninety days,'" as this is not an infamous punishment; but it was also held that there was no intention to charge vagrancy, and that the words used showed that the expression was based on a single act of connection of a woman with her husband before marriage. *Douglas v. Douglas* (1895) (Idaho) supra.

It is not slanderous per se to say of a (married) woman that she is a whore, she came out of a whore house, as these words do not charge a crime or indictable offense, either at common law or under the statutes of this state. *Pleasanton v. Kronemeier* (Del.) supra.

It will be seen that it is held in the reported case (*BARNETT v. PHELPS*, ante, 663) that it is not actionable to call an unmarried woman a whore or a prostitute, as the words impute the commission of no crime.

(2) *New rule.*

Other American cases have held that by the modern American common law it is actionable per se falsely to impute orally unchastity to a woman, and consequently that it is actionable per se falsely to impute to her orally professional or habitual unchastity. *Smith v. Silence* (1856) 4 Iowa, 321, 66 Am. Dec. 137; *Truman v. Taylor* (1857) 4 Iowa, 424; *Snediker v. Poorbaugh* (1870) 29 Iowa, 488; *Sheehy v. Cokley* (1876) 43 Iowa, 183, 22 Am. Rep. 236; *Hahn v. Lumpa* (1912) 158 Iowa, 560, 138 N. W. 492; *Battles v.*

Tyson (1906) 77 Neb. 563, 24 L.R.A. (N.S.) 577, 110 N. W. 299, 15 Ann. Cas. 1241; Wilson v. Robbins (1832) Wright (Ohio) 40 (obiter); Stevens v. Handly (1832) Wright (Ohio) 121; Stevens v. Handly (1832); Wright (Ohio) 123; Reynolds v. Tucker (1856) 6 Ohio St. 517, 67 Am. Dec. 353 (reversed on another ground). See also Barr v. Birkner (1895) 44 Neb. 197, 62 N. W. 494.

In Truman v. Taylor (1857) 4 Iowa, 424, *supra*, in holding that words imputing a want of chastity to a woman were actionable *per se*, the court said: "We need scarcely remark that our conclusion that the words spoken are actionable *per se* is not upon the ground that they import a charge of some punishable offense or crime, but upon the simple and, as we think, salutary ground that words imputing to the female a want of chastity are actionable without any proof of special damage. However much other and perhaps a majority of states may have hesitated in adopting this rule, in ours, at least, it may now be regarded as settled."

To charge of plaintiff's husband that he married a "damned false-swearing, whoring bitch of a woman," was held actionable in Duval v. Davey (1877) 32 Ohio St. 604.

III. Custom of London.

Under the custom of London, Southwark, and Bristol, a whore was "carted," and therefore it was claimed that where a woman was called a whore in London, the word was actionable *per se* in the common-law courts. This claim was at first denied. Oxford v. Cross (1599) 4 Coke, 18, 76 Eng. Reprint, 902; Hart's Case (1634) Cro. Car. 350, 79 Eng. Reprint, 907. But later it was recognized, and the word held actionable *per se* in the common-law courts. Hassel v. Capcot (1639) 1 Vin. Abr. (Eng.) 395, 1 Rolle, Abr. 36, l. 40; Rily v. Lewis (1640) 1 Vin. Abr. (Eng.) 396, 1 Rolle, Abr. 36, l. 50 ("she is a bawd and I will have her carted"); Bavoier v. Cooper (1639) 1 Rolle, Abr. (Eng.) 550, l. 12, 2 Rolle, Abr. 69, l. 40 (harlot); Wheeler v. Welch (1662) 1 Lev. 116, 83

Eng. Reprint, 326; Anonymous (1681) 1 Vent. 343, 352, 86 Eng. Reprint, 222, 227; Watson v. Clerke (1689) Holt, K. B. 428, 90 Eng. Reprint, 1136; Cook v. Wingfield (1723) 1 Strange; 555, 93 Eng. Reprint, 696 (strumpet; obiter); Theyer v. Eastwick (1767) 4 Burr. 2032, 98 Eng. Reprint, 59; Brand v. Roberts (1769) 4 Burr. 2418, 98 Eng. Reprint, 267. See also, as to Southwark and Bristol, Roberts v. Herbert (1662) 1 Sid. 97, 82 Eng. Reprint, 993, and Power v. Shaw (1744) 1 Wils. 62, 95 Eng. Reprint, 493.

Words of insinuation or indirection were considered as not within the custom of London, in Houblon v. Milner (1692) Lutw. 1039, 125 Eng. Reprint, 578; but this case was practically overruled in Vicars v. Worth (1721) 1 Strange, 471, 93 Eng. Reprint, 641, and in Hodgkins v. Corbet (1723) 1 Strange, 545, 93 Eng. Reprint, 690 ("cuckoldy," and "cuckold," of a husband).

IV. Charging plaintiff with keeping a bawdyhouse.

After some disagreement (see Simpson v. Brook (1610) 1 Bulstr. 138, 80 Eng. Reprint, 832, citing 27 Hen. VIII. fo. 15.6; Anonymous (1598) Cro. Eliz. pt. 2, p. 643, 78 Eng. Reprint, 882; — v. —, Noy, 73, 74 Eng. Reprint, 1041), it was held at common law to be an indictable offense to keep a bawdyhouse, and words charging a woman with maintaining such a place are actionable *per se* at common law, or where there are statutes punishing such offense.

Indiana. — Lipprant v. Lipprant (1875) 52 Ind. 273.

Maryland. — Griffin v. Moore (1875) 43 Md. 246.

Nebraska. — Hendrickson v. Sullivan (1889) 28 Neb. 329, 44 N. W. 448.

New Jersey. — Moore v. Beck (1904) 71 N. J. L. 7, 58 Atl. 166.

New York. — Martin v. Stillwell (1816) 13 Johns. 275, 7 Am. Dec. 374; Wilkens v. Hammann (1904) 43 Misc. 21, 86 N. Y. Supp. 744.

Pennsylvania. — Burke v. Keppel (1912) 49 Pa. Super. Ct. 590.

Rhode Island. — *Blake v. Smith* (1896) 19 R. I. 476, 34 Atl. 995.

Vermont. — *Posnett v. Marble* (1890) 62 Vt. 481, 11 L.R.A. 162, 22 Am. St. Rep. 126, 20 Atl. 813.

Wisconsin.—*Culver v. Marx* (1914) 157 Wis. 320, 147 N. W. 358.

England. — *Thorne v. Durham* (1605) Noy, 117, 74 Eng. Reprint, 1082; *Penson v. Gooday* (1631) Cro. Car. 330, 79 Eng. Reprint, 888; *Hollingshead's Case* (1631) Cro. Car. 229, 79 Eng. Reprint, 800 (obiter); *Newton v. Masters* (1678) 2 Lev. 233, 83 Eng. Reprint, 534; *Reg. v. Pierson* (1704) 1 Salk. 382, 91 Eng. Reprint, 333 (obiter); *Grove v. Hart* (1752) Sayer, 33, 96 Eng. Reprint, 793; *Huckle v. Reynolds* (1859) 7 C. B. N. S. 114, 141 Eng. Reprint, 758.

To charge a woman with keeping a bawdyhouse is actionable at common law, as imputing an offense involving not only moral turpitude, but one which subjects the party at common law to indictment and corporal punishment. *Griffin v. Moore* (Md.) *supra*.

Charging keeping a bawdyhouse is actionable, as, if true, the offense charged would subject the party charged to an indictment for a crime (common nuisance) involving moral turpitude. *Martin v. Stillwell* (N. Y.) *supra*.

In holding that words charging the plaintiff with keeping a house of ill fame were actionable in *Posnett v. Marble* (Vt.) *supra*, the court said: "It is further insisted that if the words are sufficient to charge the crime described in the statute, the punishment of the crime is not an infamous one, and that the words are therefore not actionable. This claim is in view of the fact that, by the Statute of 1884, the punishment was changed from imprisonment in the state prison to imprisonment in the house of correction. But it is sufficient if the punishment is corporal; the place of confinement is not the test. The crime charged is one that involves moral turpitude and subjects the offender to imprisonment, and the words are therefore actionable."

In *Moore v. Beck* (N. J.) *supra*, it 11 A.L.R.—43.

was held that to charge a woman with keeping a "disorderly house" was actionable per se, as charging her with a nuisance which was an indictable offense, but the case was reversed on another ground.

In *Hendrickson v. Sullivan* (Neb.) *supra*, the court decided on the ground that the accusation might support a criminal charge of running a house of prostitution, but laid down the rule that the words must charge a criminal offense involving moral turpitude, for which the party might be indicted and punished.

No question seems to have been made that the words were not slanderous in *Wendt v. Craig* (1892) 45 N. Y. S. R. 23, 17 N. Y. Supp. 748, reversed on another ground in (1895) 147 N. Y. 697, 41 N. E. 516; *Graves v. Gilchrist* (1890) 29 N. Y. S. R. 638, 9 N. Y. Supp. 88; *Lanpher v. Clark* (1896) 149 N. Y. 472, 40 N. E. 182.

In *Burke v. Keppel* (1912) 49 Pa. Super. Ct. 590, it was held that to say, "You harbor my whore, and are no better than she," is actionable per se and with an innuendo as imputing the keeping of a bawdyhouse.

It is actionable per se to charge a married woman with assisting her husband in keeping a house of prostitution by promiscuous intercourse with men, as adultery and being an inmate of a house of prostitution are both criminal offenses. *Culver v. Marx* (1914) 157 Wis. 320, 147 N. W. 358, *supra*.

The words were held actionable, as imputing a want of chastity, in *Loranger v. Loranger* (1898) 115 Mich. 681, 74 N. W. 228, and in *Cook v. Rief* (1885) 20 Jones & S. (N. Y.) 302.

Compare *State v. Boos* (1896) 66 Mo. App. 537, *infra*, VII.

In *Burch v. Bernard* (1909) 107 Minn. 210, 119 N. W. 33, it was held to be actionable per se for a member of a city council to say, when discussing the bill of the plaintiff for services as nurse to a smallpox patient in a building provided for the purpose by the city, that "there was no smallpox there, and that they were running nothing but a damn whore house." But it does not appear whether the

court considered the words as charging keeping a house of prostitution, or simply as charging the crime of fornication.

Note the distinction in the old cases between charges of being a "bawd," and of keeping a bawdyhouse. *Cavel v. Birket* (1670) 1 Sid. 438, 82 Eng. Reprint, 1204; *Luckey v. Dangerfield* (1738) 2 Strange, 1100, 93 Eng. Reprint, 1057. See also *Coleman v. Harcourt* (1664) 1 Lev. 140, 83 Eng. Reprint, 338.

V. Charging statutory crimes of adultery, fornication, etc.

During the Commonwealth, words charging adultery were actionable on account of a Commonwealth act against adultery. See *Wallis v. —* (1661) 1 Sid. 61, 82 Eng. Reprint, 970; *Gardiner v. Parker* (1658) Hardr. 107, 145 Eng. Reprint, 404.

(Perhaps on account of this statute were the decisions in *Brian v. Twite* (1652) Style, 328, 82 Eng. Reprint, 750, holding "whore" actionable, and in *Hicks v. Joyce* (1653) Style, 394, 82 Eng. Reprint, 806, holding it actionable to call a woman a whore, and to say that her plying place was Cheap-side. See also *Owen v. Jevon* (1651) Style, 274, 82 Eng. Reprint, 705.)

But in *Dekin v. Turner* (1653) Style, 387, 82 Eng. Reprint, 809, it was held that "whore," spoken since the act, was not actionable, as it was a word of heat and choler; so, as a word of passion. *Freeman v. Childeress* (1651) Style, 299, 82 Eng. Reprint, 725; see also *Colswood v. Chandler* (1657) 2 Sid. 34, 82 Eng. Reprint, 1241.

There are many modern cases holding it actionable to call a woman a whore, or to apply to her words indicating a professional or habitual unchastity, as imputing to her the statutory crimes of adultery or fornication.

Connecticut. — *Frishie v. Fowler* (1818) 2 Conn. 707 (adultery).

Georgia. — *Pledger v. Hathcock* (1846) 1 Ga. 550 (adultery); *Beggarly v. Craft* (1860) 31 Ga. 309, 76 Am. Dec. 687 (fornication).

Iowa. — *Cox v. Bunker* (1844) Morris, 269 (adultery).

Maine. — *True v. Plumley* (1853) 36 Me. 466 (adultery).

Massachusetts. — *Whiting v. Smith* (1832) 13 Pick. 364 (fornication); *Riddell v. Thayer* (1879) 127 Mass. 487 (adultery); *Rutherford v. Padlock* (1901) 180 Mass. 289, 91 Am. St. Rep. 282, 62 N. E. 381 (adultery).

New Hampshire. — *Noyes v. Hall* (1883) 62 N. H. 594 (adultery).

Oregon. — *Davis v. Sladden* (1889) 17 Or. 259, 21 Pac. 140 (adultery); *BARNETT v. PHELPS* (reported herewith) ante, 663 (adultery; obiter).

Pennsylvania. — *Smith v. Buckecker* (1833) 4 Rawle, 295 (adultery; probably); *Harker v. Orr* (1840) 10 Watts, 245 (adultery; admitting the rule); *Burford v. Wible* (1858) 32 Pa. 95 (fornication); *Hartman v. Hesser* (1859) 34 Pa. 117 (adultery); *Rhoads v. Anderson* (1888) 10 Sadler (Pa.) 247, 13 Atl. 823 (adultery); *Stoner v. Erisman* (1903) 206 Pa. 600, 56 Atl. 77 (adultery, stating the rule).

Rhode Island. — *Kelley v. Flaherty* (1888) 16 R. I. 234, 27 Am. St. Rep. 739, 14 Atl. 876 (fornication).

Texas. — *Zeliff v. Jennings* (1884) 61 Tex. 458 (adultery or fornication).

Vermont. — *Sheridan v. Sheridan* (1886) 58 Vt. 504, 5 Atl. 494.

Wisconsin. — *Ranger v. Goodrich* (1863) 17 Wis. 79 (adultery); *Gibson v. Gibson* (1877) 43 Wis. 23, 28 Am. Rep. 527 (fornication); *Klewin v. Bauman* (1881) 53 Wis. 244, 10 N. W. 398 (adultery); *Hacker v. Heiney* (1901) 111 Wis. 313, 87 N. W. 249 (adultery); *Culver v. Marx* (1914) 157 Wis. 320, 147 N. W. 358 (adultery).

New Brunswick. — *Martindale v. Murphy* (1835) 2 N. B. 161.

In *Boldt v. Budwig* (1906) 19 Neb. 739, 28 N. W. 280, it was held that to call a married woman a whore was actionable per se, probably as charging a criminal offense.

In *Smith v. Wyman* (1839) 16 Me. 14, in slander for calling an unmarried woman "a thief, a liar, and a whore," it was held that the words were actionable per se as imputing a criminal offense.

Under an Iowa statute making fornication and adultery punishable by

fine and imprisonment, the court, in holding that to call a married woman a whore was actionable *per se*, said: "We take it to be clear, in this case, that the offense imputed to the wife of the plaintiff by the words spoken would have subjected her to indictment and punishment by imprisonment, and, moreover, attached a moral turpitude inseparable from the crime of adultery. Therefore, it was not necessary to give proof of special damages to the jury on the trial of the cause below. To charge upon a woman that she is a whore would be likely to exclude her from the society of virtuous and respectable people, and prevent her from such connections in life as would be promotive of her happiness." *Cox v. Bunker* (1844) *Morris* (Iowa) 269.

To impute to a woman adultery is actionable *per se*, as charging an offense which would subject the party to an ignominious punishment or impute moral turpitude. *Zeliff v. Jennings* (1884) 61 *Tex.* 458, *supra*. So, as charging a crime involving moral turpitude punishable by law. *Ranger v. Goodrich* (1863) 17 *Wis.* 79, *supra*.

In *Andres v. Koppenheaver* (1817) 3 *Serg. & R. (Pa.)* 255, 8 *Am. Dec.* 647, *Duncan, J.*, said: "In *Turner v. Ogden* (1705) 2 *Salk.* 696, 91 *Eng. Reprint*, 590, Lord Holt lays down the rule that, to render the words actionable, imprisonment not only must be the punishment, but the punishment must be infamous. . . . But this rule of Lord Holt does not prevail in Pennsylvania. To call a woman a whore is actionable, without special damages. It is so, because crime of fornication is indictable. To call a married woman an adulteress is actionable, because indictable; and yet the punishment is not infamous; it is imprisonment. But it is indictable and attaches impurity and depravity."

In *Gallagher v. Daly* (1876) 2 *W. N. C. (Pa.)* 426, where the words were spoken of a married woman, "You frequent whore houses," with the innuendo that defendant meant to charge plaintiff with adultery, the court said: "The common-law decisions are not applicable in Pennsylv-

vania, where adultery is an indictable offense. Whether the words sustain the innuendo was for the jury."

"So, under a Wisconsin statute providing punishment by fine for lewd behavior and imprisonment for fornication, it was held that to charge an unmarried woman with being a whore was actionable *per se*. *Mayer v. Schleichter* (1872) 29 *Wis.* 646, where the court said: "The words set forth in the complaint are, then, actionable *per se*, the general rule being that words which impute to another a crime involving moral turpitude, and which subject the party committing it to a punishment by fine or imprisonment, are actionable."

In *Kelley v. Flaherty* (1888) 16 *R. I.* 234, 27 *Am. St. Rep.* 739, 14 *Atl.* 876, *supra*, words charging an unmarried woman with being a whore were held actionable *per se* as charging the crime of fornication, an offense which brings disgrace, although the legal punishment was a fine of not over \$10, which was recoverable by complaint and warrant, not by indictment.

In *Dailey v. Reynolds* (1854) 4 *G. Greene* (Iowa) 354, where an unmarried woman was charged with fornication, it was held that it was actionable *per se* to apply to a woman words charging her in effect with the acts prohibited by the statute providing that if any man and woman, not being married to each other, lewdly and lasciviously associate and cohabit together, or if any man or woman, married or unmarried, is guilty of open and gross lewdness, etc., such persons shall be subject to fine and imprisonment.

But in *Castleberry v. Kelly* (1858) 26 *Ga.* 606, it was held that to say of a wife that she has been with negroes is not slanderous, as it is not a punishable crime for a white woman to have connection with a negro.

VI. Statutory actions.

a. *Under statutes making it slanderous per se to impute a want of chastity.*

To call a woman a whore is actionable *per se*, under statutes making words imputing unchastity actionable *per se*. *Williams v. Bryant* (1842) 4

Ala. 44 (whore, or strumpet); *Pink v. Catanich* (1876) 51 Cal. 420 (as stating the rule); *Matts v. Borba* (1894) 4 Cal. Unrep. 691, 37 Pac. 159; *Rowe v. Myers* (1918) 204 Mich. 374, 169 N. W. 823; *Distin v. Rose* (1877) 69 N. Y. 122 (prostitute); *Riker v. Clopton* (1903) 83 App. Div. 310, 82 N. Y. Supp. 65 (strumpet); *Courtney v. Mannheim* (1891) 39 N. Y. S. R. 125, 14 N. Y. Supp. 929; *Freeman v. Price* (1831) 18 S. C. L. (2 Bail.) 115 (strumpet); *Zimmerman v. McMakin* (1884) 22 S. C. 372, 53 Am. Rep. 720. See also *Alcorn v. Hooker* (1843) 7 Blackf. (Ind.) 58, which, however, may possibly have arisen under the Indiana statute hereinafter referred to under VI. b.

In *Loranger v. Loranger* (1898) 115 Mich. 681, 74 N. W. 228, it was held that words construed as charging the keeping of a bawdyhouse were actionable per se, apparently as imputing a want of chastity.

In *Terry v. Bright* (1853) 4 Md. 430, it was held actionable per se to call an unmarried woman a whore, under the statute making all words spoken maliciously touching the character or reputation for chastity of an unmarried woman slanderous per se. (The statute later included married women, see *Cairnes v. Pelton* (1906) 103 Md. 40, 63 Atl. 105.)

In *Hatcher v. Range* (1904) 98 Tex. 85, 81 S. W. 289, which was an action for slander for calling plaintiff a whore, it was held that the Texas Statute of 1879, providing that if any person shall orally or otherwise falsely, etc., impute to any female a want of chastity, he shall be fined, and may be imprisoned not exceeding two years, puts slander within the rule "that any person who receives 'special injury different from that which is inflicted upon the public by the perpetration of an act punishable at law may have redress for the injury so received,'" and this would justify a departure from the common-law rule.

In *Mitchell v. Clement* (1919) 14 Alberta L. R. 248, under a statute providing that "in an action for slander for defamatory words spoken of a woman imputing unchastity or adul-

tery, it shall not be necessary to allege . . . or to prove that special damages resulted," etc., it was held that the case was within the statute where the defendant said that the plaintiff "wanted me to take \$30 out in trade at \$1 a time" (with an innuendo indicating that the words had the meaning, *inter alia*, of actual physical unchastity).

b. *Under statutes making it slanderous per se to charge adultery, fornication, etc.*

Falsely to call a woman a whore, or to impute to her professional or habitual unchastity, is actionable per se under statutes making the false charge of adultery or fornication actionable. *Roe v. Chitwood* (1880) 36 Ark. 210; *Jackson v. Williams* (1909) 92 Ark. 486, 25 L.R.A. (N.S.) 840, 123 S. W. 751; *Keck v. Shepard* (1915) 121 Ark. 633, 180 S. W. 501; *Spencer v. McMasters* (1855) 16 Ill. 405; *Hosley v. Brooks* (1858) 20 Ill. 115, 71 Am. Dec. 252; *Thomas v. Fischer* (1874) 71 Ill. 576; *Iles v. Swank* (1903) 202 Ill. 453, 66 N. E. 1042; *Claypool v. Claypool* (1894) 56 Ill. App. 21 (as admitting the rule); *Burke v. Stewart* (1898) 81 Ill. App. 506; *Ketchum v. Gilmer* (1904) 115 Ill. App. 347; *Mercy v. Talbot* (1914) 189 Ill. App. 1; *Stewart v. Major* (1897) 17 Wash. 238, 49 Pac. 503.

So it is actionable per se orally to publish a like charge falsely and maliciously, when the statute makes it actionable to publish falsely and maliciously that any person has been guilty of fornication and adultery. *Stieber v. Wensel* (1854) 19 Mo. 513; *Hudson v. Garner* (1856) 22 Mo. 424; *Elfrank v. Seiler* (1873) 54 Mo. 134 (of two sisters, "whoring folks"); *Hillebrand v. Dreinhoefer* (1883) 13 Mo. App. 586; *Israel v. Israel* (1904) 109 Mo. App. 366, 84 S. W. 453; *Reding v. Reding* (1910) 143 Mo. App. 659, 127 S. W. 936; *Cameron v. Cameron* (1912) 162 Mo. App. 110, 144 S. W. 171; *Traylor v. White* (1914) 185 Mo. App. 325, 170 S. W. 412; *McCollum v. Smith* (1917) — Mo. App. —, 199 S. W. 271. See also *Jones v. Banner* (1913) 172 Mo. App. 132, 157 S. W. 967.

So it is actionable *per se* falsely to call a woman a whore, or to impute to her professional or habitual unchastity, under a statute providing that every charge of incest, fornication, adultery, or whoredom, falsely made by any person against a female, shall be actionable in the same manner as in the case of slanderous words charging a crime the commission of which will subject the offender to death or other degrading penalties. *Rodebaugh v. Hollingsworth* (1855) 6 Ind. 339; *Rodgers v. Lacey* (1864) 23 Ind. 507; *Blickenstaff v. Perrin* (1867) 27 Ind. 527 (has been "a week in a whore house in Z," as charging whoredom); *Ward v. Colyham* (1868) 30 Ind. 395; *Sunman v. Brewin* (1875) 52 Ind. 140; *Hutchinson v. Lewis* (1881) 75 Ind. 55; *Knight v. Lee* (1881) 80 Ind. 201; *Belck v. Belck* (1884) 97 Ind. 73; *Freeman v. Sanderson* (1889) 123 Ind. 264, 24 N. E. 239; *Peterson v. Murray* (1895) 13 Ind. App. 420, 41 N. E. 836; *Stutsman v. Stutsman* (1903) 32 Ind. App. 73, 66 N. E. 773.

So it is actionable *per se* to call a woman a whore when the statute provides that every charge of incest, fornication, or adultery, made against a female, shall be placed on the same footing as other charges of a criminal nature, for which an action will lie according to the principles of the common law. *Williams v. Greenwade* (1835) 3 Dana (Ky.) 432.

c. Under miscellaneous statutes.

In *Sparks v. Bedford* (1908) 4 Ga. App. 13, 60 S. E. 809, it was held actionable *per se* publicly to call a young woman a whore, under a statute which made it slanderous to impute to another a crime punishable by law, or being guilty of some debasing act which may exclude him from society, and which provided that damages would be inferred.

In *Michelson v. Lavin* (1884) 95 Ga. 565, 20 S. E. 292, it was held that to call a woman a whore was slanderous *per se*, as imputing a crime punishable by law, to wit, adultery.

Words meaning common prostitute are actionable, under the Canadian statute providing that in any action

of slander for defamatory words imputing to a woman adultery, fornication, or concubinage, the plaintiff may recover nominal damages without averment of proof of special damages. *Paladino v. Gustin* (1897) 17 Ont. Pr. Rep. 553.

Under the Louisiana statute, providing that every act of man which causes damage to another obliges him by whose fault it happened to repair it, it was held that it was slanderous *per se*, and implied malice, to call a woman a damned whore. *Williams v. McManus* (1886) 38 La. Ann. 161, 58 Am. Rep. 171.

VII. Criminal prosecutions.

One may be convicted for calling a woman a whore, or imputing to her professional or habitual unchastity, under statutes punishing one who speaks of and concerning any female falsely and maliciously, imputing to her a want of chastity. *Haley v. State* (1879) 63 Ala. 83; *Stutts v. State* (1906) 52 Fla. 110, 42 So. 51; *McMahan v. State* (1882) 13 Tex. App. 220; *Wagner v. State* (1885) 17 Tex. App. 554; *Duke v. State* (1885) 19 Tex. App. 14; *Wallace v. State* (1899) — Tex. Crim. Rep. —, 49 S. W. 395; *Collins v. State* (1898) 39 Tex. Crim. Rep. 30, 44 S. W. 846; *Roberts v. State* (1907) 51 Tex. Crim. Rep. 27, 100 S. W. 150; *Kelley v. State* (1907) 51 Tex. Crim. Rep. 151, 101 S. W. 230; *Kyle v. State* (1909) 55 Tex. Crim. Rep. 360, 116 S. W. 598. See also *Stichtd v. State* (1888) 25 Tex. App. 420, 8 Am. St. Rep. 444, 8 S. W. 477; *Lasky v. State* (1892) — Tex. App. —, 18 S. W. 465.

It was held that to call a woman a whore was a charge of incontinency, within the statute providing that if any person shall attempt in a wanton and malicious manner to destroy the reputation of an innocent woman by words, written or spoken, which amount to a charge of incontinency, every person so offending shall be guilty of a misdemeanor. *State v. Shoemaker* (1888) 101 N. C. 690, 8 S. E. 332.

But words directly charging, in effect, that the plaintiff, a married wom-

an, kept a bawdyhouse, were held not included in the Missouri statute, providing that every person who shall falsely or maliciously charge or accuse any female of incest, fornication, adultery, or whoredom, by false speech, shall be guilty of a misdemeanor. *State v. Boos* (1896) 66 Mo. App. 537. This was on the ground

that, in a criminal slander, the intention charged must be apparent from the words used, and it could make no difference that a different meaning was given to the words by those who heard them. It was further held that a procurer might not be guilty of the act for which the house was maintained. B. B. B.

**JOE AZPARREN, Resp't.,
v.**

C. P. FERREL, Sheriff of Washoe County, Nevada, et al., App'ts.

Nevada Supreme Court — August 3, 1920.

(— Nev. —, 191 Pac. 571.)

Replevin — to recover intoxicating liquor held as evidence.

1. Claim and delivery does not lie to recover possession of intoxicating liquor held by a prosecuting officer as evidence in a criminal case, although it was unlawfully taken from the possession of plaintiff.

[See note on this question beginning on page 681.]

— right to possession.

2. To maintain an action of claim and delivery, plaintiff must show a right to immediate possession of the property.

[See 23 R. C. L. 866.]

— property in custody of law.

3. Replevin does not lie for property in custody of the law.

[See 23 R. C. L. 877.]

APPEAL by defendants from a judgment of the District Court for Washoe County (Moran, J.) in favor of plaintiff and from an order denying a motion for new trial, in a proceeding in claim and delivery to recover possession of intoxicating liquors held by defendants as evidence. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Lester D. Summerfield and W. M. Kearney, for appellants:

The liquors, being seized by police officers on an arrest made for an offense committed in their presence, were lawfully taken, and, being in custodia legis, judgment in replevin could not properly be rendered.

34 Cyc. 1367; *Feusier v. Lammon*, 6 Nev. 209; *Buckley v. Buckley*, 9 Nev. 373; *People v. Bartz*, 53 Mich. 493, 19 N. W. 161; *Hughes v. Com.* 19 Ky. L. Rep. 497, 41 S. W. 294; *Weeks v. United States*, 232 U. S. 383, 58 L. ed. 652, L.R.A.1915B, 834, 34 Sup. Ct. Rep. 341, Ann. Cas. 1915C, 1177; *Smith v. Jerome*, 47 Misc. 22, 93 N. Y. Supp. 202; *State v. Quinn*, 111 S. C. 174, 3 A.L.R. 1500, 97 S. E. 62; *Lemp v. Ful-*

lerton, 83 Iowa, 192, 13 L.R.A. 408, 48 N. W. 1034; *Allison v. Hern*, 102 Kan. 48, 169 Pac. 187; *Ring v. Nichols*, 91 Me. 478, 40 Atl. 329; *Allen v. Staples*, 6 Gray, 491; *State v. Barrels of Liquor*, 47 N. H. 369; *McDonald v. Weeks*, 2 Tenn. C. C. A. 600; *McKee v. Colpitts*, 39 N. B. 256.

Messrs. Moore & McIntosh for respondent.

Sanders, J., delivered the opinion of the court:

This is a proceeding in claim and delivery to recover the possession of twenty cases of intoxicating liquors and one bottle of "Sunnybrook" whisky. The cause was tried before the court without a jury. The

defendants appeal from the judgment in favor of plaintiff, and from an order denying their motion for new trial.

The undisputed facts are as follows:

One Joe Azparren, while traveling by automobile upon the public highway in the nighttime, on June 27, 1919, was halted by C. P. Ferrel, sheriff of Washoe county, and his deputies, Carter and Nichols, at the point of two sawed-off shotguns and an automatic pistol in the hands of said officers. The automobile contained twenty cases of intoxicating liquors and one exposed bottle of whisky. Azparren was placed under arrest, the liquors taken into the possession of the officers, and brought to Reno, Nevada, where a criminal complaint was lodged against Azparren and his traveling companion by C. P. Ferrel, sheriff, before a justice of the peace of Reno township, charging Azparren with the crime of having intoxicating liquor on a public road. The accused were admitted to bail, and, while the criminal accusation was pending and undetermined, this action of claim and delivery was commenced by Azparren against said sheriffs and Lester D. Summerfield, district attorney of Washoe county, for the possession of said liquors.

A second amended complaint was filed in the action on January 20, 1920. The defendant sheriffs, by their answer, justify the apprehension and arrest of plaintiff and the seizure of the liquors upon the ground that they acted in an official capacity, in the performance of an official duty. The defendant, Lester D. Summerfield, by the same answer, admits that the liquors are held and detained by him, under his control and dominion, for the purpose, and that purpose alone, to be offered as evidence against the accused plaintiff at the trial of the criminal action pending and undetermined against plaintiff.

The trial court, in substance and effect, finds as facts that on the 27th day of June, 1919, Joe Azparren, the

plaintiff, was traveling upon a public highway in Washoe county, by automobile, from the town of Chilcoot, in the state of California, across the state of Nevada to the town of Masonic, in the state of California; that at the time the plaintiff was, and had been, employed to haul and convey twenty cases of liquors from Chilcoot, California, to Masonic, California, by a third party, and that in the performance of his employment he followed the customary and usual route from Chilcoot by crossing the state of Nevada to reach the town of Masonic. The court further found that on said date it was lawful and legal, under the laws of California, to transport and convey intoxicating liquors over the public highway within said state, and that it was lawful and legal for plaintiff to transport said liquors over a public highway across Nevada in traveling from one point in California to another point therein. It further found that said sheriffs, unlawfully, without authority of law, and without the consent of plaintiff, seized and took into their possession said liquors, and that the same are now unlawfully detained, and that the claim of Lester D. Summerfield that said liquors are held as evidence to be offered in the criminal charge pending against plaintiff is without merit and unlawful, and specifically found that the averment of defendant sheriffs that plaintiff was apprehended and arrested in their official capacity is untrue; that plaintiff was not lawfully arrested, and that said liquors were not lawfully seized by said officers, or either of them.

Upon these and other findings not material here, the trial court rendered and caused to be entered its judgment and order that said twenty cases of liquors and the one bottle of "Sunnybrook" whisky be delivered forthwith to plaintiff, and that in the event said delivery be not forthwith made, that plaintiff have judgment against said defendants, and each of them, in the sum of \$900 (the alleged value of said liquors).

We are of the opinion that the,

finding and the conclusion of law, deducible therefrom, that Lester D. Summerfield's claim and interest in and to said liquors (that interest being that such liquors are held for the purpose of use as evidence in the criminal case pending against Joe Azparren) is without merit and unlawful is against law.

Of such importance as it may seem to appear for some justiciable pronouncement to be made as to the power and limits a peace officer may go in the enforcement of the Prohibition Law of this state, a question of equal importance is whether or not a writ of replevin may be employed as an instrument to defeat the administration of the criminal law, and whether this can be done with impunity. The record discloses the fact that the liquors are held and detained by Lester D. Summerfield as the prosecuting officer of the state of Nevada, in and for the county of Washoe; that the liquors are under his control and direction, and are detained for the purpose only to be offered by him as evidence against plaintiff at the trial of the criminal action pending and undetermined before said justice of the peace.

To sustain an action in claim and delivery, it is necessary for the plaintiff to show that he is entitled to the immediate possession of the property. *Hilger v. Edwards*, 5 Nev. 85.

Furthermore, the rule is universal that replevin lies to recover personal property unlawfully detained, provided the property is not in the custody of the law. *Buckley v. Buckley*, 9 Nev. 373.

We are of the opinion that where personal property is withheld by a district attorney as evidence against persons charged with crime, the accused has not the right to regain possession of the property by claim and delivery. The seizure and retention of the liquors in this case by the

district attorney in no manner denies or affects the title of the true owner, or the ultimate right of his agent or servant to their possession, but simply postpones his right until the exigencies of the prosecution are satisfied. The plaintiff has shown no right to the immediate possession of the property as against the power of the magistrate's court for police purposes.

The proceedings for the claim and delivery of personal property were not intended to repeal or render nugatory the police power of retention for purposes of public justice, and the owner's right of possession, his agent's or servant's, cannot be enforced while the circumstances justify such retention. *Simpson v. St. John*, 93 N. Y. 363. Says the court: "It is not only the common practice, but the requirement of the common law, that articles which may supply evidence of guilt of a party accused, found in his possession or under his control may be taken in possession by the officer officiating in making the arrest; and, indeed, it is the duty of such officer to take into his possession and retain such articles, subject to the power and direction of the court or justice having cognizance of the alleged crime. This principle is one of necessity in the administration of the criminal law, and it is generally recognized by the courts of the country, with few, if any, exceptions." *Mutual Commission & Stock Co. v. Moore*, 13 App. D. C. 78; *Com. v. Dana*, 2 Met. 329; *State v. Robbins*, 124 Ind. 308, 8 L.R.A. 438, 24 N. E. 978; *Spalding v. Preston*, 21 Vt. 9, 50 Am. Dec. 68; *McDonald v. Weeks*, 2 Tenn. C. C. A. 600; *United States v. Wilson* (C. C.) 163 Fed. 338; 24 Am. & Eng. Enc. Law, 505.

The production and identification of the seized liquors are essential to the conviction of the accused plaintiff upon the charge of having intoxicating liquors upon a public road. If, by this proceeding, the liquors are to be taken by judicial process from the officer, upon whom rests

Replevin—
right to
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—property in
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—to recover
intoxicating
liquor held as
evidence.

the duty of prosecuting the offender, it would be possible for the accused to put out of the way evidence necessary to his conviction. But it is strenuously objected that the particular liquors held to be offered as evidence in the pending prosecution against plaintiff were obtained, and are held, in ruthless violation of the law, without a warrant, either for the arrest of plaintiff, the automobile, or its contents. These are questions that may properly be presented for deliberative consideration when the liquors are offered as evidence. We advance no opinion as to the competency of the evidence under the existing facts and circumstances under which they are held, but simply decide that a writ of replevin cannot be converted into a process to render nugatory the administration of the criminal law. We decline to take from the Prohibition Act,

conceded to be difficult of enforcement, aught that will diminish its efficiency. While at no time should the act be given a construction that will make it an instrument of dishonesty, of oppression, and an object of odium, still we shall not suffer one charged with its violation, in a proceeding under claim and delivery, to defeat the whole object and intention of the law.

The judgment is reversed, and our order is that the case be remanded, with directions to the lower court to suspend any further proceedings therein until such time as the trial of the case of the state of Nevada against Joe Azparren, pending in the justice's court of Reno township, Washoe county, has been finally determined.

Coleman, Ch. J., and Ducker, J., concur.

ANNOTATION.

Right to recover property held by public authorities as evidence for use in a criminal trial.

Probably it had been the general American opinion for some time before the year 1914 that property in the hands of the public authorities, to be used as evidence upon a criminal trial, could not, as a general rule, be recovered from them before the trial. There was at the same time a widely held opinion that the competency of evidence was not affected by the fact that it had been wrongfully procured. Under these circumstances most of the comparatively few cases on the subject of this annotation denied the recovery of the property as a matter of course. *United States v. Wilson* (1908) 163 Fed. 338 (order for recovery refused); *Mutual Commission & Stock Co. v. Moore* (1898) 13 App. D. C. 78 (replevin suspended); *Smith v. Jerome* (1905) 47 Misc. 22, 93 N. Y. Supp. 202 (mandatory injunction denied); *Jones v. Pavey* (1901) 10 Pa. Dist. R. 498 (writ of replevin quashed); *McDonald v. Weeks* (1911) 2 Tenn. C. C. A. 600 (replevin); *State ex rel. Murphy v. Brown* (1914) 83

Wash. 100, 145 Pac. 69 (order refused).

In *Smith v. Jerome* (1905) 47 Misc. 22, 93 N. Y. Supp. 202, supra, where the court denied a mandatory injunction against the New York district attorney to deliver to the plaintiff letters found in a search of his room by the police of Cincinnati at the time of his arrest there, upon a charge of conspiracy, and which were seized as tending to prove him guilty, it was said: "The police have the power and it is also their duty to search the person of one lawfully arrested, and also the room or place in which he is arrested, and also any other place to which they can get lawful access, for articles that may be used in evidence to prove the charge on which he is arrested. We have no statute defining this power or prescribing this duty, but the ends of justice require that they should exist, and they have been exercised under the common law from time immemorial. The authorities on this head seem to be few, but only

because the thing has seldom, if ever, been questioned."

In *Jones v. Pavey*, (1901) 10 Pa. Dist. R. 498, *supra*, in quashing a writ of replevin for the recovery, by the accuser, of personal property found by an officer on the person arrested by him on a charge of its larceny, the court observed that "the administration of the criminal court deems that it shall retain control of all evidence tending to throw light on the criminal charge, and the arresting officer is the agent of the criminal court in retaining possession of the alleged stolen property until after the close of the prosecution."

Where the sheriff arrested one fighting with the town marshal, took from him a pistol, and brought him before a justice who issued a warrant for his arrest for unlawfully carrying a pistol, it was held that the person arrested might not replevy the pistol until it was no longer needed for evidentiary purposes. *McDonald v. Weeks* (1911) 2 Tenn. C. C. A. 600, *supra*.

In *Mutual Commission & Stock Co. v. Moore* (1898) 13 App. D. C. 78, *supra*, the court suspended the execution of the writ of replevin until its further order, where it was applied for by a corporation, composed of and controlled by persons under arrest as violators of the law, and their associates, for the purpose of the recovery of personal property seized by the police, and retained for evidence against the persons arrested.

In *United States v. Wilson* (1908) 163 Fed. 338, *supra*, the defendant being arrested, a trunk check was found on his person, and the trunk was delivered to the United States district attorney, who found therein certain papers which he proposed to use as evidence against the defendant. The court refused to grant the defendant's motion for the return to him of the trunk and the contents, which he claimed were taken by an unlawful search and seizure, and said: "It is evident from many decisions upon the subject that upon the trial of an action the manner of obtaining documentary evidence or specific chattels will not be looked into, and any objection

because of trespass will be overruled, unless the defendant has been compelled to produce papers in the case, and thus testify against himself. . . . Further, property found upon the defendant or in his immediate possession at the time of his arrest has always been considered properly usable as evidence, and no action for trespass will lie for the retention of such property by the officers of the law, for the purpose of using that property as evidence."

In *State ex rel. Murphy v. Brown* (1914) 83 Wash. 100, 145 Pac. 69, *supra*, it was held that the defendant, before his trial for bribery, could not compel the return of money and papers belonging to him which he had voluntarily surrendered to the officer making the arrest, upon the latter's statement that he desired these articles for use as evidence at the trial.

In *Simpson v. St. John* (1883) 93 N. Y. 363, pawnbrokers were not allowed an order of arrest of the police property clerk for failure to deliver up personal property on a requisition in claim and delivery, as the clerk held it as the agent of the criminal court pending the prosecution of a person for obtaining such property under false pretenses, and it was in the custody of the law; and, said the court, "cannot be taken away until that custody is ended by a conviction or acquittal, or by an order of the magistrate permitting its surrender to the owner. . . . The provisions of the Revised Statutes upon the subject are superseded by those of the Code of Criminal Procedure. §§ 685, 686, etc. Property alleged to have been stolen, which comes into the custody of a peace officer, must be held subject to the order of the examining magistrate. The latter may order its restoration to the owner upon proof of title and payment of expenses of its preservation, unless its temporary retention be deemed necessary in furtherance of justice. Such order 'entitled the owner to demand and receive the property.' Under these provisions it is apparent that, pending a prosecution of the criminal, the stolen property in the custody of an officer is in the custody

of the court. The magistrate may order a return to the owner, deeming its retention until a trial unnecessary, but if he makes no such order, the retention of the property must be deemed necessary to the purposes of public justice until, by a conviction or acquittal, the necessity is ended."

In one or two cases, however, the recovery was allowed on the ground that the constitutional rights of the accused had been violated.

Thus, in *United States v. Mounday* (1913) 208 Fed. 186, where the marshal who arrested the defendants on a charge of using the mails to defraud was accompanied by postoffice inspectors, and the latter, after the arrest, without a warrant, searched the office of the defendants and took possession of certain letters and documents, it was held, on a motion for their return, that the constitutional rights of the defendants against unreasonable searches and seizures had been violated; that the papers so secured could not be used as evidence against the defendants, either before the grand jury or at the trial; and that the defendants were entitled to their return, even though they contained matters material to the prosecution.

In *United States v. McHie* (1912) 194 Fed. 894, where the arrest was unlawful, being without a warrant, it was held that the seizure in connection therewith was on this ground illegal, and that an order would be made for the return of the property, which included books and papers, the court distinguishing causes where there had been a seizure on a valid arrest under a warrant. But the court later, and apparently before their surrender, impounded the books and papers for the trial. (1912) 196 Fed. 586.

Recent cases.

In *Weeks v. United States* (1914) 232 U. S. 383, 58 L. ed. 652, L.R.A. 1915B, 834, 34 Sup. Ct. Rep. 341, Ann. Cas. 1915C, 1177, it was held that one indicted for using the mails for the purpose of transporting coupons or tickets representing chances or shares in a lottery or gift enterprise is entitled to an order for the return to

him of papers and articles taken from his house in his absence by officers, without a search warrant, although they tend to show his guilt. This case does not hold that one who has not applied for the return of his property before the trial may object to the admission of the same when offered in evidence, on the ground that it was illegally procured. [But see *Gould v. United States* and *Amos v. United States* (U. S. Adv. Ops. 1920-21, pp. 311, 316) — U. S. —, 65 L. ed. —, 41 Sup. Ct. Rep. —.]

And in *United States v. Friedberg* (1916) 233 Fed. 313, it was held that the court will order the return of papers seized by internal revenue officers acting clearly beyond the authority of the warrant, without authority of law, and in violation of the petitioner's constitutional rights. "The exigency of necessity for obtaining evidence in a particular case does not justify the tendency which has grown up to proceed by 'raid' of the house and property of a supposed offender, rather than by the orderly process provided by law and guaranteed by the Constitution."

But in *United States v. Maresca* (1920) 266 Fed. 713, the court refused to direct the United States district attorney to return to the accused a book of a company, which the court said he "was cheated into giving up" to an officer whose search warrant did not cover the place where the book was.

In *State v. Mansert* (1915) 88 N. J. L. 286, L.R.A. 1916C, 1014, 95 Atl. 991, it was held that the court properly denied application of one accused of keeping a disorderly house for the return of the register and cash book of the house, which was used as a hotel. The accused was arrested under a warrant in the hotel office, where the said books lay upon the counter and were taken by the officer without a search warrant at the time of making such arrest. The Constitution of New Jersey contained a clause against unreasonable searches and seizures, which, it was held, was not violated. The court distinguished the *Weeks* Case, stating that there the marshal, in the absence of the defendant, "broke open

the door of his house" without warrant, and seized books and papers. (It does not appear in the Weeks Case that the marshal "broke open the door.")

It will be seen that it is held in the reported case (*AZPARREN v. FERREL*, ante, 678) that intoxicating liquors taken by officers from the plaintiff when arresting him for the crime of having intoxicating liquors in a public road, which liquors are detained to be offered as evidence against the plaintiff on his criminal trial, may not be recovered in an action of claim and delivery by the plaintiff before such criminal trial, as such property is in the custody of the law, and that any claim that the liquors were obtained and are held in violation of the law, without a warrant for the arrest or the taking, might properly be presented when the liquors were offered in evidence.

Limits of the doctrine.

The public authorities will not be allowed to retain property having no relation to the charge against the prisoner. See, in illustration: *Brent v. Beck* (1838) 5 Cranch, C. C. 461, Fed. Cas. No. 1,835; *Ex parte Craig* (1827) 4 Wash. C. C. 710, Fed. Cas. No. 3,321; *Wise v. Mills* (1911) 110 C. C. A. 563, 189 Fed. 583 (contempt proceedings on disobedience of order reported (1911) 185 Fed. 318) writ of error and appeal dismissed in (1911) 220 U. S. 549, 55 L. ed. 579, 31 Sup. Ct. Rep. 597; *Rex v. Barnett* (1829) 2 Car. & P. (Eng.) 600; *Rex v. Burgess* (1836) 7 Car. & P. (Eng.) 488; *Rex v. Kinsey* (1836) 7 Car. & P. (Eng.) 447; *Rex v. Bass* (1849) 2 Car. & K. (Eng.) 822; *Reg. v. Harris* (1881) 1 B. C. pt. 1 p. 255. See also *Rex v. Rooney* (1836) 7 Car. & P. (Eng.) 515.

The court refused to quash a writ of replevin against a constable who, having a warrant to arrest a man upon a charge of forgery, searched his trunk and, finding therein some articles which he suspected were stolen, took them into his custody. Cranch, Ch. J., observed that "the property did not appear to have been in the custody of the law. Mr. Beck may

have done right in taking the goods, but having no warrant therefor, or to arrest Henderson for theft, his custody was not the custody of the law, so as to make it any contempt of this court, or of any court, to replevy them." *Brent v. Beck* (Fed.) supra.

It may be noted that in *Thatcher v. Weeks* (1887) 79 Me. 547, 11 Atl. 599 (trover) it was held that an officer who had arrested a man for beating a drum upon a street, contrary to a city ordinance, had no right to retain the drum, although he had occasion to believe that it would again be used illegally, where there was no pretense that the drum was needed for evidence.

In *Moreno v. Ago Chi* (1909) 12 Philippine, 439, the issue was whether money not connected with the crime, taken by an officer at the time of the arrest from the person of the accused, and deposited in court, should, after the trial, be returned to the defendant, or paid to the attorney who defended him, to satisfy the attorney's claim for services. But in holding that the money should be returned to the defendant, the court, regarding the power of the officer to search and seize articles at the time of making an arrest, stated: "An officer making an arrest may take from the person arrested any money or property found upon his person which was used in the commission of the crime, or which might furnish the prisoner with the means of committing violence or of escaping, or which may be used as evidence in the trial of the cause; but there is very serious doubt whether an officer making an arrest has the right to take from the defendant any property found upon his person, unless for some reasons just mentioned. . . . Unless some of these special reasons exist, the officer should not deprive the defendant of the possession of his property. . . . To deprive the defendant of his money or property under other circumstances than those mentioned above is to deprive him, perhaps, of the lawful means of defense."

Property taken from a third person.

The police were enjoined from open-

ing the petitioner's safe, or interfering with his possession of it, when they had seized it on a warrant against a third person on the ground that it might contain evidence against the latter. *Owens v. Way* (1914) 141 Ga. 796, L.R.A.1915E, 399, 82 S. E. 132, Ann. Cas. 1915C, 963.

In *Newberry v. Carpenter* (1895) 107 Mich. 567, 31 L.R.A. 163, 61 Am. St. Rep. 346, 65 N. W. 530, the court granted a mandamus compelling a judge to vacate an order depriving complainant of the possession and power of control over a certain boiler and some machinery owned by her, but in possession of the public authorities for the purpose of use in connection with a criminal prosecution of an engineer, on the ground that the constitutional protection against unreasonable seizures is violated by entering a private inclosure and taking away from the possession of the owner, under order of court, a wrecked boiler, engine, and other materials, for use as exhibits on a prosecution of another person for criminal negligence in causing the explosion of the boiler.

But in *Spalding v. Preston* (1848) 21 Vt. 9, 50 Am. Dec. 68, it was held that the plaintiff could not recover, in an action of trover against the sheriff for pieces of German silver of the precise size and thickness of Mexican dollars, and made in that form for the purpose of being stamped and milled into counterfeit coin of that description, which were taken by the sheriff from a third party who was indicted, and detained for the double purpose of being used as evidence upon the trial, and also of preventing their being put in circulation. See also *Jones v. Pavey* (1901) 10 Pa. Dist. R. 498, in the early part of this annotation.

In *Good v. Police Comrs.* (1920) — Md. —, — A.L.R. —, 112 Atl. 294, it was held that a claimant could not maintain replevin against police commissioners to recover an automobile

taken from the possession of a third party (who renounced all rights thereto), where the car was to be used as evidence in an effort to convict certain third parties of the crime of larceny for the theft of the same.

Miscellaneous.

Where a horse, taken possession of by a constable when he arrested the defendant for its larceny, was given up to the defendant under a court order on his giving a bond, the order expressly declaring that the right of the true owner to maintain replevin for the property should not be impaired thereby, it was held that the property was not in custody of the law and that the true owner might replevy it. *Byrne v. Byrne* (1895) 89 Wis. 659, 62 N. W. 413.

It may be noted that where a prisoner arrested for fraudulently obtaining goods on credit moved for a return of money taken from him on his arrest, and which had been attached and garnished, it was held that an officer may be garnished for money which he has taken from the debtor under arrest, where a statute makes property in his hands subject to legal process, if the arrest was made in good faith and there is probable ground for believing the money to be connected with the offense, or useful as evidence on the trial of the prisoner. *Ex parte Hurn* (1891) 92 Ala. 102, 13 L.R.A. 120, 25 Am. St. Rep. 23, 9 So. 515.

(Sometimes the statute provides that the person in whose possession are found goods which it is suspected have been stolen may give security to produce the same at the trial. See *Com. v. Thompson* (1900) 24 Pa. Co. Ct. 179.)

While it is not intended to include cases arising after the trial, reference may be made, in that connection, to *United States v. Parker* (1908) 166 Fed. 137, and *Lynch v. St. John* (1878) 8 Daly (N. Y.) 142. B. B. B.

JOHN E. C. KOHLSAAT et al., Partners under the Firm Name and Style
of C. Crane & Company, Plffs. in Err.,
v.

PARKERSBURG & MARIETTA SAND COMPANY.

United States Circuit Court of Appeals, Fourth Circuit — May 12, 1920.

(266 Fed. 283.)

Evidence — burden of proof — fault of bailee.

1. The burden of establishing fault on the part of a bailee for hire for loss of the bailment is upon the bailor, and the burden of proof never shifts to the bailee, although at some stages of the trial it may be his duty to go forward with the evidence.

[See note on this question beginning on page 690.]

Shipping — liability of hirer for loss of boat. swerable for its loss or injury which happens without his fault.

2. The hirer of a boat is not an-

[See 24 R. C. L. 1105, 1106.]

ERROR to the District Court of the United States for the Southern District of West Virginia (Keller, J.) to review a judgment in favor of plaintiff in an action brought to recover the value of a boat alleged to have been negligently lost by defendants, and the unpaid balance of the agreed rental of said boat. *Reversed.*

The facts are stated in the opinion of the court.

Argued before Pritchard and Knapp, Circuit Judges, and Rose, District Judge.

Messrs. Charles H. Stephens, Jr., and Fitzpatrick, Campbell, Brown, & Davis, for plaintiffs in error:

Defendants' agreement to return the derrick boat to plaintiff at Parkersburg, in as good condition as the day received, less the usual wear and tear, is no more than what the law implies in any ordinary contract of bailment.

Mulvaney v. King Paint Mfg. Co. 167 C. C. A. 642, 256 Fed. 612; *Ames v. Belden*, 17 Barb. 513; *Young v. Leary*, 185 N. Y. 569, 32 N. E. 607.

The court erred in its charge on the burden of proof.

Sullivan v. Capital Traction Co. 34 App. D. C. 358; *Cox v. Aberdeen & A. R. Co.* 149 N. C. 117, 62 S. E. 884; *Hughes v. Atlantic City & S. R. Co.* 85 N. J. L. 212, L.R.A.1916A, 927, 89 Atl. 769; *Foss v. McRae*, 105 Me. 140, 73 Atl. 827; *Klunk v. Hocking Valley R. Co.* 74 Ohio St. 125, 77 N. E. 752, 20 Am. Neg. Rep. 176; *Vischer v. North Western Elev. R. Co.* 256 Ill. 572, 100 N. E. 270; *Southern R. Co. v. Prescott*, 240 U. S. 632, 60 L. ed. 836, 36 Sup. Ct. Rep. 469; *Clafin v. Meyer*, 75 N.

Y. 260, 31 Am. Rep. 467; *Memphis & R. Co. v. Reeves*, 10 Wall. 176, 19 L. ed. 909; *Western Transp. Co. v. Downer*, 11 Wall. 129, 20 L. ed. 160; *Cau v. Texas & P. R. Co.* 194 U. S. 427, 48 L. ed. 1053, 24 Sup. Ct. Rep. 663, 16 Am. Neg. Rep. 659; *Sweeney v. Erving*, 228 U. S. 233, 57 L. ed. 815, 33 Sup. Ct. Rep. 416, Ann. Cas. 1914D, 905; *Pacific Mail S. S. Co. v. Panama R. Co.* 163 C. C. A. 625, 251 Fed. 449; *United Metals Selling Co. v. Pryor*, 155 C. C. A. 621, 243 Fed. 91; *Washburn-Crosby Co. v. Johnston*, 60 C. C. A. 187, 125 Fed. 273; *Willett v. Rich*, 142 Mass. 356, 56 Am. Rep. 684, 7 N. E. 776; *Hunter v. Ricke Bros.* 127 Iowa, 108, 102 N. W. 826, 18 Am. Neg. Rep. 68; *Standard Marine Ins. Co. v. Traders' Compress Co.* 46 Okla. 356, 148 Pac. 1019; *Stewart v. Stone*, 127 N. Y. 500, 14 L.R.A. 215, 28 N. E. 595; *Knights v. Piella*, 111 Mich. 9, 66 Am. St. Rep. 375, 69 N. W. 92; *Sanford v. Kimball*, 106 Me. 355, 138 Am. St. Rep. 345, 76 Atl. 890; *Hughes v. Atlantic City & S. R. Co.* 85 N. J. L. 212, L.R.A.1916A, 927, 89 Atl. 769.

Where the duty of establishing negligence is on the plaintiff, the plaintiff must also show that such negligence was a proximate cause.

Darby Candy Co. v. Hoffberger, 111 Md. 84, 73 Atl. 565; 1 Thomp. Neg. § 45.

Messrs. Holt, Duncan, & Holt, for defendant in error:

There is nothing misleading or erroneous in the charge of the court upon the subject of the burden of proof.

Southern R. Co. v. Prescott, 240 U. S. 632, 60 L. ed. 836, 36 Sup. Ct. Rep. 469; Higman v. Camody, 112 Ala. 267, 57 Am. St. Rep. 33, 20 So. 480; Fleischman v. Southern R. Co. 76 S. C. 237, 9 L.R.A. (N.S.) 519, 56 S. E. 974; Cumins v. Wood, 44 Ill. 416, 92 Am. Dec. 189; Bennett v. O'Brien, 37 Ill. 250, 1 Am. Neg. Cas. 622; Burlingame v. Horne, 30 Ill. App. 330, 1 Am. Neg. Rep. 621; Apczynski v. Butkiewicz, 140 Ill. App. 375; Southern R. Co. v. Aldredge, 142 Ala. 368, 38 So. 805; Travelers Indemnity Co. v. Fawkes, 120 Minn. 353, 45 L.R.A. (N.S.) 331, 139 N. W. 703; Powers v. Jughardt, 101 App. Div. 53, 91 N. Y. Supp. 556; Selesky v. Vollmer, 107 App. Div. 300, 95 N. Y. Supp. 130; Snell v. Cornwell, 93 App. Div. 136, 87 N. Y. Supp. 1; Harms v. New York, 69 Misc. 315, 125 N. Y. Supp. 477; Winttingham v. Hayes, 144 N. Y. 1, 43 Am. St. Rep. 725, 38 N. E. 999; Dalton v. Redemeyer, 154 Mo. App. 190, 133 S. W. 133; Shropshire v. Sidebottom, 30 Mont. 406, 76 Pac. 941; Davis v. A. O. Taylor & Son, 92 Neb. 769, 139 N. W. 687; Hildebrand v. Carroll, 106 Wis. 324, 80 Am. St. Rep. 29, 82 N. W. 145; 3 Am. & Eng. Enc. Law, 2d ed. 750; 5 Cyc. 217; The Genessee, 70 C. C. A. 673, 138 Fed. 549; Swenson v. Snare & T. Co. 87 C. C. A. 443, 160 Fed. 459; United States v. Denver & R. G. R. Co. 191 U. S. 84, 48 L. ed. 106, 24 Sup. Ct. Rep. 33; Chicopee Bank v. Seventh Nat. Bank, 8 Wall. 641, 19 L. ed. 422.

Knapp, Circuit Judge, delivered the opinion of the court:

Plaintiffs in error, defendants below, leased from defendant in error, plaintiff below, a certain derrick boat for the term from August 11, 1917, to the 31st of December of that year, when it was to be returned to the lessor at Parkersburg, West Virginia, "in as good condition as the day received, less the usual wear and tear." The boat was duly delivered to the lessees, who used the same in their lumber business at Brent, on the Kentucky side of the Ohio river, some 10 miles above

Cincinnati. Early in December the river was frozen over, and defendants tied the boat to the shore. The cold weather continued with extreme severity for two months or more, except for a few days around Christmas. Twice the boat was forced from its moorings by the moving ice, first for about 150 feet, later for a mile or so, and each time again secured. In February, 1918, when the ice gorge broke up, the boat was carried down the river and became a total loss.

Plaintiff brought this suit to recover the value of the boat and an unpaid balance of the agreed rental. The latter item is not in dispute. Whether defendants are liable for the value of the boat depends upon whether it was lost through any negligence on their part. As this was clearly a question of fact for the jury, the verdict in favor of plaintiff should stand, if the trial court was right in its ruling on the burden of proof. In the course of his instructions to the jury the learned judge repeatedly stated that the burden of proof, on the issue of negligence, was cast upon the defendants. For example, in the earlier part of the charge it was said: "The failure to return, I say, creates a presumption of negligence, and therefore upon a charge of that kind the burden to show that the defendant was not in default shifts to him. Now, he can meet that by proof of due care on his part in all the contingencies that arose while the boat was in his possession. That matter has been testified about, and argued about, and it is for you, throughout all the circumstances shown in this case, to determine whether that burden that was upon the defendant has been met."

And in the closing statement, the last word before the jury retired, they were again told: "Now, as I have said, it is the duty of the plaintiff to prove his case by a preponderance of the evidence; but I have charged you, and I repeat that charge, that upon the admitted facts the plaintiff starts out, having

proved the loss of the boat, with a presumption that it was negligently lost, and it is for the defendants to show that it was not negligently lost, and that, as I say, shifts the burden upon that issue."

There appears to be some confusion of thought and some conflict of authority, particularly in the earlier decisions, because of the double meaning of the phrase "burden of proof." Primarily it means the duty resting on one party or the other, usually the party having the affirmative, to establish by preponderance of evidence a proposition essential to the maintenance of the action. In this sense the burden of proof never shifts or changes, but remains from first to last where it is placed by the pleadings or the substantive law of the case. Sometimes, however, the phrase is used to describe the duty of going forward with the evidence during the progress of the trial. The plaintiff may offer sufficient proof to make a *prima facie* case, or he may be aided by a presumption of law, which, if nothing further appeared, would entitle him to a verdict; and when this happens the burden of meeting the *prima facie* case devolves on the defendant. Thus, the duty of "going forward"—that is, the necessity of producing further evidence—may shift back and forth as the trial proceeds. But when all the proofs are in, and the case is ready for submission to the jury, the question of whose duty it was to go forward with the evidence at any turn of the trial practically disappears; and the more important question arises as to which party has the burden of establishing by the greater weight of evidence the proposition in dispute; or, to use the expressive language of Professor Wigmore, which party takes the risk of nonpersuasion.

This distinction bears directly on the ruling under review. A bailee for hire is not an insurer of the property placed in his possession, and cannot be held to answer if it be lost or damaged without his fault. He contracts to

take ordinary care of the property, and is liable only for loss occasioned by his own negligence. Hence the essential element of a bailor's cause of action, the fact to be established by him, is negligence on the part of the bailee. On that issue the burden of ^{Evidence—}burden of proof ^{—fault of bailee.} proof rests all the while on the plaintiff, and at no stage of the trial can it be passed over to the defendant. True, it is often said that when the plaintiff proves delivery of the property to the defendant, and that it has not been returned as agreed, the burden of proof shifts to the other side. These facts may make a *prima facie* case, or, as the court below puts it, give rise to a presumption of negligence; but, whatever the form of expression, the meaning is always the same, namely, that it then becomes the defendant's duty to go forward with the evidence and explain how the damage occurred. And this is entirely reasonable, for presumably the facts in that regard are within his knowledge. But when this has been done, and especially if it be shown that the loss resulted from a cause consistent with due care on his part, the duty of going forward has been met and the *prima facie* case overcome; and for the reason that the right of recovery in such case depends upon whether or not the defendant was negligent, and on that issue, as already said, the burden throughout is on the plaintiff.

And this has long been the settled rule of law. In *Memphis & C. R. Co. v. Reeves*, 10 Wall. 176, 190, 19 L. ed. 909, 913, which was an action against a carrier for damage to goods, and in which the defendant claimed that the damage was caused by an extraordinary flood, the Supreme Court said: "It is not necessary for him [defendant] to prove that the cause was such as releases him, and then to prove affirmatively that he did not contribute to it. If, after he has excused himself by showing the presence of the overpowering cause, it is charged that his negligence contributed to the

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loss, the proof of this must come from those who assert or rely on it."

Again, in *Western Transp. Co. v. Downer*, 11 Wall. 129, 133, 134, 20 L. ed. 160, 161, also an action against a carrier on a bill of lading which exempted losses occasioned by perils of navigation, it was said: "If the danger might have been thus avoided, it is plain that the loss should be attributed to the negligence and inattention of the company, and it should be held liable, notwithstanding the exception in the bill of lading. The burden of establishing such negligence and inattention rested with the plaintiff, but the court refused an instruction to the jury to that effect, prayed by the defendant, and instructed them that it was the duty of the defendant to show that it had not been guilty of negligence. In this respect the court erred."

In the recent case of *Southern R. Co. v. Prescott*, 240 U. S. 632, 60 L. ed. 836, 36 Sup. Ct. Rep. 469, which seems directly in point and controlling of the case at bar, the ruling is as follows: "The railway company was, therefore, liable only in case of negligence. The plaintiff, asserting neglect, had the burden of establishing it. This burden did not shift. As it is the duty of the warehouseman to deliver upon proper demand, his failure to do so, without excuse, has been regarded as making a *prima facie* case of negligence. If, however, it appears that the loss is due to fire, that fact in itself, in the absence of circumstances permitting the inference of lack of reasonable precautions, does not suffice to show neglect, and the plaintiff, having the affirmative of the issue, must go forward with the evidence."

A pertinent statement of the law is found in *Clafin v. Meyer*, 75 N. Y. 260, 31 Am. Rep. 467, cited with approval in the *Prescott Case*, *supra*: "It will be seen, as the result of these authorities, that the burden is ordinarily upon the plaintiff alleging negligence to prove it against a warehouseman, who accounts for his failure to deliver by

11 A.L.R.—44.

showing a destruction or loss from fire or theft. It is not, of course, intended to hold that a warehouseman, refusing to deliver goods, can impose any necessity of proof upon the owner by merely alleging as an excuse that they have been stolen or burned. These facts must appear or be proved with reasonable certainty. Nor do we concur in the view that there is in these cases any real 'shifting' of the burden of proof. The warehouseman, in the absence of bad faith, is only liable for negligence. The plaintiff must in all cases, suing him for the loss of goods, allege negligence and prove negligence. This burden is never shifted from him."

To the same effect is *Willett v. Rich*, 142 Mass. 356, 56 Am. Rep. 684, 7 N. E. 776, in which the court says: "As the only contract of the warehouseman is that he will use due care in keeping the property, and deliver it on demand, if, after using due care, he shall have it in his possession, a plaintiff must show a breach of this contract to entitle him to recover, either in contract or tort. We do not see how, by changing the form of his declaration, he can change the liability or rights of the warehouseman. Whatever the form of declaration is, he is required to prove a breach of the contract. It may be that, where there is a refusal to deliver, the plaintiff may make out a *prima facie* case upon proving this fact, because such refusal, if unexplained, is some evidence of the breach of the contract. But this does not shift the burden, originally on the plaintiff, to prove a breach of contract."

Of like and unmistakable import are, among others: *Washburn-Crosby Co. v. Johnston*, 60 C. C. A. 187, 125 Fed. 273; *United Metal Selling Co. v. Pryor*, 155 C. C. A. 621, 243 Fed. 91; *Pacific Mail S. S. Co. v. Panama R. Co.* 163 C. C. A. 625, 251 Fed. 449; *Hunter v. Ricke Bros.* 127 Iowa, 108, 102 N. W. 826, 18 Am. Neg. Rep. 68; *Hughes v. Atlantic City & S. R. Co.* 85 N. J. L. 212, L.R.A.1916A, 927, 89 Atl. 769, and

Standard Marine Ins. Co. v. Traders' Compress Co. 46 Okla. 356, 148 Pac. 1019.

In the light of these authorities we are constrained to hold that the learned judge was in error in charging the jury that the burden of proof was on the defendants to show that

the boat was not lost by their negligence; and it cannot be doubted, when the opposing proofs on this issue are examined, that the error was prejudicial. The judgment must be reversed, and the cause remanded, with instructions to grant a new trial.

ANNOTATION.

Presumption and burden of proof in actions for injury to or loss of boat during bailment.

I. Introductory statement, 690.

II. Burden of proof in general; *prima facie* case, 690.

III. Special contract, 697.

IV. Rule as affected by pleadings or form of action, 697.

I. Introductory statement.

As to presumption and burden of proof where subject of bailment is destroyed or damaged by fire, see annotation appended to Beck v. Wilkins-Ricks Co. 9 A.L.R. 554.

The principal question with which the present annotation deals is that of presumption and burden of proof as to care or negligence of the bailee of a boat, and the duty of going forward with the evidence, in cases where damages are sought for injury to or loss of the boat during a bailment thereof. The term "action," as used in the title to the note, includes, of course, counterclaims for damages set up by the bailor where an action is brought against him by the bailee. Cases are not generally included, except for illustrative purposes, where no claim for damages is made with respect to injury to or loss of a vessel, as, for example, cases presenting the question of presumption of seaworthiness of a boat where the action is for loss of or injury to the cargo. Of course, questions merely of competency or sufficiency of evidence to show negligence are not covered.

II. Burden of proof in general; prima facie case.

The question of burden of proof as to care and negligence where property is injured or destroyed while in the possession of a bailee is one which has occasioned much confusion in the courts. Notwithstanding

the fact that the proper use of the term "burden of proof" has often been pointed out by courts and text-writers, the authorities continue frequently to use it in widely different senses. The burden of proof, using the term in its proper sense of ultimate burden of establishing any particular issue, seems clearly to rest upon that party who would fail if the issue were not established; in other words, upon the party having the "risk of nonpersuasion" as to the issue in question. If the bailor of a boat, for instance, brings an action against the bailee for damage to or loss of the boat during the bailment, alleging that the damage or loss was due to the negligence of the bailee, the ultimate burden of proving negligence seems clearly to rest on the bailor, and does not shift during the trial; although, by showing a failure to return the boat, or a return thereof in a damaged condition, the bailor may make out a *prima facie* case which would entitle him to a recovery of damages, unless the bailee offered evidence to rebut the presumption of negligence arising against him. In such a case the bailee has the duty of going forward with the evidence; but it is incorrect, or at least inaccurate, to say that he has the burden of proving freedom from negligence. The same situation may arise where the circumstances of the loss or injury, as proved, are such as do not ordinarily occur without negligence, in which case the bailee may be obliged,

in order to prevent recovery of damages against him, to go forward with evidence to rebut the presumption of negligence which arises from the circumstances of the loss or injury. This is but an illustration of the application of the doctrine of *res ipsa loquitur*.

It should be observed that the question of burden of proof as to care or negligence should be clearly distinguished from burden of proof as to the manner or fact of the loss. For instance, if the bailee of a boat, in an action against him by the bailor for negligently causing its loss or injury, sets up as a defense that the boat was lost or injured in a particular way, which is denied, the burden of proving this defense as to the manner of the loss may well be upon the bailee; but this does not conflict with the rule that the ultimate burden of proving negligence in such a case rests upon the bailor.

The above considerations apply in any case where negligence is a part of the bailor's cause of action, but, as is shown under IV. *infra*, the form of the action and the allegations of the pleadings may affect the question of burden of proof of negligence, since it seems that if the action by the bailor is merely for breach of contract, negligence is not a part of the plaintiff's case, and he does not have the "risk of nonpersuasion" as to this issue.

The rules above stated are well expressed and discussed in the reported case (*KOHLSAAT v. PARKERSBURG & M. SAND Co.* ante, 686) where it was held to be prejudicial error for the court, in an action by the bailor of a boat against the bailee, to instruct the jury that the burden of proof was on the defendant to show that the boat was not lost by its negligence.

In *W. H. Beard Dredging Co. v. Hughes* (1902) 113 Fed. 680, an action by the owner of a scow for damages alleged to have been caused by the negligent manner in which it was used by the defendant, a charterer, the court stated that there was testimony tending to show that the boat was returned to its owner in a damaged condition, but that there was no evidence

from which it could be determined in what manner the injury was received; that the contract amounted to a simple bailment for hire, and that, without proof of negligence on the part of the hirers or charterers, there could be no recovery against them. The decision is affirmed in (1903) 58 C. C. A. 192, 121 Fed. 808, where it appears that the only evidence on the claim for damages to the boat was that after a return from sea it was leaking badly, as was also the case while it was in use. This decision does not seem necessarily opposed to the general rule that a *prima facie* case for the bailor is made out by proof of the bailment and a return of the property in a damaged condition, where the damage is such as does not ordinarily occur without negligence; since the damage in this instance, from the leakage of the boat, was such that apparently no inference of negligence on the part of the bailee would arise therefrom.

The burden of proving negligence, in an action by a bailor against the bailee of a boat which was destroyed by fire while in the bailee's possession, was held in *D'Echoux v. Gibson Cypress Lumber Co.* (1905) 114 La. 626, 38 So. 476, to be upon the plaintiff, under a statute making the defendant in such case liable for destruction occasioned by fire only "when it is proved that the same has happened either by his own fault or neglect, or by that of his family."

But while the general principles seem clear theoretically, and appear to be well established in cases of bailments other than those of injury to or loss of vessels, the courts, in the class of cases under consideration, have not infrequently in their opinions used language not in harmony therewith, unless the term "burden of proof" is construed in the sense of the duty of going forward with the evidence. This is true of the following cases: *Swenson v. Snare & T. Co.* (1908) 87 C. C. A. 443, 160 Fed. 459; *Terry & T. Co. v. Merritt & C. Derrick & Wrecking Co.* (1909) 93 C. C. A. 613, 168 Fed. 533; *Empire Engineering Co. v. Reid Wrecking Co.* (1919) 257 Fed. 770; *Bernstein v. Morse* (1919) 261 Fed.

435 (assuming that burden of proof rested upon the bailee); *Parker v. Washington Tug & Barge Co.* (1915) 85 Wash. 575, 148 Pac. 896.

In *Swenson v. Snare & T. Co.* (Fed.) supra, a libel to recover damages for the loss of a pile driver which sank while in the bailee's possession, the court said that, as such an occurrence was not in the usual course of things, the burden was thrown on the respondent, as bailee, to show how the loss occurred, and that it was not caused by its negligence. And the court, after reviewing the evidence, concluded with the statement that the district court had found that the evidence showed negligence on the part of the bailee, but it was unnecessary to go that far, it being sufficient to state that the respondent had not sustained the burden of proof imposed upon it by law.

And in *Terry & T. Co. v. Merritt & C. Derrick & Wrecking Co.* (1909) 93 C. C. A. 613, 168 Fed. 533, supra, the court quoted with approval from the *Swenson Case*, supra, in a case where a derrick sank while in the possession of the charterer, stating that the principles of the former case were applicable, and that, the vessel having been injured while in the exclusive possession of the respondent as bailee, the burden was upon it to show, first, how the injury occurred, and, second, that it was free from negligence. The court further said: "The respondent did show the circumstances of the accident, but offered no evidence to show the cause of the sinking of the vessel, and, to rebut the presumption against it, relied upon the presumption of unseaworthiness arising from the sinking of the vessel without apparent cause. The presumption of unseaworthiness generally arises in insurance cases, where a vessel is in the possession of the insured and where means of knowledge concerning the condition of the vessel are available to him, rather than to the insurer. But where a vessel is in the exclusive possession of a charterer, means of knowledge are as readily available to him as to the owner, and we perceive no especial reason

why there should be any presumption in the matter. We deem it unnecessary to decide this question, however, as we are of the opinion that, if the presumption of unseaworthiness exists in the case, the libellant rebutted it by its proof concerning the condition of the vessel before and after the accident. In our opinion, the respondent failed to sustain the burden of proof imposed upon it as a bailee in possession, and the decree was erroneous."

In *Bernstein v. Morse* (1919) 261 Fed. 435, supra, the court assumed that the rule of the case last cited was applicable, where an action *ex delicto* was brought for injury to a boat chartered by the libellant to the respondent, which the former attempted to prove was grounded because of negligent loading by the respondent, although the court stated that the general rule was that, in an action *ex delicto*, the libellant has the burden of proving negligence on the part of the respondent. And in this case, assuming that the bailee had the burden of proving how the injury occurred and that he was free from negligence, the court held that he had sustained this burden.

It was said in *Empire Engineering Co. v. Reid Wrecking Co.* (1919) 257 Fed. 770, supra, that "in the event of an extraordinary occurrence, or in case of failure to skilfully perform work, by reason of which a bailor sustains loss, the burden ordinarily is no doubt on the bailee to prove that the loss was not caused by his negligence or want of care and precaution." In line with this principle, although there is a confusion of ideas, is the further statement that, "where a vessel is injured through the negligence of a bailee who has the vessel in his custody at the time of the damage, he has the burden of showing that the damage to the vessel was not sustained through his fault." In support of the last statement, the court cited *Swenson v. Snare & T. Co.* and *Terry & T. Co. v. Merritt & C. Derrick & Wrecking Co.* (Fed.) supra.

The Washington court in *Parker v. Washington Tug & Barge Co.* (Wash.)

supra, merely quotes from Federal cases above cited.

Where a scow was damaged because of listing while being loaded with clay, the court in *White v. Schoonmaker-Connors Co.* (1920) — C. C. A. —, 265 Fed. 465, said: "It is true that, because the scow was damaged while under the control of the respondent, there was a presumption of liability for negligence arising from a failure to return it in as good order as when received, reasonable wear and tear excepted, and that this presumption cast upon the respondent the obligation of showing that the damage was not the result of his own negligence, or that of anyone for whose acts he was responsible." So far as appears, however, the question of presumption and burden of proof was not a determining consideration in this case, because on the evidence the court found that the injury to the vessel was not due to the bailee's fault, but was due to the unfitness of the scow to carry the kind of material for which it was chartered, and that, as the charterer was not under an absolute obligation to return the scow in good condition, but was required to exercise only ordinary care, he was not liable for the damage.

And in an action for damages to a scow used by the bailee for transporting sand and gravel in construction work, where it appeared that when redelivered to the bailor the bottom near one of the corners was in such a damaged condition that it leaked badly, although the vessel was in good condition when delivered to the bailee, the court in *Burley v. Hurley-Mason Co.* (1920) — Wash. —, 191 Pac. 630, regarded as applicable the doctrine that, in cases where property is delivered to the bailee in good condition and returned damaged, "a presumption arises of negligence on the part of the bailee, and casts upon him the burden of showing the exercise of ordinary care." In affirming the judgment for the plaintiff for damages, the court said: "It is also claimed that the court failed to find, and the evidence failed to show, that the appellant did not exercise ordinary care to protect

the scow from damage while it was in its possession. The court specifically found that it was in good condition at the time of delivery, and that when redelivered it was in a 'leaky and bad condition, with the bottom planks sprung and broken,' and in one of the conclusions recited that the damage was caused wholly by the carelessness and negligence of the defendant. Under the rule of law second above stated, the fact that the scow was delivered in good condition and redelivered in bad condition would raise a presumption of negligence, and cast upon the appellant the burden of showing that it had exercised ordinary care. The character of the injury sustained by the scow was such as to indicate that the injured portion had rested upon a knob or hump, while the balance of the scow was afloat. There was evidence that at one point where it was caused to be moored by the appellant there was a hump on the beach upon which the scow would rest when the tide receded. The trial court was right in its conclusion that the presumption arising from the fact of injury was not overcome by the evidence."

In some cases the burden of proof is said to shift from the bailor to the bailee, but it is not always entirely clear in what sense the court used the phrase "burden of proof." At least, in some cases, the term means, apparently, only the duty to go forward with the evidence, which is the only sense in which the "burden of proof" may properly be said to shift.

Thus, in *Wintringham v. Hayes* (1894) 144 N. Y. 1, 43 Am. St. Rep. 725, 38 N. E. 999, where the bailor in an action against him by the bailee for materials furnished for the boat, set up a counterclaim for damages to the boat, the court stated that, while it was true as a general proposition that a bailor charging negligence on the part of a bailee has the burden of proof, yet sometimes slight evidence will shift the burden to the bailee; that in the case at bar, if the defendant, in support of his counterclaim, was able to prove the condition of the boat when delivered to the plaintiff,

the nature of the subsequent injury she sustained, and that they were not the result of ordinary wear and tear, he would have made out a *prima facie* case, and the "burden of proof will be shifted to the plaintiff, who, as bailee, had the yacht exclusively within his control, and should be able to show the manner in which he discharged his contract obligations in the premises."

And although the court referred to the burden of proof as shifting from one party to the other, and resting upon the bailor or bailee upon the development of the circumstances in the evidence, the term "burden of proof," as used in *Higman v. Camody* (1896) 112 Ala. 267, 57 Am. St. Rep. 33, 20 So. 480, does not, it seems, necessarily mean the ultimate burden, but rather the duty of going forward with the evidence in order to show, or to rebut, a *prima facie* case. In this instance, the court said that if the property was in good condition for purposes of the bailment, and was not returned, or returned in an injured state, or, if defective, the injury was not attributable to the defect, the burden was on the bailee, since in either case the injury would not have happened in the ordinary course of things, had he been prudent and diligent. But the court said further that the burden was on the bailee, not, "indeed, to acquit himself of all negligence, but to show a cause producing the injury, which *prima facie* did not arise or result from or operate on account of a want of ordinary care on his part. This being done, the burden shifts back to the plaintiff to affirmatively show some causal negligence on the part of the defendant. To illustrate: The hirer of a boat loses it in a storm of sufficient severity to have probably caused the loss without fault on his part. He acquits himself of negligence *prima facie* by showing these facts, and throws the onus on the latter to prove that, notwithstanding the storm, the boat would not have been lost but for defendant's negligence in going out in the storm, or, being out, his want of care and diligence in handling the boat. And in such case

it is with the plaintiff to reasonably satisfy the jury by a preponderance of evidence that not the storm alone, but the failure of the defendant to act with prudence and diligence in view of the storm, caused the loss."

In *Higman v. Camody* (Ala.) *supra*, an action for injury to a barge hired by defendant from the plaintiff, it was held error to charge that, before the bailor could recover, the jury must believe that the bailee failed to use ordinary care, because they might find the facts such as to raise a *prima facie* case of negligence, entitling the bailor to recover. The court said: "The evidence is conflicting as to the condition and river worthiness of the barge when it was let and delivered to the defendant, and the jury might have reached either conclusion,—that it was, or that it was not, in proper condition. There is no conflict in the evidence showing serious injuries to the barge, and that they were sustained during the second voyage. They were of a character which ordinarily would not have been suffered, had the barge been in good condition when it was let to defendant, and had the defendant and his employees been prudent and diligent in the use of it. Assuming, as the jury had a right to find, that the condition was good, the *prima facie* presumption on these facts was that the injuries complained of resulted from defendant's negligence. Charge 1, given for defendant, is bad in view of these facts and this principle. Its effect was to put the burden on plaintiff to show negligence on the part of the defendant, even though the jury should have concluded that the barge was in proper condition when delivered to the bailee."

As before stated, the burden of proving the manner of the loss may rest upon the bailee. Thus, where the lessee of a boat, who had been sued by the lessor for failure to return the same, alleged as a defense that it was driven ashore and wrecked as the result of a sudden, unusual, and extraordinary storm, the court in *Oakland Barge & Lighter Co. v. Foster* (1914) 25 Cal. App. 193, 143 Pac. 83, said it was conceded "that the burden of

proof was upon the defendant to show that the barge in question was lost as a result of a sudden, unusual, and extraordinary storm, and that, when this was done, the burden of proof shifted to the plaintiff to the extent of affirmatively showing that, notwithstanding the storm, the barge would not have been lost but for the defendant's negligence, or his want of skill or care in operating the barge." In this case, it may be observed, the judgment, which was affirmed on appeal, was for the defendant, the lower court having found that the lessee was not negligent.

And the failure to return the boat, or its return in a damaged condition, without proof of the cause of the loss or injury, or with such proof of loss or injury as raises a presumption of negligence calling for the application of the doctrine of *res ipsa loquitur*, will make out a *prima facie* case, requiring the bailee to go forward with evidence of due care in order to rebut the *prima facie* case against him.

Thus, a charterer of a boat, as bailee, is *prima facie* responsible for any failure to return the boat in good order, reasonable wear and tear excepted. *White v. Upper Hudson Stone Co.* (1917) 160 C. C. A. 651, 248 Fed. 893, petition for writ of certiorari denied in (1918) 246 U. S. 665, 62 L. ed. 929, 35 Sup. Ct. Rep. 335.

And where there was evidence that the libellant's boat had been run over while in a flotilla, by the boat behind it, under circumstances showing that the arrangement of the boats involved a risk, on account of wind and tide, that such an accident as the one in question might happen, it was held in *The Genessee* (1905) 70 C. C. A. 673, 138 Fed. 549, that the case was a proper one for the application of the rule that a presumption of negligence arises against a bailee for hire when it appears that the subject of the bailment has been injured or destroyed while within his custody, by an accident such as in the ordinary course of things does not happen when a bailee uses due care.

So, in *International Contracting Co. v. Walsh* (1902) 115 Fed. 851, an ac-

tion for injury to scows hired by the respondent from the libellant, due to the parting of towlines furnished by the latter, the court took the view that in the absence of evidence of imprudent exposure of the boats by the respondent, to perilous weather or negligent handling, it was a justifiable inference that the damage was due to a failure of the libellant to equip the boat with suitable towlines; and that the burden of proof that the respondent had increased his legal liability over ordinary contracts of bailment, so as to guarantee that he would return the boat in good condition whatever perils of the sea might injure it, was on the libellant, the presumption being against such a covenant.

Results, it was said in *Walling v. Porter Gildersleeve Co.* (1915) 222 Fed. 1002, frequently give rise to presumptions, as, if a boat is moored in a safe harbor, free from dangers of the sea and risks of navigation, and is found shortly afterwards filled with water, without any other apparent cause for her sinking, the natural inference would be that she was in a leaking condition; while in the case of a boat recently in use, and therefore presumptively seaworthy, if left in a position in which it would strand at low water and be left by the tide so badly listed that it would fill before it was floated on the flood tide, the fact that the boat was found sunk, under such circumstances, would give rise to a natural inference that the sinking was due to want of care in mooring the boat in such a place.

Where a vessel under charter is returned in a damaged condition, there is a presumption of liability for want of care arising from the failure to redeliver it in like condition as received; but this presumption may be overcome by evidence that the injury is such as might have occurred through ordinary wear and tear, together with testimony of those in charge of it that there was no fault in navigation or any unusual occurrence which would account for the damage. *Mulvaney v. King Paint Mfg. Co.* (1919) 167 C. C. A. 642, 256 Fed. 612 (where injury

to chime log and to doorsill of vessel was not accounted for).

And it was held in *McLoughlin v. New York Lighterage & Transp. Co.* (1894) 7 Misc. 119, 27 N. Y. Supp. 248, that the presumption of negligence arising from the return in a damaged condition of a boat chartered by the plaintiff to the defendant could be rebutted, and was in this case overcome by evidence that the injury occurred through the negligence of an independent contractor.

An instruction that, in order to avoid liability for the sinking of the vessel, the defendants "are not required to show definitely and certainly what caused the sinking" thereof, was held in *St. Louis & T. River Packing Co. v. Nowland* (1919) — Mo. —, 215 S. W. 11, not erroneous as equivalent to instructing the jury that the burden was upon the plaintiff, the owner of the vessel, to show that the sinking thereof was caused by gross negligence of the officers or crew, or to overlading, this being the only ground upon which, under the charter party, there could be a recovery from the charterer. The action was on a bond given by the charterer and an insurance company, who were the defendants, conditioned for the return of the vessel which, the plaintiff proved, had sunk at a dock while in possession of the charterer. It was said, regarding the instruction above referred to: "It says that this was equivalent to instructing the jury that the burden was upon the plaintiff to show that the sinking of the vessel was caused by gross negligence of the officers or crew, or overlading. Without expressing any opinion upon the question whether this construction, if couched in plain, simple, and unmistakable words, would or would not be error, we are of the opinion that it is susceptible of no such construction. . . . The cause of the disaster was immaterial, except in so far as it might tend to prove that the sinking was negligent or not. If there was no negligence in the handling of the vessel at the time, then the sinking was without negligence of the officers or crew. If the disclosure of the real

cause would have shown negligence, the burden was upon plaintiff to show it. That is peculiarly true in this case, where the charter party required the lessee and master to immediately notify the plaintiff of the disaster, and to remain with the vessel only until the owner could take possession."

While a presumption of unseaworthiness of the boat may arise from the accident itself, under some circumstances, leaving the owner, the bailor, to rebut such presumption, and while, on the contrary, the bailee who is in possession of a boat at the time of the accident, and who has expressly or impliedly agreed to return it or to explain his default, must offer evidence to explain his failure to return it, yet if both the bailor and bailee offer testimony not only as to the cause of the accident, but as to their own compliance with their duty under the charter and under general rules of law, the findings of fact will not only dispose of the question of burden of proof, but will determine responsibility for the accident, and there is no need of falling back upon a presumption, unless the entire record shows no evidence of explanation from which could be found the cause of the accident with respect to one party or the other. *Bartley v. Borough Development Co.* (1914) 214 Fed. 296.

The proposition is supported also by *Bartley v. Borough Development Co.* (Fed.) supra, that where a boat is injured while in possession of a bailee, from accident for which unseaworthiness would be a sufficient producing cause, a presumption of unseaworthiness arises, in the absence of any other explanation of the accident.

The presumption of seaworthiness in a boat, it was held in *Werk v. Leathers* (1872) 1 Woods, 271, Fed. Cas. No. 17,415, was completely rebutted, where it appeared that the ship was old and approaching the end of her life as a boat, and that she suddenly failed in a vital part, without any apparent cause. The action was by the shipowner against the charterer for the amount required to repair the vessel, for damages, and for the balance of the agreed rental. The

decision is affirmed in (1878) 97 U. S. 379, 24 L. ed. 1012.

In this connection, attention is called to several illustrative cases involving the question of presumption of seaworthiness of the vessel and circumstances sufficient to overcome this presumption, where the action was not for injury to or loss of the vessel, but for such causes as damages to the cargo, or breach of the charter party.

The presumption of seaworthiness in a boat which was less than two years old was held in *Pyman v. Von Singen* (1880) 5 Hughes, 196, 3 Fed. 802, not overcome by evidence merely that, in thirty-six hours after it put to sea, the bolts in the propeller shaft became loose, necessitating a delay in making repairs, where it appeared that this might have been due to the racing of the propeller during a gale which had lasted for twelve hours, although there was no evidence of a special examination of the bolts before starting the trip. The action in this case was for damages from the charterers because of refusal to load it, the defense being delay due to the unseaworthiness of the vessel.

In *McCann v. Conery* (1882) 11 Fed. 747, in which the nature of the action does not appear, it is held that instructions were not erroneous that, since the charter party declared that the vessel was in good order, the presumption was in favor of seaworthiness, and the burden of showing unseaworthiness was upon the charterer.

See also, among other cases involving the question of presumption of seaworthiness in a vessel which is the subject of a bailment, and the sufficiency of evidence to rebut it, but not presenting a state of facts within the scope of the note: *The Marlborough* (1891) 47 Fed. 667; *The Rover* (1887) 33 Fed. 515; *The Transit* (1918) 162 C. C. A. 243, 250 Fed. 71.

III. Special contract.

It was held in *Alaska Coast Co. v. Alaska Barge Co.* (1914) 79 Wash. 216, L.R.A.1915C, 423, 140 Pac. 334, that a charterer who had contracted to return the vessel to the owner in as good condition as when he received it,

the act of God excepted, had the burden of proving that the injury was caused by the act of God, in case he returned it in a damaged condition. The court followed and approved the class of cases which, in actions for loss of goods or baggage by a carrier, hold that if the carrier seeks to excuse itself for loss occurring through an act of God, the burden of proof rests upon it to establish such defense. See on this point 4 R. C. L. § 379, and 5 R. C. L. § 837.

And in an action for breach of contract to keep a boat in good repair and return it in good condition, where the evidence shows that there has been a breach of the contract, proof of negligence is not necessary to entitle the bailor to recover damages from the bailee. *Robertson v. Plymouth Lumber Co.* (1914) 165 N. C. 4, 80 S. E. 894. As to effect of pleadings or form of action, see IV. *infra*.

That the presumption is against a special covenant on the part of the bailee to return the boat, notwithstanding perils of the sea, see *International Contracting Co. v. Walsh* (Fed.) under II. *supra*.

IV. Rule as affected by pleadings or form of action.

In the note above referred to in 9 A.L.R. 559, on the question of presumption and burden of proof where the subject of the bailment is destroyed or damaged by fire, cases are referred to under subd. IV. which have distinguished with respect to the burden of proving negligence on the part of the bailor where the action is based on breach of contract, and where it is based on negligence. Several cases within the scope of the present note have made a distinction in this regard.

In *Bernstein v. Morse* (1919) 261 Fed. 435, where the judgment was for the respondent in an action *ex delicto*, the court, although recognizing the general rule that in an action *ex delicto* the libellant has the burden of proving negligence, assumed for the purpose of the case the applicability of the rule that where a ship is injured while in the exclusive possession of a bailee, the burden is on the

latter to show how the injury occurred and that he was free from negligence, stating that this gave the libellant the benefit of the rule which would have prevailed if he had alleged a breach of contract and a failure to return the boat in good condition at the end of the contract of hiring, the burden in that case being on the respondent, the charterer, to show justification for such breach.

And where the bailor of a boat sued for breach of implied contract to return the same in good condition, it was held in *Harms v. New York* (1910) 69 Misc. 315, 125 N. Y. Supp. 477, that it was unnecessary for the plaintiff to allege or prove negligence, but that he made out a prima facie case by showing the hiring, the delivery of the

boat to the defendant in good condition, and its return in a damaged condition. The court said, however, that had the plaintiff brought his action in tort it would have been necessary for him to prove negligence.

That negligence on the part of the bailee need not be proved where the action is for breach of a special contract to return the property in good condition, see *Robertson v. Plymouth Lumber Co.* (N. C.) *supra*, III.

But that negligence must be proved in ordinary contracts of bailment where the action is based on negligence, see *W. H. Beard Dredging Co. v. Hughes* (Fed.) *supra*, II., where, however, the question of effect of the pleadings or form of action is not discussed.

R. E. H.

JESSE NEVIN ROBERTS et al., Plffs. in Err.,

v.

HELEN G. CRISS, Admr., etc., of Hugh Ferguson Criss, Deceased.

United States Circuit Court of Appeals, Second Circuit — May 12, 1920.

(266 Fed. 296.)

Contract — illegal consideration — inducing breach of contract.

1. A contract the consideration for which is breach by one of the parties of a contract with a stranger is illegal.

[See note on this question beginning on page 706.]

Abatement — death of party pending appeal.

2. As a general rule, the death of a party pending a writ of error does not abate the suit.

[See 1 R. C. L. 39, 40.]

Party — death — right of executor to hearing.

3. An executrix of a defendant in error who dies pending the writ of error, who fails to become a party to the action in compliance with a notice under rule of court, has no right to file a brief or be heard on the argument, and is without right to costs if the judgment is affirmed.

Action — to enforce contract — immoral consideration.

4. No action can be maintained for

breach by a member of a stock exchange of his contract to give the other contracting party the benefit of his membership in such exchange in their transactions, where, to the knowledge of such other party, the member is forbidden to do so by the rules of the exchange.

[See 6 R. C. L. 816 et seq.]

Pleading — failure to plead illegality of contract — effect.

5. Failure to plead illegality of a contract brought before the court for enforcement does not prevent the court's refusing its aid.

[See 21 R. C. L. 552, 553.]

ERROR to the District Court of the United States for the Southern District of New York (Hand, Dist. J.) to review a judgment in favor of de-

defendant in an action brought to recover damages for alleged breach of a contract to give plaintiffs the benefit of defendant's membership in a stock exchange. *Affirmed.*

Statement by Rogers, Circuit Judge:

The plaintiffs are citizens of the state of Ohio and residents of the city of Cincinnati, in that state. The defendant is a citizen of the state of New York and a resident of the southern district therein. The complaint avers: That on January 3, 1905, the plaintiffs and the defendant, together with one Thomas B. Criss, since deceased, entered into a partnership under the firm name of Roberts, Hall, & Criss. That the firm was formed to conduct a general brokerage and commission business, with offices in Cincinnati and in the city of New York, and that it carried on such business until June 5, 1912. That the partnership agreement contained a provision that during the continuance of the partnership no one of the firm should engage in speculative contracts or purchases. That at the time when the partnership was formed, and ever since, the defendant has been a member of the New York Stock Exchange. That in the month of January, 1910, the defendant, Criss, in violation of his agreement, engaged in contracts of a speculative nature, which resulted in his suspension from the Stock Exchange because of obligations which neither he nor the firm could meet; the firm becoming insolvent, which led to the appointment of a receiver over its assets. That, because of the facts above stated, the plaintiffs sustained large pecuniary losses, and a large part of the assets of the partnership were used in settlement of the losses resulting from these speculative contracts. That on June 5, 1912, the plaintiffs agreed with defendant, Criss, to release him from all their claims against him, the consideration being a new partnership agreement to be entered into between them, by which there should be secured to the plaintiffs for a period of four years all the benefits to be derived from a membership in the New

York Stock Exchange through the use of defendant's seat therein; Criss having been restored to his membership in the Exchange. That the new partnership agreement was made and business was carried on under it until January 25, 1915. That shortly prior to that date the plaintiffs were advised by defendant that the partnership agreement of June 5, 1912, had been examined by the Stock Exchange officials, who required it to be forthwith rescinded as in contravention of its rules, under penalty of the suspension of defendant, Criss, from its membership. That thereupon, in order to prevent the suspension of defendant, Criss, as aforesaid, the partnership agreement of June 5, 1912, was dissolved, and it was agreed that the dissolution should not constitute a release by the plaintiffs of any legal rights to which they were entitled as against Criss.

It is alleged that defendant has failed to perform his agreement to secure to plaintiffs the benefit of his membership in the Exchange, and that by reason of his failure the plaintiffs have been obliged to transact their business as nonmembers of the Exchange, and have been compelled to pay full commissions on all sales and purchases made for their customers, and that their good will has been impaired and their credit injured and a large amount of business has been diverted from them, to their damage in the sum of \$100,000, and they bring suit for the recovery of that amount. At the close of the case defendant moved to dismiss the complaint, and the court granted the motion.

Argued before Ward, Rogers, and Manton, Circuit Judges.

Mr. Hartwell Cabell, for plaintiffs in error:

The mere fact that a promisor cannot perform a contract without breaching a prior contract he has made with a third party does not in any sense constitute a legal impos-

sibility, and is not a defense to an action on the later contract.

Millward v. Littlewood, 5 Exch. 775, 155 Eng. Reprint, 339, 20 L. J. Exch. N. S. 2; Spiers v. Hunt [1908] 1 K. B. 720, 77 L. J. K. B. N. S. 321, 98 L. T. N. S. 27, 24 Times L. R. 183; Wilson v. Carnley [1908] 1 K. B. 729, 1 B. R. C. 901, 77 L. J. K. B. N. S. 594, 98 L. T. N. S. 265, 24 Times L. R. 277, 52 Sol. Jo. 239, 14 Ann. Cas. 157; Wilc v. Harris, 7 C. B. 999, 137 Eng. Reprint, 395, 7 Dowl. & L. 114, 18 L. J. C. P. N. S. 297, 13 Jur. 961; Jones v. North, L. R. 19 Eq. 426, 44 L. J. Ch. N. S. 388, 32 L. T. N. S. 149, 23 Week. Rep. 468; Wald's Pollock, Contr. p. 516.

Where parties have made an agreement, neither can thereafter, without the consent of the other, impose additional terms or conditions upon the other.

Ayers v. Grand Lodge, A. O. U. W. 188 N. Y. 280, 88 N. E. 1020; Rockwell v. Knights Templars & M. Mut. Aid Asso. 134 App. Div. 736, 119 N. Y. Supp. 515.

To constitute tortious interference with a contract, the intermeddler must have knowledge of the contract, must induce the breach, and such breach must cause actual and substantial damage.

Lumley v. Gye, 2 El. & Bl. 216, 118 Eng. Reprint, 749, 22 L. J. Q. B. N. S. 463, 17 Jur. 827, 1 Week. Rep. 432, 1 Eng. Rul. Cas. 706; Pollock, Torts, 10th London ed. 573, 574; Bigelow, Torts, 8th Am. ed. 141; Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 62 L. ed. 260, L.R.A.1918C, 497, 38 Sup. Ct. Rep. 65, Ann. Cas. 1918B, 461; Angle v. Chicago, St. P. M. & O. R. Co. 151 U. S. 1, 38 L. ed. 55, 14 Sup. Ct. Rep. 240; Ritterman v. Louisville & N. R. Co. 207 U. S. 205, 52 L. ed. 171, 28 Sup. Ct. Rep. 91, 12 Ann. Cas. 693; McGurk v. Cronenwett, 199 Mass. 457, 19 L.R.A.(N.S.) 561, 85 N. E. 576; Tubular Rivet & Stud Co. v. Exeter Boot & Shoe Co. 86 C. C. A. 648, 159 Fed. 824; Knickerbocker Ice Co. v. Gardiner Dairy Co. 107 Md. 556, 16 L.R.A.(N.S.) 746, 69 Atl. 405; Cumberland Glass Mfg. Co. v. DeWitt, 120 Md. 381, 87 Atl. 927, Ann. Cas. 1915A, 702; Carmen v. Fox Film Corp. 258 Fed. 703; Lewis v. Bloede, 120 C. C. A. 335, 202 Fed. 7; Sweeney v. Smith, 167 Fed. 385.

Insufficiency in the proof of damage is not enough to support a direction to find for the defendant.

Wakeman v. Wheeler & W. Mfg. Co. 101 N. Y. 205, 54 Am. Rep. 676, 4 N. E. 264; Dickinson v. Hart, 142 N. Y. 183, 36 N. E. 801; Oscanyan v. Winchester Repeating Arms Co. 103 U. S. 261, 26 L. ed. 539; Ramsey v. Ryerson, 24 Abb. N. C. 114; Kling v. Corning News Co. 208 N. Y. 334, 101 N. E. 897; Weeks v. Van Ness, 104 App. Div. 7, 93 N. Y. Supp. 337.

It is immaterial whether or not defendant was actually liable to plaintiffs for the losses caused by the collapse of the Hocking Valley pool.

Fire Ins. Asso. v. Wickham, 141 U. S. 564, 35 L. ed. 860, 12 Sup. Ct. Rep. 84; Northern Liberty Market Co. v. Kelly, 113 U. S. 199, 28 L. ed. 948, 5 Sup. Ct. Rep. 422; Llano Improv. & Furnace Co. v. Pacific Improv. Co. 13 C. C. A. 625, 30 U. S. App. 253, 66 Fed. 526; Wahl v. Barnum, 116 N. Y. 87, 5 L.R.A. 623, 22 N. E. 280; Lockwood v. Title Ins. Co. 73 Misc. 296, 130 N. Y. Supp. 824.

Mr. M. E. Harby, for defendant in error:

The cause of action alleged not having been proven, the direction of a verdict in favor of the defendant was correct.

Sheehy v. Mandeville, 7 Cranch, 208, 3 L. ed. 317; Southwick v. First Nat. Bank, 84 N. Y. 420.

The agreement of purported copartnership dated June 5, 1912, was not an enforceable agreement, because it provided for no benefit to Criss, and no detriment to the plaintiffs, and was not founded upon anything but an alleged moral obligation or sense of honor.

Morris v. Norton, 21 C. C. A. 553, 43 U. S. App. 739, 75 Fed. 912; McGuire v. Hughes, 207 N. Y. 516, 46 L. R.A.(N.S.) 577, 101 N. E. 460, Ann. Cas. 1914C, 585.

The agreement of June 5th, 1912, was immoral in its conception and corrupting in its tendency, and therefore void.

Re Renville, 46 App. Div. 37, 61 N. Y. Supp. 549; Hocking Valley R. Co. v. Barbour, 198 App. Div. 341, 179 N. Y. Supp. 819; Lewis v. Wilson, 121 N. Y. 284, 24 N. E. 474; Hyde v. Woods, 94 U. S. 523, 24 L. ed. 264; Belton v. Hatch, 109 N. E. 593, 4 Am. St. Rep. 495, 17 N. E. 225; Van Pelt v. McGraw, 4 N. Y. 110; 2 Cooley, Contr. 3d ed. p. 592; Lamb v. S. Cheney & Son, 227 N. Y. 418, 125 N. E. 817; Deutsch v. Robert Hoe Estate Co. 174 App. Div.

685, 161 N. Y. Supp. 968; Pross v. Excelsior Cleaning & Dyeing Co. 110 Misc. 195, 179 N. Y. Supp. 176; Angle v. Chicago, St. P. M. & O. R. Co. 151 U. S. 1, 38 L. ed. 55, 14 Sup. Ct. Rep. 240; Truax v. Raich, 239 U. S. 33, 60 L. ed. 131, L.R.A.1916D, 545, 36 Sup. Ct. Rep. 7, Ann. Cas. 1917B, 283; Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 62 L. ed. 260, L.R.A. 1918C, 497, 38 Sup. Ct. Rep. 65, Ann. Cas. 1918B, 461; Armstrong v. Toler, 11 Wheat. 258, 6 L. ed. 468; S. C. Posner Co. v. Jackson, 223 N. Y. 325, 119 N. E. 573; Walker v. Cronin, 107 Mass. 555; Berry v. Donovan, 188 Mass. 353, 5 L.R.A.(N.S.) 899, 108 Am. St. Rep. 499, 74 N. E. 603, 3 Ann. Cas. 738; McGurk v. Cronenwett, 199 Mass. 457, 19 L.R.A.(N.S.) 561, 85 N. E. 576; Cornellier v. Haverhill Shoe Mfrs. Asso. 221 Mass. 554, L.R.A.1916C, 218, 109 N. E. 643; Rhoades v. Malta Vita Pure Food Co. 149 Mich. 235, 112 N. W. 940; Brennan v. United Hatters, 73 N. J. L. 729, 9 L.R.A.(N.S.) 254, 118 Am. St. Rep. 727, 65 Atl. 165, 9 Ann. Cas. 698; Kock v. Burgess, 167 Iowa, 727, 149 N. W. 858; Cumberland Glass Mfg. Co. v. De Witt, 120 Md. 387, 87 Atl. 927, Ann. Cas. 1915A, 702; Thacker Coal & Coke Co. v. Burke, 59 W. Va. 253, 5 L.R.A.(N.S.) 1091, 53 S. E. 161, 8 Ann. Cas. 885; Bixby v. Dunlap, 56 N. H. 456, 22 Am. Rep. 475; Employing Printers' Club v. Dr. Blosser Co. 122 Ga. 518, 69 L.R.A. 90, 106 Am. St. Rep. 137, 50 S. E. 353, 2 Ann. Cas. 694; Quinn v. Leathem [1901] A. C. 495, 1 B. R. C. 197, 70 L. J. P. C. N. S. 76, 65 J. P. 708, 50 Week. Rep. 139, 85 L. T. N. S. 289, 17 Times L. R. 749, 27 Eng. Rul. Cas. 66; Lumley v. Gye, 2 El. & Bl. 216, 118 Eng. Reprint, 749, 22 L. J. Q. B. N. S. 463, 17 Jur. 827, 1 Week. Rep. 432, 1 Eng. Rul. Cas. 706; Glamorgan Coal Co. v. South Wales Miners' Federation [1903] 2 K. B. 545, 72 L. J. K. B. N. S. 893, 89 L. T. N. S. 393, 19 Times L. R. 708; Read v. Friendly Soc. [1902] 2 K. B. 732, 1 B. R. C. 503, 71 L. J. K. B. N. S. 994, 51 Week. Rep. 115, 87 L. T. N. S. 493, 19 Times L. R. 20, 66 J. P. 822; Pollock, Torts, 10th ed. p. 343; Anson, Contr. p. 276; Wood, Mast. & S. §§ 230, 231; Schouler, Dom. Rel. § 487; Hammon, Contr. § 350; Randall v. Howard, 2 Black. 585, 17 L. ed. 269; Wyckoff v. Weaver, 66 N. J. L. 648, 52 Atl. 356; Sprague v. Webb, 163 App. Div. 292, 153 N. Y. Supp. 1020; Bliss v. Matteson, 52 Barb. 335; Dent v. Ferguson,

132 U. S. 50, 33 L. ed. 242, 10 Sup. Ct. Rep. 13; Holman v. Johnson, Cowp. pt. 1, p. 341; Bolton v. Amsler, 95 N. Y. Supp. 481; Wald's Pollock, Contr. 3d Am. ed. p. 376; Woodstock Iron Co. v. Richmond & D. Extension Co. 129 U. S. 643, 32 L. ed. 819, 9 Sup. Ct. Rep. 402; Oscanyan v. Winchester Repeating Arms Co. 103 U. S. 261, 26 L. ed. 539; Taenzer v. Chicago, R. I. & P. R. Co. 112 C. C. A. 153, 191 Fed. 543; Pittsburgh Constr. Co. v. West Side Belt R. Co. 151 Fed. 125, affirmed in 11 L.R.A.(N.S.) 1145, 83 C. C. A. 501, 154 Fed. 929; Sirkin v. Fourteenth Street Store, 124 App. Div. 384, 108 N. Y. Supp. 830.

The court will not lend its aid to enforce, and will not award damages for failure to perform, a contract which grows immediately out of or is in part connected with an illegal or immoral act.

Armstrong v. Toler, 11 Wheat. 258, 6 L. ed. 468; Gray v. Hook, 4 N. Y. 449; Pittsburgh Constr. Co. v. West Side Belt R. Co. 151 Fed. 125, affirmed in 11 L.R.A.(N.S.) 1145, 83 C. C. A. 501, 154 Fed. 929.

The alleged obligation or agreement of Criss to secure to plaintiffs the benefit of his seat upon the Stock Exchange in a manner provided by the Exchange rules was repudiated and rescinded by the plaintiffs; accordingly Criss was warranted in going no further with it, and the plaintiffs may not have any recovery against him.

Ralya v. Atkins, 157 Ind. 331, 61 N. E. 726; The Eliza Lines, 199 U. S. 119, 50 L. ed. 115, 26 Sup. Ct. Rep. 8, 4 Ann. Cas. 406; Shaw v. Republic L. Ins. Co. 69 N. Y. 286; New York Phonograph Co. v. Edison, 136 Fed. 600.

Although the defendant's motion was to dismiss the complaint on the merits, the direction by the court that the jury render a verdict for the defendant was correct.

Oscanyan v. Winchester Repeating Arms Co. 103 U. S. 261, 26 L. ed. 539.

Rogers, Circuit Judge, delivered the opinion of the court:

Before considering this case on the merits, there is a preliminary matter to which reference must be made. A brief has been presented to the court which is entitled, "Brief Submitted by Administratrix of Defendant in Error." It is signed by counsel, who describes himself as

"Attorney for Administratrix of Defendant in Error." The brief contains this statement: "The defendant died on January 25, 1919; this brief is submitted by his administratrix, appointed in New Jersey."

Counsel who presented this brief was heard upon the argument. There is, however, the question whether the action has abated, and whether there is a defendant before the court.

In *Bell v. Bell*, 181 U. S. 175, 45 L. ed. 804, 21 Sup. Ct. Rep. 551, the defendant died after argument in the Supreme Court, but before the case was decided. The court affirmed the judgment nunc pro tunc as of the date when the case was argued. As a general rule, the death of a party pending a writ of

error furnishes no ground for the abatement of the suit. In *Green v. Watkins*, 6 Wheat. 260, 5 L. ed. 256, decided in 1821, the court, speaking through Mr. Justice Story, said: "There is a material distinction between the death of parties before judgment, and after judgment, and while a writ of error is depending. In the former case, all personal actions by the common law abate; and it required the aid of some statute, like that of the 31st section of the Judiciary Act of 1789, chap. 20, to enable the action to be prosecuted by or against the personal representative of the deceased, when the cause of action survived. . . . But in cases of writs of error upon judgments already rendered, a different rule prevails. In personal actions, if the plaintiff in error dies before assignment of error, it is said that, by the course of proceedings at common law, the writ abates; but, if after assignment of errors, it is otherwise. In this latter case, the defendant may join in error, and proceed to get the judgment affirmed, if not erroneous; and he may then revive it against the representatives of the plaintiff."

Rule 19 of this court (79 C. C. A. xxx., 150 Fed. xxx.) provides that

whenever, pending a writ of error or appeal in this court, either party shall die, the proper representatives of such deceased party may voluntarily come in and be admitted parties to the suit, and thereupon the case shall be heard and determined as in other cases. In this case that course was not pursued, and the executrix has not been admitted as a party to the suit. But rule 19 also provides that, if the representatives of the deceased do not become parties to the action, the other party may suggest the death on the record, and on motion obtain an order that, unless they do become parties to the action within sixty days, the party moving for the order, if plaintiff in error, shall be entitled to open the record, and, on hearing, have the judgment reversed, if it be erroneous. The executrix of the defendant, Criss, not having asked to be made a party, the plaintiff in error gave her notice that he would move for an order requiring her to become a party within sixty days, and that, if she did not, he would be entitled to a hearing and have the judgment reversed, if it should be found to be erroneous. This court granted the order on November 18, 1919, over the objection of the executrix, who appeared specially and denied the jurisdiction of the court to make the order "or continue the cause against me as executrix of my said husband or otherwise." But, as the executrix never complied with the privilege accorded to her to become a party within the specified period, or, for that matter, at any time since, she is not now and never has been a party to the action, and her counsel was without right to file a brief or to be heard on the argument, and she is without right to costs, if the court concludes that there is no reason why the judgment should be reversed.

At the conclusion of the plaintiff's case the defendant's motion to dis-

Abatement—
death of party
pending appeal.

Party—death
—right of
executor to
hearing.

miss on the merits was based on two grounds:

(1) Because it appeared that the plaintiffs and defendant knew at the time that the last copartnership agreement was made that it violated the rules of the New York Stock Exchange; that two parties have no rights, one against the other, if they depend upon a contract which, at the time of its making, is known to be in violation of some other contract which is obligatory.

(2) Because plaintiff testified that he refused to make the new contract with the defendant, which would have given the plaintiff the right to do business on the New York Stock Exchange, although defendant was ready, willing, and able to make the contract according to his agreement.

The court granted the motion and directed the jury to render a verdict for the defendant. "The case," said the court, "therefore, seems to come down to this: The plaintiffs, with knowledge that the defendant was a member of the New York Stock Exchange and bound by its rules,—in other words, that he had a contractual relation with the Exchange to obey these rules,—entered into a contract with the defendant in violation of these rules. This was a contract to commit a tort, and can form no basis for recovery in his action."

The agreement of January 3, 1905, and that of June 5, 1912, provided for the formation of a "partnership" to carry on a general brokerage business in stocks, bonds, and other securities; but neither agreement in fact or in law created a partnership. Under the terms of these agreements there was to be no division of assets or profits. Criss was to carry on his business in New York as a member of the New York Stock Exchange, and was to retain all his profits arising therefrom. The plaintiffs were to carry on their business in Cincinnati, and were to retain all the profits arising therefrom. It was also provided that the death of any of the parties should not work a dissolution of the firm,

and that the surviving "partners" should enjoy the benefits accruing from the membership of Criss upon the Exchange. The plaintiffs, as purported "partners" of Criss, carried on, as they admit, a large and profitable business with sundry members of the Stock Exchange, on all of which business they received a large per cent of the regular commissions charged by said members of the Exchange, because they were apparently partners of a member of the Exchange. Under their agreement their business was to be conducted under the rules of the Exchange. Those rules provided (xxxiv., §§ 2 and 3) that a partnership might conduct its business on the Exchange under the terms provided for members, if one of the general partners had a membership in the Exchange, and if the interests of the partners in the main house and branch houses of the firm were identical. In this case they clearly were not identical in the sense intended. The rules also provided that the individual members of a firm not members of the Exchange were not to possess the privilege of having their individual transactions executed on the Exchange upon the terms applicable to members. No person elected to membership could be admitted to the privileges of the Exchange until he had signed the constitution of the Exchange. That constitution was the contract between the members, and by signing it the member pledged himself to abide by it. Article 17, § 6, provided that any member adjudged guilty of wilful violation of the constitution, or of any resolution of the governing committee, should be subject to suspension or expulsion therefrom.

We agree that it is the right of the members of this Exchange to have the contract entered into by all of them duly observed by each of them. We agree that if A, who is not a member of the Stock Exchange, enters into an agreement with B, who is a member, for the conduct of business on the Exchange

under its rules, and if that agreement involves a violation of the rules, the agreement so made is an attempt to violate the proprietary rights of the other members of the Exchange. These rights are property rights, and the attempt on the part of A, knowing the rules, to have B violate his agreement with his associates, is a malicious attempt to have B break a contract with the members and obtain for A rights which violate the terms of the constitution by which the members of the Stock Exchange are governed.

The agreement of June 5, 1912, like the agreement of January 3, 1905, violated the rules of the Exchange. If the plaintiffs did not understand when they made it that the agreement of January 3, 1905, violated those rules, they became aware of the fact shortly after the agreement was made; for they were distinctly informed by Criss that the Exchange held that the agreement was in violation of the rules. Nevertheless, the agreement of June 5, 1912, which was not substantially different in the matter now under consideration, continued the objectionable provision. So that, shortly prior to January 25, 1915, the plaintiffs were advised by defendant, Criss, that the agreement of June 5, 1912, had been examined by the officials of the Stock Exchange and held by them to be in contravention of the rules of the Exchange, and that he had been ordered by its officers to abrogate the agreement forthwith under a penalty of a suspension from its membership; that thereafter, and on January 25, 1915, in order to prevent the suspension of defendant, Criss, from the Exchange, the "partnership" of June 5, 1912, was dissolved, it being agreed, however, that the dissolution should not release Criss from any liabilities he was under to the plaintiffs.

The cause of action is stated in paragraph 15 of the complaint. That paragraph is as follows: "That the defendant, although at all times since the 25th day of January, 1915,

a member in good standing of the New York Stock Exchange, and in the full exercise of all the privileges of such membership, has failed and refused, and still fails and refuses, to secure to plaintiffs the benefit of his membership in said Exchange in the transaction of their business, and that by reason of said failure and refusal plaintiffs have been obliged to transact their business as nonmembers of said Exchange, and without the benefits accruing to membership therein."

The agreement upon which the suit is based grew out of and is based upon the agreement of June 5, 1912. And in *Armstrong v. Toler*, 11 Wheat. 258, 6 L. ed. 468, Chief Justice Marshall, speaking for the court, declared that the law was correctly stated which told a jury that "where the contract grows immediately out of, and is connected with, an illegal or immoral act, a court of justice will not lend its aid to enforce it. And if the contract be in part only connected with the illegal transaction, and growing immediately out of it, though it be, in fact, a new contract, it is equally tainted by it."

It appears that the cause of action grows out of the failure of defendant to secure to the plaintiffs the benefit of defendant's membership in the Ex-

Action—to enforce contract—immoral consideration.

change, when to have done so would have caused him to break his contract with the Exchange. The question comes down to this: Can such a cause of action be sustained? There can be no doubt concerning the answer which must be given to such a question. We are satisfied that the agreement into which these parties entered violated the rules of the Exchange, and that all parties, the plaintiffs as well as the defendant, knew that fact when they entered into it. The court below was clearly right in saying that the plaintiffs, with knowledge that "the defendant was a member of the New York Stock Exchange and bound by its rules,—in other words, that he had a

contractual relation with the Exchange to obey these rules,—entered into a contract with the defendant in violation of these rules.”

The courts do not aid the parties to illegal agreements. If any principle of law is settled, it is that a party to an illegal undertaking cannot come into a court, either of law or equity, and ask to have his illegal contract carried out. *Ex dolo malo non oritur actio*, and in *pari delicto potior est conditio defendentis*. It makes no difference whether the contract has been executed, or remains still executory. The defense of illegality may be set up, not as a protection to defendant, but as a disability in the plaintiff. It was said by Lord Mansfield in *Holman v. Johnson*, Cowp. pt. 1, pp. 341, 343: “No court will lend its aid to a man who founds his cause of action on an immoral or an illegal act. If, from the plaintiff’s own stating or otherwise, the cause of action appears to arise *ex turpi causa* or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff.”

In *Dent v. Ferguson*, 132 U. S. 50, 66, 33 L. ed. 242, 248, 10 Sup. Ct. Rep. 13, 19, the Supreme Court, speaking through Mr. Justice Lamar, cited with approval Chancellor Walworth’s opinion in *Bolt v. Rogers*, 3 Paige, 154, 157, in which he said: “Wherever two or more persons are engaged in a fraudulent transaction to injure another, neither law nor equity will interfere to relieve either of those persons, as against the other, from the consequences of their own misconduct.”

In *Hocking Valley R. Co. v. Barbour*, 190 App. Div. 341, 179 N. Y. Supp. 810, recently decided, the plaintiff had sold certain gondola cars to the Central Locomotive & Car Works. Prior to that sale the plaintiff had entered into a contract with one Wardwell for the sale of 300 of the said gondola cars. The

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two sales left about 50 cars belonging to the plaintiff unsold. The plaintiff, apparently being unwilling to hazard a liability to Wardwell by making the sale to the Central Locomotive & Car Works, insisted that the latter should give a bond, executed by it and signed by defendants’ testator, to save the plaintiff harmless from all damages and costs which might result if the plaintiff made the sale. The bond was given, the contract between the plaintiff and Wardwell was broken, and all the cars were delivered to the Central Locomotive & Car Works. An action was then brought by Wardwell against the plaintiff, and judgment was obtained for the breach of contract. Then suit was brought by plaintiff against the executors of the bondsmen upon his contract to save the plaintiff harmless from all damages arising from the failure to deliver the cars to Wardwell. The supreme court, appellate division, first department, held the action could not be maintained, as the bond was unenforceable, having been executed as an inducement to the seller to break his contract with a third party. The bond was executed for an illegal purpose. In the course of its opinion the court said: “Whatever right of action Wardwell may have had against the plaintiff, he had a primary right to have his contract consummated, and as this indemnity bond was given with full knowledge of all the parties of the fact that its purpose was to procure the plaintiff to deliberately violate his contract with Wardwell, the court will not give its aid. The law cares nothing for what a fraudulent party may lose, but will leave the parties where it finds them, and will leave them to disentangle themselves from the meshes in which they have become involved by their fraudulent agreement.”

In *Wald’s Pollock on Contracts*, 3d Am. ed. 376, it is said: “An agreement will generally be illegal, though the matter of it may not be an indictable offense, and though the in-

formation of it may not amount to the offense of conspiracy, if it contemplates any civil injury to third persons. Thus an agreement . . . to carry out some object in itself not unlawful . . . by means of . . . breach of contract or breach of trust is unlawful and void."

In 13 C. J. § 343, it is said that "an agreement is illegal and void where its object is the commission of a civil wrong against a third person, although the wrong may not be an indictable offense or crime, either at common law or under the statutes. This is true, for example, . . . of an agreement to perpetrate a fraud on a third person."

It is clear to us that the plaintiffs' cause of action grows out of an illegal and immoral contract. The immorality of the agreement to allow the plaintiffs the use of defendant's seat on the Stock Exchange, contrary to the rules of the Exchange, and known to be so to all the parties, is so apparent that discussion is really unnecessary; and it is a well-established principle of sound public policy that no court will lend its aid to a plaintiff who grounds his action upon an immoral agreement. Therefore the court below was right in his direction to the jury to find a verdict for the defendant.

The fact that the illegality of the

agreement was not pleaded is of no moment. In *Oscan-yan v. Winchester Repeating Arms Co.* 103 U. S. 261, 26 L.

Pleading—
failure to plead
illegality of
contract—effect.

ed. 539, the court held that the illegality of the contract might be considered without being pleaded, saying: "The position of the plaintiff that the illegality of the contract in suit cannot be noticed, because not affirmatively pleaded, does not strike us as having much weight. We should hardly deem it worthy of serious consideration had it not been earnestly pressed upon our attention by learned counsel. . . . It [the objection of illegality] was one which the court itself was bound to raise in the interest of the due administration of justice. The court will not listen to claims founded upon services rendered in violation of common decency, public morality, or the law. . . . It would not be restrained by defects of pleading, nor, indeed, could it be by the defendant's waiver, if we may suppose that in such a matter it would be offered."

Inasmuch as the cause of action grows out of an agreement which the court cannot recognize, it is unnecessary to consider any other question. The direction of a verdict in favor of the defendant was justified under the circumstances.

There being no defendant in this court, as heretofore stated, there can be no costs.

Judgment affirmed.

ANNOTATION.

Validity of contract which contemplates the violation of a contract with a third person.

It will be noted that cases are not included herein which pass upon the validity of a contract between a third person and an agent or employee, the purpose and effect of which is to tempt the latter to betray the confidence of his principal or employer; e. g., a contract to impart or make use of trade secrets.

The general rule that a contract the object or tendency of which is to place one of the parties thereto under obligation to assume an antagonistic or inconsistent position with regard to his contractual duties to a third person is invalid, has been applied to an agreement between parties, the purpose and object of which are to in-

duce one party to the agreement to violate his contract or agreement with a third person. *ROBERTS v. CRISS* (reported herewith) ante, 698; *Rhoades v. Malta Vita Pure Food Co.* (1907) 149 Mich. 235, 112 N. W. 940; *Moody v. Newmark* (1898) 121 Cal. 446, 53 Pac. 944; *Hocking Valley R. Co. v. Barbour* (1920) 190 App. Div. 341, 179 N. Y. Supp. 810, subsequently before appellate division upon other questions (1920) 192 App. Div. 654, 183 N. Y. Supp. 163.

In *Rhoades v. Malta Vita Pure Food Co.* (1907) 149 Mich. 235, 112 N. W. 940, a contract by the terms of which an employee of a manufacturing company, whose knowledge and skill were essential to the success of the company, agreed to leave the service of the company and enter that of a competitor, the purpose being to injure the business of the former employer, was held invalid, and the employee who breached the agreement was denied recovery of his salary under the second agreement. The court said: "According to plaintiff's proofs, it was understood by him and Mr. Wisner that the primary reason for the agreement between plaintiff and the Pure Food Company was to get the plaintiff out of the employ of the Force Food Company, and thereby deprive that company, as a competitor of the Pure Food Company, of the benefit of his skill and experience in installing the machinery in their plant and manufacturing their product. The agreement was to be kept secret, and plaintiff was not to be openly in the employ of the Pure Food Company, but, 'as a cover,' was to be ostensibly in the employ of others. The object was to 'put Force out of business; and he says: "That is our intention; we have the money back of us and will do it."'" The court concluded that the agreement between plaintiff and defendant was not binding upon the latter for the reason that the transaction was illegal and fraudulent, and did not furnish a good consideration for the promise; and for another reason with which this annotation is not concerned.

In the reported case (*ROBERTS v.*

CRISS, ante, 698) a contract made with a member of a stock exchange, which required the member to violate rules of the exchange, of which the other party was aware, was held invalid, and the right of the latter to maintain an action thereon was denied.

In *Hocking Valley R. Co. v. Barbour* (N. Y.) supra, a bond, the real purpose of which was to indemnify the obligee against any claim for damages on account of his failure to deliver to a third person, pursuant to an existing contract of sale, certain cars which the principal obligor in the bond desired to purchase, was held to rest upon an illegal consideration and an illegal purpose, which the courts would not enforce. So far as appears, the motive of the obligor was to secure the cars for itself, and was not primarily to deprive the third person thereof. The court said: "If the court should enforce this contract, it would be thereby making itself a party to the consummation of the wrong. It matters not in what position the parties may find themselves, where they are in *pari delicto*, a court will aid neither party to enforce any right to claim under such an agreement. Whatever right of action Wardwell [purchaser under previous contract] may have had against the plaintiff, he had a primary right to have his contract consummated; and as this indemnity bond was given with full knowledge of all the parties of the fact that its purpose was to procure the plaintiff to deliberately violate his contract with Wardwell the court will not give its aid. The law cares nothing for what a fraudulent party may lose, but will leave the parties where it finds them, and will leave them to distangle themselves from the meshes in which they have become involved by their fraudulent agreement."

And see also *Moody v. Newmark* (1898) 121 Cal. 446, 53 Pac. 944, which holds to be invalid an agreement by the pledgee of property with the seller thereof that he would not redeliver it to the pledgeor upon the latter redeeming his pledge, until he had also paid the purchase price.

In this connection it may be of interest to compare the principle applied in the foregoing cases with the principle applied in actions to recover damages in behalf of one party to a contract from a third person who induced the breach of the contract. According to the earlier rule, which is still adhered to by many, if not the majority, of the later cases passing upon the question, a person who induced the breach of a contract between parties is not liable in damages to the injured party unless he acted maliciously, and any presumption of malice may be overcome by showing that the breach complained of was due to a contract entered into by the defendant to promote his legitimate interests. See annotation appended to *Wheeler-Stenzel Co. v. American Window Glass Co.* L.R.A.1915F, 1076. In the foregoing note it is said that a person is liable in damages for intentionally and maliciously inducing the breach of a contract unless he can present some legal justification for his conduct in this regard; that the principal question arises in determining what, if anything, will constitute a justification which will relieve a third person from liability for thus interfering with and procuring the breach of a contract to which he was not a party or privy. Upon this point it is said that the cases are not in accord. "Some late cases have extended the doctrine, and held it applicable to cases where the breach of contract was the necessary result of a contract between a third person and one of the original contracting parties, and such third person induced the same with knowledge of the original contract, although his purpose was to promote his own interests." In this connection it is to be noted that the present annotation is limited to cases involving actions to recover on the subsequent contract which caused the breach of the original contract, and it does not involve actions to recover damages for the breach of or to enforce the original contract.

In *Citizens State Bank v. Rosenberger* (1918) 40 S. D. 256, 167 N. W. 154, it appeared that a purchaser deposited

with a bank a portion of the purchase price of real estate, under an agreement with the bank whereby the deposit would be returned to him if the vendor was unable, within a designated time, to convey a good title to the premises. While in this situation the vendor, in order to induce the bank to credit him with the deposit, agreed to indemnify it against loss. This indemnity contract was held valid in the absence of evidence that the purpose thereof was to defraud the vendee of his deposit. The court said: "The fact that the contract sued upon and the parties thereto had in contemplation that these advance part payments had been deposited with the bank should at all times be kept in mind in considering this case. If the specific money representing these advance payments had in fact been specifically deposited in escrow, to have been kept intact, separate and apart from all other moneys of the bank, and the parties to this action had been dealing with respect to money so held in escrow, then there would have been a different proposition confronting the parties and this court, as a different obligation would then have been resting upon the bank; but in this case the money was deposited in the bank the same as any other general deposit, and became intermingled with all other moneys of the bank, and there was no obligation resting on the bank to return the specific money deposited, but the only obligation resting on the bank was that of debtor agreeing to pay a large sum of money to whomever eventually might be entitled thereto under the contract for the sale of land. This is the construction that the parties to this action placed upon the deposit of the money with the bank. The money in question never, as a matter of fact, became an escrow, although so denominated. The contracts set out in the complaint indicate a general, and not a special, deposit. A general deposit of money such as was contemplated by the parties to this suit was not in fact an escrow of money, but was nothing more than a general deposit. . . . We fail to discover any principle of

public policy in relation to the giving of the indemnity which permitted Rosenberger to procure the amount of the deposit from the bank. It might as well be said, for all this court knows, that Rosenberger and the surety company conspired to fleece the bank."

In *J. I. Case Threshing Mach. Co. v. Fisher* (1909) 144 Iowa, 45, 122 N. W. 575, where defendants were at the same time engaged in selling on commission machines manufactured by plaintiff and by another company, both operating under a license from a third company, it was held, in upholding a counterclaim for commissions, that if the plaintiff, on being satisfied that defendants were getting better terms from the second company than it (plaintiff) was offering, saw fit to add a further commission on business already done for it by defendants as an inducement to them to abandon further relations with the second company, there was nothing illegal in doing so, it not appearing that the defendants had agreed to act exclusively as agents for the second company. The court added that even if there

were such exclusive agency, the plaintiff might negotiate for its abandonment without legal wrong. This was apparently on the further assumption that there was no binding contract for an unexpired period. The court said: "If the contract is one by its terms or in its nature terminable, there is no wrong in offering inducements to the party to terminate it in the interest of the person offering inducement for such action to his own advantage."

The suggestion by plaintiff of illegality in an attempt to induce the second company to violate its contract with the third company, by the terms of which the second company was bound under penalty not to sell the machines for less than a specified price, was disposed of by the statement that it was wholly without force as to defendants' conduct, as it did not appear that they had any knowledge of the terms of such contract; and, so far as appears, they may have assumed that the plaintiff company and the second company were at liberty to compete as to the terms on which they would sell machines. A. G. S.

BOARD OF COUNTY COMMISSIONERS OF OKFUSKEE COUNTY,
Plff. in Err.,
v.

TOM HAZLEWOOD, Ex-County Attorney, et al.

Oklahoma Supreme Court — September 7, 1920.

(— Okla. —, 192 Pac. 217.)

Attorney — adjudging percentage of recovery.

1. Well-settled principles of public policy forbid courts, in the absence of statutory authority or consent of the attorney's client, to adjudge and decree the attorney a portion of the proceeds of a judgment recovered by the attorney in favor of his client.

[See note on this question beginning on page 713.]

— county — percentage of collections.

2. Under § 1557, Rev. Laws 1910, a county attorney is entitled to 25 per cent of all forfeited bonds and recognizances actually collected by him

during his term of office, and where a judgment on a forfeited bond or recognizance is recovered by him on behalf of the state, he is only entitled to 25 per cent of the amount thereof

Headnotes by RAMSEY, J.

actually collected by him, and not entitled to an amount equivalent to 25 per cent of the judgment.

Judgment — in favor of county — direction for disbursement.

3. That part of a judgment recovered by a county attorney on a forfeited bond or recognizance, directing the clerk of the court to disburse the proceeds of the judgment, when received, so as to pay the county attorney a sum equivalent to 25 per cent of the entire judgment, is void as to the state and county, it appearing that neither the state nor county consented thereto, nor was represented by an attorney or duly authorized agent.

Attorney — transaction with client — burden of proof of fairness.

4. Although the relation of attorney and client does not render the attorney incapable of entering into a transaction or contract with his client, nevertheless the burden of proof is upon the attorney to prove fairness and the best of faith, and that the merits of the transaction between him and his client were uninfluenced by the relationship.

[See 2 R. C. L. 966.]

— right to deal in subject of employment.

5. An attorney has no capacity to deal for himself in the subject-matter

of his employment, without his client's knowledge and consent.

[See 2 R. C. L. 970, 971.]

— investigation of fairness.

6. Where an attorney deals in the subject-matter of his employment without the knowledge and consent of his client, the question of good faith or fairness or adequacy of the consideration will not be inquired into. The door is shut to all investigation, on the principle that one cannot serve two masters where self-interest is involved, and a transaction by an attorney involving the subject-matter of his employment, without the knowledge and consent of his client, is vitiated by the law, irrespective of its merits, fairness, or good faith; and whether it is injurious to the client is immaterial, because the law does not stop to speculate upon the probability that the attorney resisted temptation. The law removes the temptation by proclaiming in advance that the attorney shall not deal for himself with the subject-matter intrusted to him by his client, without the knowledge and consent of his client.

[See 2 R. C. L. 971.]

— recovery by county.

7. The board of county commissioners may recover from a county attorney and his bondsmen all sums received by the county attorney, by virtue of his office, in excess of legal fees and compensation.

ERROR to the County Court for Okfuskee County (Ballard, Special J.) to review a judgment in favor of defendants in an action brought to recover the amount received by defendant Hazlewood as county attorney, in excess of his legal fees and compensation. *Reversed.*

The facts are stated in the opinion of the court.

Mr. T. S. Hurst, for plaintiff in error:

The county attorney is entitled only to one fourth of the amount of money collected on forfeited bail bonds during his term of office, and is not entitled to one fourth of the amount of judgments obtained, whether collected or not.

36 Cyc. 1116; Regents of University v. Board of Education, 20 Okla. 809, 95 Pac. 429; Cole v. McKune, 19 Cal. 422; Herrn v. Sharp County, 81 Ark. 38, 98 S. W. 704; State v. Barron, 74 Ind. 374; State v. Stone, 72 Ala. 185; Power v. Fleming County, 99 Ky. 200, 35 S. W. 541.

The money came into defendant's hands by virtue of his office, and the sureties on his official bond are liable for the amount which he received and was not entitled to, and which he did not account for to the county treasurer.

Hughes v. Oklahoma County, 50 Okla. 410, 150 Pac. 1029.

The plea of *res judicata* will not lie in this case.

23 Cyc. 1237, 1290; Woodworth v. Hennessey, 32 Okla. 267, 122 Pac. 224; Garfield County v. Huett, 35 Okla. 713, 130 Pac. 927; Harris v. Beaven, 11 Bush, 254.

Ramsey, J., delivered the opinion of the court:

J. C. Wright, county attorney of Okfuskee county, obtained a judgment in favor of the state of Oklahoma in the district court on May 22, 1911, against Rudd, for \$1,050 on two forfeited appeal bonds, wherein Will Edwards had been convicted in the county court for selling liquor. An appeal from said judgment was prosecuted to this court, and W. H. Dill, as surety, executed a superseas bond to stay execution on the judgment. The judgment was affirmed by this court on November 11, 1913. *Edwards v. State*, 39 Okla. 605, 136 Pac. 577. Defendant in error, Tom Hazlewood, was county attorney of Okfuskee county from the first Monday in January, 1913, until January, 1915. During his term of office Hazlewood filed suit against Dill, surety on the superseas bond, and recovered a judgment on October 9, 1914, for \$1,296.92. The said judgment was rendered in favor of the plaintiff in a case styled "The State of Oklahoma, Plaintiff, v. W. H. Dill, Defendant." The judgment contained the following order, to wit: "It is further ordered that the clerk of this court disburse the above-named sum as follows, to wit: To the treasurer of Okfuskee county, for the use and benefit of the public school fund of said county, \$946.97; to Tom Hazlewood, county attorney, the sum of \$315.65; to pay the costs in case No. 587, *State of Oklahoma v. J. L. Rudd*, in the sum of \$34.30; and for costs in this case in the sum of \$6.05."

Dill paid to the clerk of the district court the sum of \$400 on said judgment, whereupon the clerk paid over to Hazlewood the sum of \$315.65, same being 25 per cent of the judgment. Plaintiff in error contends that Hazlewood was only entitled to 25 per cent of the \$400 collected during his term of office. The balance of the judgment was paid after Hazlewood's term of office expired.

1. Under the provisions of § 1557,

Rev. Laws 1910, providing that the county attorney, in addition to his annual salary, "shall receive 25 per cent of all forfeited bonds and recognizances by him collected," Hazlewood was not entitled to 25 per cent of the judgment.

He was only entitled to 25 per cent of that part of the judgment actually collected by him during his term of office. Section 1557, Rev. Laws 1910, means exactly what it says, and it would be difficult to clarify its language.

"The meaning of the word 'collect,' as given by the lexicographers, is 'to gather; to assemble.' When used with reference to the collection of money, it often implies much more than the mere act of receiving the money." *Hubbell v. Bernalillo County*, 13 N. M. 546, 86 Pac. 430; *Purdy v. Independence*, 75 Iowa, 356, 39 N. W. 641.

The Indiana Statute of 1876 (1 Rev. Stat. p. 475, § 234), prescribing certain fees for prosecuting attorneys, contained this provision: "And when he prosecutes to final judgment against the defendant, ten (10) per cent on money collected," as additional compensation.

In *State v. Barron*, 74 Ind. 374, the court held that the prosecuting attorney was not entitled "to any such percentage, unless it appeared that he had prosecuted to final judgment a suit for the recovery of the forfeited money, and even then he would only be entitled to 10 per cent on the money collected on such judgment." See also *Ex parte Ford*, 74 Ind. 415; *State ex rel. Atty. Gen. v. Denny*, 67 Ind. 148; *State ex rel. Tompkins v. Stone*, 72 Ala. 185; *Knox v. State*, 9 Baxt. 202; *Power v. Fleming County*, 99 Ky. 200, 35 S. W. 541; *Adams v. Bristol*, 126 App. Div. 660, 111 N. Y. Supp. 231.

2. Defendants contend that the judgment of the district court in the case against Dill is *res judicata*, because of that judgment the court adjudged that Hazlewood was entitled to \$315.65, and directed the clerk to pay him that sum. Neither the state

nor county was a party to that part of the judgment directing the clerk to pay over to Hazlewood \$315.65. Hazlewood was attorney for the state in that case, and as county attorney was the legal representative of the county. His personal interest was adverse to the state and county, and, in so far as the judgment awards Hazlewood \$315.65, it is not binding on the state or county, and not res judicata. Hazlewood was not the plaintiff in the action, and there is nothing in the agreed statement of facts to show that the state or county was represented by any independent counsel. Neither the state nor county had any opportunity to defend against Hazlewood's claim.

Well-settled principles of public policy forbid courts, in the absence of statutory authority or consent of the attorney's client, to adjudge and decree the attorney a portion of the proceeds of the judgment recovered by the attorney for his client. The relation of attorney and client is one of trust and confidence, requiring a high degree of fidelity and good faith. Even in transactions between attorney and client, the burden of proof is upon the attorney to prove

—transaction with client—burden of proof of fairness.

fairness and the best of faith, and that the transaction between him and his client was uninfluenced by the relationship. There is no incapacity for dealing with a client, but there is absolute incapacity of an attorney to deal for his own interest in the subject-matter of the litigation, without his client's knowledge and consent. *Payne v. Beard*, 159 C. C. A. 341, 247 Fed. 247; *Hanson v. Sjostrom*, 171 C. C. A. 286, 260 Fed. 460; *Hermann v. Hall*, 133 C. C. A. 619, 217 Fed. 947; *Robertson v. Chapman*, 152 U. S. 673, 38 L. ed. 592, 14 Sup. Ct. Rep. 741. But in a transaction by an attorney of

this kind, where the client was neither consulted nor represented by himself or an authorized agent, the question of good faith is not inquired into. The door is shut to all investigation. On the principle that a man cannot serve two masters, especially where self-interest is involved, the transaction is vitiated by the law, irrespective of its merits, fairness, or good faith; and whether it is injurious to the client is immaterial. The law does not stop to speculate upon the probabilities that the attorney resisted temptation; it removes the temptation by proclaiming in advance that he shall not deal for himself, without the knowledge and consent of his client, with the subject-matter intrusted to him and involved in his representation as attorney. See *Harris v. Beaven*, 11 Bush, 254; *Michoud v. Girod*, 4 How. 503, 11 L. ed. 1076; *Thornton, Attys.* §§ 164, 166; *Kimball v. Ranney*, 122 Mich. 160, 46 L.R.A. 403, 80 Am. St. Rep. 548, 80 N. W. 992; *Cunningham v. Jones*, 37 Kan. 477, 1 Am. St. Rep. 257, 15 Pac. 572.

3. The clerk of the court, in paying over to Hazlewood under the direction of the judgment \$315.65, instead of \$100, acted ministerially as the amanuensis of the court. *Hirsh v. Twyford*, 40 Okla. 220, 139 Pac. 313. But the original wrong was committed by Hazlewood in either procuring the court to make the order directing the clerk to pay him \$315.65, or permitting the court to make such order. He had no right to the \$215.65, and his acceptance of that amount, in excess of the amount due him, constituted the collection of illegal fees and compensation by virtue of his office, for which he and his bondsmen are responsible. *Hughes v. Oklahoma County*, 50 Okla. 410, 105 Pac. 1022.

The judgment of the trial court is reversed, and the cause remanded, with directions to the court to enter

—investigation of fairness.

Judgment—in favor of county—direction for disbursement.

Attorney—adjudging percentage of recovery.

—right to deal in subject of employment.

—recovery by county.

(— Okla. —, 192 Pac. 217.)

judgment on the agreed facts against Hazlewood and his bondsmen, J. L. Sandlin and J. N. Jones. Harrison, Vice Ch. J., and Kane, Pitchford, Johnson, and Higgins, JJ., concur.

ANNOTATION.

Power of court to adjudge and decree to attorney part of the judgment recovered by his client.

It will be seen that it is held in the reported case (OKFUSKEE COUNTY v. HAZLEWOOD, ante, 709) that, in the absence of statute or the consent of the client, it is error for a court, in entering a judgment at law, to enter a part of it in favor of the attorney.

No case has been found which questions the soundness of such doctrine.

Where an award has been made to a client for property taken in eminent domain by a city, the court may not, on the attorney's application, direct what part of the award the city is to pay to the client, and what part to the attorney. The attorney must sue, or the client voluntarily consent to have the court determine the matter, as he does where he asks for an order against the attorney for the distribution of a fund actually in court which is subject to the attorney's lien. *Re Lexington Ave.* (1898) 30 App. Div. 602, 52 N. Y. Supp. 203, affirmed in (1898) 157 N. Y. 678, 51 N. E. 1092.

In equity cases, however, the decree sometimes provides that a payment of fees be made to a named attorney for a party.

In *Central R. & Bkg. Co. v. Pettus* (1884) 113 U. S. 116, 28 L. ed. 915, 5 Sup. Ct. Rep. 387, the court said that complainants in a certain equity suit "are entitled to be allowed, out of the property thus brought under the control of the court, for all expenses properly incurred in the preparation and conduct of the suit, including such reasonable attorney's fees as were fairly earned in effecting the result indicated by the final decree. And when an allowance to the complainant is proper on account of solicitors' fees, it may be made directly to the solicitors themselves, without any application by their immediate client."

In *Colley v. Wolcott* (1911) 109 C. C. A. 425, 187 Fed. 595, where the serv-

ices of complainant's solicitors had resulted in rescuing from spoliators a large amount of property, not only for the benefit of the complainant, but for the benefit of all the stockholders of a company, and by means of these services the property was brought under the control of the court, the court said: "In these circumstances nothing is plainer than that the cost of a restitution of this kind should be borne by those benefited by it. . . . While allowances for solicitor's fees have sometimes been made in favor of the complainants in the suit, no reason is apparent why they should not be made directly to those who are entitled to it. They are officers of the court, and should properly be protected, when a trust fund created by them is in the custody of the court and subject to final disposition by it."

In *Princeton Coal & Min. Co. v. Gilchrist* (1912) 51 Ind. App. 216, 99 N. E. 426, an action brought by a minority stockholder of a corporation, charging that majority stockholders were largely indebted to the corporation, the judgment directed the defendants to pay each a certain sum to the clerk of the court, out of which the clerk was directed to pay the plaintiff's attorneys \$1,000, and to pay the remainder to the treasurer of the corporation; thereafter the plaintiff sold his stock, and all the stockholders voted to satisfy the judgment, which was done. In an action by the attorneys to carry the former decree into examination, the court said: "We think it clear that in an equitable proceeding by a minority stockholder to require those in control of the affairs of a corporation to restore to it property or money wrongfully withheld, the court in its decree may provide that plaintiff be reimbursed, out of the fund recovered, for his costs, charges,

and counsel fees. . . . It has been held by the United States Supreme Court, as well as by this court, that in an action where an allowance may properly be made to the complainant on account of attorney's fees, the same may be made directly to the attorneys. *Central R. & Bkg. Co. v. Pettus* (1885) 113 U. S. 116, 124, 28 L. ed. 915, 918, 5 Sup. Ct. Rep. 387; *Traylor v. Richardson* (1891) 2 Ind. App. 452, 28 N. E. 205."

This doctrine in equity cases was apparently followed;

—where counsel appearing for the state tried to have a will construed in behalf of a charity, and succeeded in securing a large sum in that behalf, the court directed the executor to pay them an amount allowed for their services, *Re Creighton* (1913) 93 Neb. 90, 139 N. W. 827;

—where the court, having a fund in court for distribution, made an allowance to certain solicitors for the plaintiff, who had withdrawn, for their services up to the time of their withdrawal, *Rumsey v. People's R. Co.* (1900) 84 Mo. App. 508;

—where, a complainant's efforts having brought into court a fund which was subject to no fixed liens, and there were enough claims prior to his own to exhaust the fund, his attorney's fees were directed paid before these preferred claims, *Campbell v. Provident Sav. & L. Soc.* (1900) — Tenn. —, 54 L.R.A. 817, 61 S. W. 1090;

—where, after the recovery of a verdict in favor of the plaintiff in a policy of tornado insurance, on a motion for distribution of the fund, the court "entered judgment upon the verdict, allowed an attorney's fee" of a certain sum "in favor of" M, the plaintiff's attorney, and directed that the balance be distributed among mortgagees, although both the mortgagees and the plaintiff objected to the allowance of fees to the plaintiff's attorney, *Lomack Home v. Iowa Mut. Tornado Ins. Co.* (1912) 155 Iowa, 728, 133 N. W. 725, petition for rehearing overruled in (1912) — Iowa, —, 137 N. W. 936;

—where, in an equity case, inter-

veners who were entitled to share had benefited by the litigation, the court ordered that the defendants pay into court a certain sum for distribution, and that 10 per cent of that amount be taxed against and paid out of the fund to the complainant's solicitors, *Adams v. Kehlor Min. Co.* (1889) 38 Fed. 281.

In *Weigand v. Alliance Supply Co.* (1897) 44 W. Va. 133, 28 S. E. 803, it was held that "where a fund is brought into a court of equity through the services of an attorney who looks to that alone for his compensation, although his interest cannot technically be called a "lien," he is regarded as the equitable owner of the fund, to the extent of the reasonable value of his services; and the court administering the fund will intervene for his protection, and award him a reasonable compensation, to be paid out of it."

In some equity cases, the court will direct a payment to be made to an attorney out of his client's share.

Thus the court, in an equity case, directed an allowance out of a party's share to be paid to his attorneys before the creditors of such party, who were also parties, should be paid. *Kirk v. Breed* (1896) 3 Ohio N. P. 122.

So where an attorney has by his labor brought a fund into a court of equity, and his client thereupon assigns his interest, and the assignee endeavors to take the fund out of court, ignoring the attorney, the court may make the attorney an allowance out of his client's share. *McKelvy's Appeal* (1885) 108 Pa. 615.

And in *Olds v. Tucker* (1880) 35 Ohio St. 581, the principle was recognized in an equity case of making the compensation of an attorney a charge against his client's share of a fund in the hands of a receiver. See also *Re Creighton* (Neb.) *supra*.

For examples of other equity cases, where the payments were apparently directed to be made to named attorneys, see *Edwards v. Bay State Gas Co.* (1909) 172 Fed. 971; *Milliman v. Seed* (1917) 206 Ill. App. 362; *Davis v. Gemmell* (1891) 73 Md. 530, 21 Atl. 712; *State ex rel. Brown v. Wayne County Agri. Soc.* (1917) 101 Neb. 427, 163 N. W. 764.

For an order in a divorce suit, directing that a sum to enable the plaintiff to prepare for trial be paid to her named attorneys, see *Traylor v. Richardson* (1891) 2 Ind. App. 452, 28 N. E. 205.

In partition suits the practice varies in different jurisdictions. In Illinois, for example, it is error in a partition action to make an allowance to a solicitor by name. *Lilly v. Shaw* (1871) 59 Ill. 72; *McMullen v. Reynolds* (1904) 209 Ill. 504, 70 N. E. 1041; *Fread v. Hoag* (1907) 132 Ill. App. 233.

On the other hand, in Tennessee, it seems to be the practice in partition to direct fees to be paid to the solicitors, naming them. *Scott v. Marley* (1911) 124 Tenn. 388, 137 S. W. 492; see also *Pate v. Maples* (1897) — Tenn. —, 43 S. W. 740.

The court in partition may not decree that one half of the recovery in favor of infants shall inure to the benefit of their attorneys. *White v. Simonton* (1904) 34 Tex. Civ. App. 464, 79 S. W. 621, where the court said: "The appellees are all minors, and the attorneys themselves were not before the court as parties, and there is no pleading warranting such finding. In addition, we doubt whether, in any event, the attorneys would be entitled to such relief."

It is necessary to bear in mind the limitations of the equity rule.

Where the court is not administering a trust fund, but merely deciding a contest in equity between individuals as to their rights in certain property, the court has no power to fix fees as between attorney and client. *Cauthen v. Cauthen* (1900) 76 S. C. 226, 56 S. E. 978.

In *Hand v. Savannah & C. R. Co.* (1883) 21 S. C. 162, the court said: "No one can legally claim compensation for voluntary services to another, however beneficial they may be, nor for incidental benefits and advantages to one, flowing to him on account of services rendered to another by whom he may have been employed. Before legal charge can be sustained, there must be a contract of employment either expressly made or superinduced by the law upon the facts. And thus it is, as we have said above, that in the case of executors, administrators, and other trustees, and in creditors' bills, and suits of that nature, where the representative of a class is the principal and first actor, either as plaintiff or defendant, the class being so numerous as not to be conveniently made parties individually, the law superinduces a contract on the part of all having a common interest that the common property shall be chargeable with the reasonable contracts as to fees, expenses, etc., of the representative." B. B. B.

KENTUCKY GLYCERINE COMPANY, Appt.,

v.

COMMONWEALTH OF KENTUCKY.

Kentucky Court of Appeals — September 14, 1920.

(188 Ky. 820, 224 S. W. 360.)

Nuisance — explosive in highway — misdemeanor.

The keeping of high explosives in a public highway in a populous community, without guard or signal, to the terror, alarm, and great danger of the citizens, is a common nuisance indictable at common law.

[See note on this question beginning on page 719.]

APPEAL by defendant from a judgment of the Circuit Court for Wayne County convicting it of maintaining a common nuisance. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Benton & Davis and Bertram & Bertram, for appellant:

Courts will not condemn as a nuisance, a business, or a course of conduct in a business, that is producing or transporting an article essential to the public defense or of extensive private consumption.

People v. Sands, 1 Johns. 78, 3 Am. Dec. 296; *Dumesnil v. Dupont*, 18 B. Mon. 800, 68 Am. Dec. 750; *Kinney v. Koopman*, 116 Ala. 310, 37 L.R.A. 497, 67 Am. St. Rep. 119, 22 So. 593.

There is no allegation in the indictment that the defendant's act was not necessary nor reasonably required in the conduct of its business.

Louisville & N. R. Co. v. Com. 158 Ky. 773, 166 S. W. 237.

The transportation of nitroglycerin or other explosives along a public highway is not a nuisance.

12 Am. & Eng. Enc. Law, 506; *People v. Sands*, supra.

Messrs. Charles J. Dawson, Attorney General, and T. B. McGregor, Assistant Attorney General, for the Commonwealth:

A common nuisance is a misdemeanor at common law and punishable as such under indictment, and, not having been changed by statute, is still in force in this state.

Com. v. Beals, — Ky. —, 119 S. W. 813; *Owensboro v. Hope*, 33 Ky. L. Rep. 426, 110 S. W. 272; *Sullivan v. Com.* 13 Ky. L. Rep. 397; *Louisville & N. R. Co. v. Com.* 158 Ky. 773, 166 S. W. 237; *Clark*, *Crim. Law*, p. 398.

Explosives have long been recognized as constituting one of the commonest forms of nuisance.

11 R. C. L. 657; 20 R. C. L. "Nuisance," § 25; *Actiesselskabet Ingrid v. Central R. Co.* L.R.A.1916B, 716, and note, 132 C. C. A. 316, 216 Fed. 72; *People's Gas Co. v. Tyner*, 131 Ind. 277, 16 L.R.A. 443, 31 Am. St. Rep. 433, 31 N. E. 59, 17 Mor. Min. Rep. 481; *Dumesnil v. Dupont*, 18 B. Mon. 800, 68 Am. Dec. 750; *Ft. Worth & D. C. R. Co. v. Beauchamp*, 95 Tex. 496, 58 L.R.A. 716, 93 Am. St. Rep. 864, 68 S. W. 502; *Rudder v. Koopman*, 116 Ala. 332, 37 L.R.A. 489, 22 So. 601.

When defendant left its wagon on the side of a public highway, unguarded and unprotected and without any danger signals displayed, and in the vicinity of residences, and in a pop-

ulous community, and near the corporate limits of a town, this act was negligence or nuisance per se.

Southern R. Co. v. Adkins, 133 Ky. 264, 117 S. W. 321, 119 S. W. 820; *Wilson v. Phoenix Powder Mfg. Co.* 40 W. Va. 413, 52 Am. St. Rep. 890, 21 S. E. 1035; *Harrington v. Providence*, 38 L.R.A. 308, note; *State ex rel. Hopkins v. Excelsior Powder Mfg. Co.* 259 Mo. 254, L.R.A.1915A, 615, 169 S. W. 267; 19 Cyc. 6; *Henry v. Cleveland, C. C. & St. L. R. Co.* 67 Fed. 426.

Where there is any evidence, however slight, tending to connect the accused with the crime charged in any of its degrees, the case will be submitted to the jury, and motion for peremptory instruction overruled.

Gordon v. Com. 186 Ky. 508, 124 S. W. 806; *Com. v. Little*, 140 Ky. 550, 131 S. W. 387.

Settle, J., delivered the opinion of the court:

This is an appeal from a judgment of conviction, entered in the Wayne circuit court, upon a verdict finding the appellant corporation guilty of maintaining a common nuisance, and fixing its punishment at a fine of \$200. The prosecution was under an indictment charging that offense.

The grounds filed in support of its motion for a new trial, made in the court below, are relied on by appellant for the reversal of the judgment asked of this court, viz.: (1) Error of the trial court in overruling the appellant's demurrer to the indictment; (2) that the verdict is unsupported by and contrary to the evidence; (3) error of the trial court in instructing the jury.

Regarding the first of these grounds it appears from the allegations of the indictment that the appellant in Wayne county, and within a year before the finding of the indictment, then engaged in the conduct of its business of manufacturing and selling nitroglycerin, "a highly explosive and dangerous agency, in conveying and transporting same over and through said

county, did unlawfully, at all times, and continuously, leave large quantities of said nitroglycerin, highly explosive and easily ignited by friction or jar, in and upon the public road near the home of H. Bates, and in a thickly populated community, where people and vehicles frequently passed; and this without danger signals or any person in charge of same, and without any precautions being taken to safeguard the community or persons living in the vicinity or passing said place where same was so left and stored, to the terror, alarm, and great danger, and to the common public nuisance, of the citizens of the commonwealth in the neighborhood residing, being, and having the right to reside and be, contrary to law and against the peace and dignity of the commonwealth of Kentucky." The facts thus alleged define and constitute a misdemeanor, declared by the common law a "common nuisance," for the creating or maintaining of which it provides a penalty against the offender, consisting of a fine in any amount or imprisonment in jail any length of time, or both such fine and imprisonment, in the discretion of the jury. As the common law de-

Nuisance—
explosive in
highway—
misdemeanor.

fining and denouncing this offense has not been abrogated or changed by any

statute of this state, it is still in force therein, and the offense punishable according to its provisions.

Of the many definitions of the offense given by writers on criminal law, no better one can be found than the following, contained in Clark's Criminal Law, p. 398: "A common or public nuisance, which is a misdemeanor at common law, is a condition of things which is prejudicial to the health, comfort, safety, property, sense of decency, or morals of the citizens at large, resulting either (a) from an act unauthorized by law, or (b) from neglect of a duty imposed by law."

Nitroglycerin, however necessary its manufacture and use, being per se a dangerous substance because of

its great destructive force and power as an explosive, and the exceptional ease with which it may be caused to explode, must be handled with such care as would be commensurate with such danger; and, while to make the owner liable in a civil action for an injury resulting from its explosion proof of negligence should be made, where, as in this case, the act complained of is not the occurrence of an explosion or a resulting injury, but the unlawful storing or continuous placing of the explosive by the owner in a manner and in a locality which made its presence dangerous to the lives and property of the surrounding residents, if the facts alleged in the indictment were established by the evidence, appellant's conviction was authorized, as such continued storing or placing of the explosive in a thickly populated community in the manner charged, being a menace to life and property, constitutes a nuisance per se; and this would even be true if the nitroglycerin had been repeatedly left unguarded by appellant in a wagon in a public road on its own premises, traveled by others of a populous community. *Southern R. Co. v. Adkins*, 133 Ky. 264, 117 S. W. 321, 119 S. W. 820; *Ft. Worth & D. C. R. Co. v. Beauchamp*, 95 Tex. 496, 58 L.R.A. 716, 93 Am. St. Rep. 864, 68 S. W. 502; 2 R. C. L. § 25; *People's Gas Co. v. Tyner*, 131 Ind. 277, 16 L.R.A. 443, 31 Am. St. Rep. 433, 31 N. E. 59, 17 Mor. Min. Rep. 481. Considered as a whole, the indictment sets forth in substantially correct form, and in conformity to the requirements of the Criminal Code, the acts constituting the common-law offense charged; hence the demurrer to the indictment was properly overruled by the trial court.

Appellant's complaint that the verdict is unsupported by the evidence is refuted by the evidence itself contained in the bill of exceptions, which was to the effect that appellant is engaged in the manufacture, in Wayne county, of nitroglycerin for use in exploding oil wells where crude oil production ob-

tains. The principal market for the explosive at the time of and prior to the finding of the indictment was in the oil fields of Allen and Warren counties, to which it was hauled by appellant from Frazer, in Wayne county, over the usual highways of travel, in wagons having painted on them the appellant's corporate title, "Kentucky Glycerine Company." To lessen the danger of explosion of the nitroglycerin while transporting it, the wagons were provided with specially constructed springs, also padded boxes in which the nitroglycerin, after being placed in cans, was deposited. So highly explosive is the nitroglycerin that a little of it left adhering to a can after it has supposedly been emptied has been known to explode with dangerous force and effect, and with the cans filled to their capacity an explosion of a wagonload of the nitroglycerin in a populous neighborhood would inevitably prove disastrous in the extreme, both to life and property. It further appears from the evidence that appellant's wagons, or at least one of them, used in its business of transporting nitroglycerin, were repeatedly left, both day and night, for hours at a time and often all night, covering a period of more than a month, within a year of and down to the finding of the indictment, in or upon the side of the public road leading into the town of Monticello, the county seat of Wayne county, in a thickly populated neighborhood, immediately contiguous to its corporate boundary; and, when so placed and permitted to remain, the wagon was oftener than not loaded with nitroglycerin, and invariably left without anyone guarding it, and without signals in the form of placards by day, lights by night, or other precautions, to warn residents of the vicinity and travelers of the highway of the explosive nature of the nitroglycerin, or remnants thereof, in the wagon, and of the danger attending its presence in such a locality, where a collision from a passing vehicle or person with it might be sufficient to produce such a jar as

would cause an explosion of its contents.

The above evidence is uncontradicted, and must be taken as true. Manifestly it establishes appellant's guilt of creating and maintaining a nuisance that menaced the safety of Bates, near whose home it existed, that of other near-by residents, and of all persons traveling the highways at that point. In view of this evidence, no reason is perceived for the appellant's contention that the verdict was unauthorized. In our opinion any other verdict than that returned would have been without support from the evidence; hence the refusal of the trial court to direct a verdict for appellant was not error.

Appellant's complaint of instruction 1, given by the trial court, is also untenable. It is insisted that the court erroneously assumed in this instruction that the acts charged in the indictment as constituting the offense endangered the lives and property of residents in the vicinity where appellant's wagons loaded with nitroglycerin were placed. The instruction does, in effect, declare nitroglycerin a dangerous explosive, and this assumption was authorized by the evidence, but it left it to the jury to determine whether the lives and property of persons in the vicinity where it was left were subjected to danger from its presence; telling them, in substantially correct terms, that if they believed from the evidence beyond a reasonable doubt that appellant's servants left its wagon containing deposits of nitroglycerin in sufficient quantities to be dangerous as an explosive in or near Monticello, and same was likely to explode, thereby endangering life and property, they should find it guilty. This, with the further usual instruction as to reasonable doubt, seems to have fairly advised the jury of the law of the case.

As in our opinion the record shows no prejudicial error occurring on the trial in the court below, the judgment is affirmed.

ANNOTATION.

Storing of explosives in highway as a nuisance.

"It is a general rule that the manufacture and keeping of large quantities of gunpowder and other explosives in, or dangerously near to, public places, such as towns and highways, is a public nuisance, and indictable as such, whether negligently or carefully conducted; and this was the rule at common law. Upon the trial of such indictments, it is a question of fact for the jury, whether the keeping and depositing, or the manufacturing, of such substances, really does create danger to life and property as alleged, and this must be a question of degree, depending on the circumstances of each particular case." 11 R. C. L. 655.

The present concern is as to the effect of storing the explosives in the highway.

It is held in the reported case (*KENTUCKY GLYCERINE CO. v. COM.* ante, 715) that the storing of high explosives in a public highway in a populous community, without guard or signals, to the terror, alarm, and great danger of the citizens, is a common nuisance indictable at common law.

And in *Holman v. Clark* (1917) 272 Mo. 266, 198 S. W. 868, an action for injuries to property from the explosion of dynamite stored by a sewer contractor in a shed located in a city street, it was held that the facts warranted the conclusion that the contractor had created a nuisance in the street, it appearing, as stated in the opinion, "that at the time of the explosion there were 50 or 100 pounds of dynamite in the shed; that the neighborhood was populous; and that in the shed, constructed of pine boards, was a gasoline engine equipped with

a gasoline supply tank beneath it, and that in the same shed there was a large separate gasoline tank which was partially empty—which condition usually results in the formation of an explosive mixture of air and gasoline vapor; that attached to the engine was a muffler which might 'back fire' with some violence; that at the time of the explosion several sticks of dynamite had been left near the muffler, probably for the purpose of thawing them, the weather being cold."

And in a similar action reported in *Ricker v. McDonald* (1903) 89 App. Div. 800, 85 N. Y. Supp. 825, it was held that the storing by a tunnel contractor, at a street corner, in the heart of a large city, of a quantity of dynamite largely in excess of that permitted by the city authorities, was a nuisance both at common law and under the provisions of the city charter.

And in *Wetsell v. Reilly* (1913) 159 App. Div. 688, 145 N. Y. Supp. 167, an action for the death of a traveler from the explosion of dynamite in a shanty built in the street by a sewer contractor, tried upon the theory of negligence, where the plaintiff also pleaded that defendant used and kept dynamite in violation of the ordinances of the city and the laws of the state, the court said: "If there was a causal relation between the dynamite kept by the defendant and the explosion shown by proof, the defendant might be liable for the maintenance of a nuisance, if it were shown either that the permit had been violated, or that the dynamite had been negligently or improvidently kept." G. V. L.

COLONEL PARKER, Plff. in Err.,

v.

ELLA M. PARKER et al.

Oklahoma Supreme Court — May 13, 1919.

(75 Okla. 234, 182 Pac. 697.)

Parent and child — conveyance to parent — presumption.

1. When a confidential relation exists between a parent and child, and the child is mentally weak, and such confidential relation is such that the parent exercises an influence over the child, and a business transaction takes place between them resulting in a conveyance to the parent from the child, and the parent is benefited by the transaction, either as a gift, or by reason of an inadequate consideration, the law presumes everything against the transaction, and leaves the burden of proof upon the person benefited, to show that the confidential relation has been, as to that transaction, suspended, and that the transaction was fairly conducted.

[See note on this question beginning on page 735.]

Evidence — drunkenness — sufficiency.

2. The evidence in this case examined, and held sufficient to support the finding of the court that Clark Parker, at time of executing the deed, was an habitual drunkard and mentally weak, and that a confidential and fiduciary relation existed between him and his father, and that he was under the influence of his father at said time.

— undue influence — sufficiency.

3. The evidence of the court examined, and held to be sufficient to support the finding of the court as to the facts and the judgment of the court in setting aside the deed from the son to the father upon the grounds of undue influence; that at the time of the execution of the deed the son was mentally weak and an habitual drunkard; and the evidence failed to disclose that said transaction was fairly made, or that undue influence was not exerted by the father over the son.

Headnotes by MCNEILL, J.

ERROR to the District Court for Oklahoma County (Clark, J.) to review a judgment in favor of defendant, cross petitioner, and overruling a motion for new trial, in an action brought to quiet title to certain property. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Everest, Vaught, & Brewer, B. T. Hainer, and Burns & Toney, for plaintiff in error:

The relinquishment of a homestead claim, or of rights given by a contest, is a valid consideration for a note or an agreement.

Tecumseh State Bank v. Maddox, 4 Okla. 583, 46 Pac. 563; *McKennon v. Winn*, 1 Okla. 328, 22 L.R.A. 501, 33 Pac. 582.

The sanity of a person, and his competency to make a contract, are universally presumed in the absence of evidence to the contrary.

State v. Scott, 49 La. Ann. 253, 36 L.R.A. 723, 21 So. 271, 10 Am. Crim. Rep. 585; *McKeever v. Carter*, 53 Okla. 360, 157 Pac. 56; *Loman v. Paulin*, 51 Okla. 294, 152 Pac. 73; *Perryman v. State*, 12 Okla. Crim. Rep. 500, 159 Pac. 937; 2 Pom. Eq. Jur. § 947; 14 R. C. L. § 74; *Reynolds v. Dechaums*, 24 Tex. 174, 76 Am. Dec. 101.

The court erred in holding that the mere relationship of father and son created "a confidential" relation as contemplated by law, and placed upon the plaintiff the burden of proof as to the whole matter.

Towson v. Moore, 173 U. S. 17, 43 L. ed. 597, 19 Sup. Ct. Rep. 332; Malow v. Walker, 115 Iowa, 238, 91 Am. St. Rep. 158, 88 N. W. 452; Lavelle v. Lavelle, 164 Iowa, 99, 145 N. W. 476; Garrison v. Spencer, 58 Okla. 442, 160 Pac. 493; Richardson v. Smart, 152 Mo. 623, 75 Am. St. Rep. 488, 54 S. W. 542; Re Hess, 48 Minn. 504, 31 Am. St. Rep. 670, 51 N. W. 614; Richmond's Appeal, 21 Am. St. Rep. 99, note.

Mr. H. N. Boardman for defendant in error.

McNeill, J., delivered the opinion of the court:

This action was commenced by Colonel Parker against Ella M. Parker and Jennie L. Parker, a minor, to quiet title to lots 40 to 48 inclusive, in block 16, Parker and Colcord addition to Oklahoma City, and lots 9 and 10, block 24, Second Main street addition to Oklahoma City, Oklahoma. The defendant, Ella M. Parker, filed an answer and cross petition, but a demurrer was sustained to the same. The defendant, Jennie L. Parker, by her guardian, Ella M. Parker, filed an answer and cross petition, alleging in substance that she was the sole and only heir of Clark Parker, deceased; that Clark Parker and her mother, Ella M. Parker, homesteaded a certain tract of land, and received a patent to the same, about the year 1901; that a portion of the same was platted and dedicated for town-site purposes, and sold to Colcord, and was known as the Parker and Colcord town-site addition; that the land in question, to wit, lots 40 to 48, in block 16, supra, was reserved from the transfer conveying said land to Colcord, and was to remain the property of Clark Parker and Ella M. Parker as a homestead, together with ten lots in block 8, same addition, and alleging, further, that Clark Parker and Ella M. Parker were divorced on the 5th day of April, 1909, and that Clark Parker died in March, 1911; that Clark Parker was an habitual drunkard, and totally incapable of transacting any business of any nature whatsoever for himself from the date of the platting of the land until his death, all of said facts being known

11 A.L.R.—46.

to Colonel Parker; that by undue influence, and for the purpose of defrauding Clark Parker, Colonel Parker secured from Clark Parker powers of attorney, for the purpose of defrauding the defendant, and prevailed on Clark Parker and Ella M. Parker to move to Ohio in 1903; at that time Clark Parker was the owner of \$100,000 in cash and notes, and that the said money was obtained from the community property and joint earnings of Clark Parker and Ella M. Parker, and that said Colonel Parker obtained a power of attorney and collected the same, and appropriated all of the same to his own use; that on the 27th day of December, 1905, Clark Parker executed a warranty deed to Colonel Parker for the lots above described, and including ten lots in block 8, same addition; that at the time of executing said deed he (Clark Parker) was totally incompetent by reason of being an habitual drunkard, and by reason of his incompetent mental condition, and by reason of undue influence exercised over him by Colonel Parker; that at that time a confidential and fiduciary relation existed between Clark Parker and Colonel Parker; that at the time of receiving the deed the property was worth \$25,000, and that Colonel Parker paid nothing for the same; and alleges by reason of said facts the deed was null and void, and the petition also asked for an accounting for rents and profits.

On the trial of the case the court rendered judgment in favor of Jennie L. Parker and against the plaintiff, and quieting title and setting aside the deed from Clark Parker to Colonel Parker, and rendering judgment against Colonel Parker for the rents collected from said premises, and interest amounting to \$16,477.

It developed that the ten lots in block 8 had been sold to innocent purchasers by Colonel Parker for \$11,000, and no decree was rendered as to that portion of the property. Jennie L. Parker then asked to amend, and asked judgment for \$11,000 for the lots that had been

sold, and for additional amounts for Colonel Parker failing to account for the proceeds of the sale of the property originally platted. The court held these issues were not proper subjects to be litigated in this action, and defendant dismissed her cross petition as to these issues, and they are not before this court for determination.

The plaintiff filed a motion for new trial, but the same was overruled and the case is now here on appeal. The parties will be referred to as Colonel Parker, plaintiff, and Jennie L. Parker, defendant, being the position they occupied in the court below, and occupying the same position in this court.

The questions involved are practically two: First, is the evidence sufficient to support the judgment of the court? Second, after the court found that Clark Parker, deceased, was mentally weak, and that a fiduciary and confidential relation existed between him and his father, then was the burden upon the plaintiff to show that the transaction was fair, and an adequate consideration paid for the premises, and was without undue influence?

The court made the following finding:

"Clark Parker, since about 1893, had been a horse trader and dealer. He was much below the average in intelligence; was an habitual drunkard for fifteen years immediately prior to his death; was incompetent practically all of that time to transact business of importance; and was completely under the influence of his father, who managed all of his affairs except his dealing in horses.

"Under the circumstances disclosed by the record in this case, the burden was upon the plaintiff to show that Clark Parker, when he executed this deed to Colonel Parker on December 27, 1905, was legally capable of so doing; that it was in fact his free act and deed; that there was valuable consideration therefor; and that it was not brought about by the undue influence of his father, who was grantee therein. In this he has

failed. The deed should be set aside, and the plaintiff should be required to pay to the defendant and cross petitioner, Jennie L. Parker, the proceeds of the funds collected by him as shown by the evidence, and in addition thereto an amount equal to the rental value of the premises for the time the same were in his possession, and not covered by the collections herein found to have been made by him."

The court's findings may be divided as follows:

First. Clark Parker was much below the average in intelligence, and an habitual drunkard, and had been for fifteen years immediately prior to his death.

Second. He was incompetent practically all of that time to transact business of importance.

Third. He was completely under the influence of his father, who managed all of his affairs except his dealing in horses.

The plaintiff argues that these findings are not supported by the evidence.

First. Was he below the average in intelligence and an habitual drunkard? The evidence upon this question was conflicting. The defendant introduced more than twenty witnesses in order to substantiate the fact that Clark Parker was an habitual drunkard. These witnesses dealt with his habits from about the year 1895 to 1911, at the time of his death. Numerous witnesses told and related the fact of his being intoxicated practically all of the time they knew him; his rambling conversation; the fact that he had taken the "Keely cure," upon one or two occasions, after going to the state of Ohio; that he was indebted to the saloon keeper in the sum of \$1,000; the fact that he was drunk whenever witnesses saw him. The testimony of the wife was to the effect that he was intoxicated practically all of the time; that he took no interest in the home life; that while in a drunken condition he often threatened to do violence to her and the child; that the divorce was ob-

tained practically upon the grounds of habitual drunkenness. The wife relates the fact that at the time of the birth of the child in 1900, being the defendant in this action, he was drunk and lay in a haystack all night. While it is true other witnesses stated that he was not an habitual drunkard, but practically all agree that he drank, and had seen him intoxicated at some time. There were between forty and fifty witnesses who gave testimony in regard to this fact. We cannot say that the finding of the court upon this question is contrary to the weight of the evidence, but we are of the opinion that the evidence of the people who were most closely associated with Clark Parker, the people who were familiar with his everyday life, support the finding of the court that he was an habitual drunkard.

As to whether he was below the average in intelligence, we think this fact is sustained by the evidence, and in fact we cannot remember of any particular testimony adduced to show where he exhibited any degree of intelligence; but the evidence clearly supports this to be the fact, even though in a drunken condition he was a fairly good horse trader. That appeared to be his only ambition in life, and he cared for nothing else; his family nor his father and sisters appeared to have no place in his mind.

As to the next proposition, was there a confidential and fiduciary relation existing between Colonel Parker and Clark Parker, and was Clark Parker under the influence of his father, Colonel Parker? We think these findings are also supported by the great weight of the evidence, and are practically without contradiction.

After Clark Parker filed on this land, which was in 1895, Colonel Parker went to Ohio, and was gone for some time. In May, 1897, Colonel Parker's wife died, and then he and his two little girls moved to the home of Clark Parker. After that

time, until the platting of the land in 1901, the farming of this place was looked after by the plaintiff. Whatever was sold from the premises was sold by the plaintiff. The grocery bills were looked after by him. He and the wife of Clark Parker attended to the selling of the butter, milk, and eggs, and everything that went to the caring for the home. During that time Clark Parker was engaged in trading horses. As soon as the patent for the land was obtained and the advisability of selling the same arose, Clark Parker paid no attention to the same, but Colonel Parker made the contract, and the only thing that the son did was to sign the contract and the deeds. Colonel Parker received all the money, amounting to at least \$65,000. The grocery bill, which had accumulated to some \$500 prior to this time, Colonel Parker signed a note and thereafter paid the same.

Shortly after the platting of the land, and after receiving more than \$40,000 for the same, Colonel Parker purchased some land in Ohio, took the deed in the name of Clark Parker, without even consulting the son. The evidence does not disclose that Colonel Parker ever consulted him upon any proposition, but dealt as he thought best. If a deed was to be signed Clark Parker signed it, and if a contract was to be signed he signed it at the request of his father. The improvements on lots 40 to 48, block 16, supra, to the amount of \$4,000, were made by Colonel Parker. This was the home and barn where Clark Parker was living. Colonel Parker had the overseeing of the same, directed what was to be done, and when it was to be done. The purchasing of lots 9 and 10, block 24, from Mr. Haley, was consummated by Colonel Parker. The improvements of over \$11,000 were placed upon lots 9 and 10, block 24, supra, by Colonel Parker. The only transactions since 1895, outside of trading horses, that Clark Parker appeared to have anything to do with, was the trading for a piece of land at Capitol hill, and this was brought

about by the trading of horses and in disposing of the same by receiving stock therefor, together with buying a hotel or saloon in Ohio. The evidence further disclosed that the grocery bills in Ohio, after Clark Parker and his wife had moved there, were settled for, or a great portion of them, by Colonel Parker. The evidence further disclosed that Clark Parker's wife, after moving to Ohio, asked him about the rents, and about the business, and he said he knew nothing about the same, but his father was looking after the same for him. The transactions concerning the real estate amounted to the sum of \$65,000. The evidence failed to disclose the time when there was any consultation even between the father and son regarding the same, but that the father attended to all of the business, so we think the evidence clearly supports the finding of the court that confidential and fiduciary relation existed between father and son, that the son was weak-minded caused by drunkenness, and that he was under the absolute domination and influence of his father. We think the evidence supports the finding of the court upon these propositions.

The evidence does not disclose the exact value of the property deeded December 27, 1905, but the lots in block 8, it is admitted, were disposed of by Colonel Parker for \$11,000. As to lots in block 16, there is no evidence as to what the value of the same was, but it was admitted about the year 1902 Colonel Parker placed at least \$4,000 worth of improvements upon the same. Lots 9 and 10 in block 24 cost \$1,000, and improvements of \$11,000 were placed on the same, and in addition thereto sidewalk improvements. All of this was prior to the time of deed to Colonel Parker. The value is not testified to, but without evidence to the contrary it would be presumed that lots 9 and 10, block 24, would be worth what they cost and improvements placed thereon, or \$12,000; that the lots in block 16 had improvements on them to the value of \$4,000; that the lots

in block 8 were sold for \$11,000; without placing any value upon the lots in block 16, the value of the property would be approximately \$27,000.

The question then presented is: After the court finding that the son was weak mentally, an habitual drunkard, under the influence of his father; that a confidential and fiduciary relation existed between them; that the father had been dealing with the son's real estate, and had sold and collected practically \$65,000, in notes and cash, without any evidence that any settlement had ever been had between them; then this transaction showing the transfer of property of the value of at least \$27,000 for a recited consideration in the deed of \$14,000—did the court properly hold that under those circumstances the burden of proof was upon the plaintiff to show that at the time of the execution of the deed Clark Parker was legally competent to execute the deed, that the deed was executed as his free act and deed, and that a valuable consideration was paid therefor, and the transaction was not brought about by the undue influence of the father, the grantee therein named, over the son?

The evidence disclosed that Colonel Parker took his son Clark Parker to a notary public, introduced him, stating he wanted to sign a deed, paid for the acknowledgment. This deed was executed about a week after the wife had sued for a divorce, and almost as soon as Colonel Parker arrived in Ohio from Oklahoma.

Under this state of the record the court held that the burden was upon the father to show that there was a valuable consideration, that the transaction was not brought about by undue influence, and at the time Clark Parker was mentally competent.

The court below held when all of these conditions existed the burden was then upon Colonel Parker to prove that the transaction was fair, that the consideration was paid, and that the same was adequate, and

that no undue influence was exercised by him at the time over the son.

In a case where the question of parent and child, guardian and ward, principal and agent, was involved, being the same question involved in the case at bar, and being the case of Daniel v. Tolon, 53 Okla. 666, 4 A.L.R. 704, 157 Pac. 756, the court, speaking through Justice Sharp on page 672 of 53 Okla., said: "While equity does not deny the possibility of valid transactions between parties where a fiduciary relationship exists, yet because every such relation implies a condition of superiority held by one of the parties over the other, in every transaction between them by which the superior party obtains a possible benefit, equity raises a

Parent and child—
conveyance to parent—
presumption.

presumption against its validity, and casts upon that party the burden of proving affirmative-

ly his compliance with equitable requisites, and of thereby overcoming the presumption. The broad principle on which the court acts in cases of this description is that wherever there exists such a confidence, of whatever character that confidence may be, as enables the person in whom confidence or trust is reposed to exert influence over the person trusting him, the court will not allow any transaction between the parties to stand, unless there has been the fullest and fairest explanation and communication of every particular resting in the breast of the one who seeks to establish a contract with the person so trusting him. Whenever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influences exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not

have been impeached if no such confidential relation had existed. Tate v. Williamson, L. R. 1 Eq. 536, 14 L. T. N. S. 163, 14 Week. Rep. 449; Tate v. Williamson, L. R. 2 Ch. 55, 60, 15 L. T. N. S. 549, 15 Week. Rep. 321; Rhodes v. Bate, L. R. 1 Ch. 252, 257, 35 L. J. Ch. N. S. 267, 12 Jur. N. S. 178, 13 L. T. N. S. 778, 14 Week. Rep. 292. The principle announced and its effect upon the rights and liabilities of the parties thereto extends to transactions between a trustee and a beneficiary, principal and agent, attorney and client, guardian and ward, parent and child, as well as to other relations."

We think the above case is controlling in the case at bar.

This same rule is announced in Jones on Evidence, vol. 2, p. 104, as follows: "When confidential relations exist between two persons, resulting in one having an influence over the other, and a business transaction takes place between them resulting in a benefit to the person holding the influential position, the law presumes everything against the transaction, and casts the burden of proof upon the person benefited, to show that the confidential relation has been, as to that transaction, . . . suspended, and that it was as fairly conducted as if between strangers."

Elliott on Contracts, vol. 4, p. 1036, lays down the following rule: "The influence of a parent over a child is such that if the parent takes a voluntary conveyance, or one upon an inadequate consideration, from a son or daughter, the burden of proof is upon such parent to show that he did not take any unfair advantage of his influence and authority in the transaction."

The same principles are announced in cases similar to the one at bar, though not identical, but it has been uniformly applied by this court in the following cases: Pevehouse v. Adams, 52 Okla. 495, 153 Pac. 65; Miller v. Thompson, — Okla. —, 171 Pac. 850; Hogan v. Leeper, 37 Okla. 655, 47 L.R.A.

(N.S.) 475, 133 Pac. 190; Bruner v. Cobb, 37 Okla. 228, L.R.A.1916D, 377, 131 Pac. 165.

While it is true that the deed in the case at bar recites a consideration, it is prima facie evidence as between the parties that the consideration has been paid, as was held in the case of Adams Oil & Gas Co. v. Hudson, 55 Okla. 386, 155 Pac. 220; but this was the only evidence introduced in the case to show that the consideration of any amount has been paid. Under the facts in this case, the court held, and we think rightly so, that the same was not sufficient. The evidence disclosed that in 1900, and prior to the time of platting this land in 1901, all of the parties were without means except the homestead of Clark Parker. At the time of the death of Clark Parker the evidence disclosed that his estate amounted to \$240. The father, at the time of platting the land, had no money or property that he accounted for. He collected all the proceeds of the sale of this land, amounting to at least \$65,000, and at the time of the death of the son was in very comfortable circumstances.

We think the evidence in this case supports the finding of the court that Clark Parker was an habitual drunkard and mentally weak, and that a confidential and fiduciary relation existed between

them; that he was under the absolute influence of his father at the time of executing the deed. We think the evidence is sufficient to further find that no consideration was paid for these premises; but that would be unnecessary. Colonel Parker relied solely upon the recital in his deed to show that said consideration had been paid and the transaction fairly conducted. This was not sufficient.

From the evidence in the case we feel that the judgment of the court is supported by the weight of the evidence, and that there is no error in the record, and that the judgment of the court should be affirmed.

Sharp, Pitchford, Harrison, Riney, and Johnson, JJ., concur.

Petition for rehearing denied July 29, 1919.

NOTE.

The decision in the reported case (PARKER v. PARKER, ante, 720) aptly illustrates those cases which broadly rule that a presumption of undue influence is raised by the mere fact that a conveyance is from a child to a parent, so as to cast the burden upon the parent claiming the benefit of the conveyance to rebut the presumption. This class of cases is treated in subdivision III. of the annotation following SHACKLEFORD v. SHACKLEFORD, post, 737, upon the general question of "Fraud or undue influence in conveyance from child to parent."

EMMA P. WILLIAMS, née Canary, Appt.,
v.

JAMES D. CANARY.

United States Circuit Court of Appeals, Eighth Circuit — March 2, 1918.

(161 C. C. A. 352, 249 Fed. 344.)

Parent and child — validity of contract between parent and adult child.

1. A contract between parent and adult child cannot be said to be prima facie void in law, or to be so doubtful as to impose an affirmative burden of justification.

[See note on this question beginning on page 785.]

Equity — examination of contract between parent and child.

2. A transaction between a parent and his child who has just attained majority will be examined by equity with a searching eye to discover whether or not in all the circumstances a fraudulent or unconscionable advantage has been taken.

[See 20 R. C. L. 590, 591.]

Evidence — burden of proof — fairness of transaction with ward.

3. Equity casts upon a guardian who contracts with his ward about the

time of his emancipation the burden of showing that the transaction was understood, was fair and reasonable, and that no advantage was taken.

[See 12 R. C. L. 1170.]

Guardian and ward — contract within statutory time for discharge — validity.

4. That a guardian is not by statute entitled to his discharge until a year after the ward's majority does not make invalid a contract between them within that time.

APPEAL by plaintiff from a decree of the District Court of the United States for the Eastern District of Oklahoma (Campbell, Dist. J.) dismissing a petition filed to cancel an oil and gas mining lease of certain land, and also a working contract supplemental to the lease, alleged to have been obtained by defendant by fraud and undue influence. *Affirmed.*

The facts are stated in the opinion of the court.

Argued before Hook and Smith, Circuit Judges, and Trieber, District Judge.

Messrs. George S. Ramsey, Edgar A. de Meules, Malcolm E. Rosser, and Villard Martin, for appellant:

The lease from plaintiff to defendant was and is voidable because of the relationship between the parties.

1 Minor, Inst. 444; 2 Pom. Eq. Jur. § 962; Miller v. Simonds, 72 Mo. 669; Garvin v. Williams, 44 Mo. 465, 100 Am. Dec. 314; Cocking v. Pratt, 1 Ves. Sr. 400, 27 Eng. Reprint, 1105; Archer v. Hudson, 7 Beav. 551, 49 Eng. Reprint, 1180, 8 Jur. 761; Taylor v. Taylor, 8 How. 183, 12 L. ed. 1040; Towson v. Moore, 173 U. S. 17, 43 L. ed. 597, 19 Sup. Ct. Rep. 332; Noble v. Moses, 81 Ala. 530, 60 Am. Rep. 175, 1 So. 217.

Any social or domestic force which, though not sufficient to amount to duress, controls free action, is sufficient to set aside a conveyance.

Munson v. Carter, 19 Neb. 293, 27 N. W. 208; June v. Willis, 30 Fed. 11; Huguenin v. Baseley, 14 Ves. Jr. 273, 33 Eng. Reprint, 526, 9 Revised Rep. 148, 276, 6 Eng. Rul. Cas. 834; Allore v. Jewell, 94 U. S. 506, 24 L. ed. 260; Noble v. Moses, supra; McClure v. Lewis, 72 Mo. 314.

When duty and interest conflict, interest must give way.

Keech v. Sandford, Cas. t. King, 61, 25 Eng. Reprint, 223, 2 Eq. Cas. Abr. 741, pl. 7, 22 Eng. Reprint, 629, 15 Eng. Rul. Cas. 455, 1 White & T. Lead. Cas. in Eq. 441; Fox v. Mackreth, 2

Cox, Ch. 320, 30 Eng. Reprint, 148, 1 White & T. Lead. Cas. in Eq. 188; Michoud v. Girod, 4 How. 503, 11 L. ed. 1076; Davoue v. Fanning, 2 Johns. Ch. 252.

Purchase by a guardian immediately after his ward attains majority is voidable.

1 Story, Eq. Jur. § 317; 1 Minor, Inst. 503; Fidelity Trust Co. v. Butler, 28 Ky. L. Rep. 1268, 91 S. W. 676; Williams v. Davison, 133 Mich. 344, 94 N. W. 1048; Ashton v. Thompson, 32 Minn. 25, 18 N. W. 918; Daniel v. Tolon, 53 Okla. 666, 4 A.L.R. 704, 157 Pac. 756; Gillette v. Wiley, 126 Ill. 310, 9 Am. St. Rep. 587, 19 N. E. 287; Baum v. Hartmann, 226 Ill. 160, 80 N. E. 711.

The fact that the defendant was the father as well as the guardian of complainant does not relax the strictness of the rule.

Carter v. Tice, 120 Ill. 277, 11 N. E. 529; Baum v. Hartmann, supra; Ashton v. Thompson, 32 Minn. 25, 18 N. W. 918.

Plaintiff was entitled to full information about the property before leasing it.

Hatch v. Hatch, 9 Ves. Jr. 296, 32 Eng. Reprint, 616, 1 Smith, 226; Waldstein v. Barnett, 112 Ark. 141, 165 S. W. 459; Archer v. Hudson, 7 Beav. 551, 49 Eng. Reprint, 1180, 8 Jur. 761; Tucke v. Buchholz, 43 Iowa, 415; McParland v. Larkin, 155 Ill. 84, 39 N. E. 609; Berkmeier v. Kellerman, 32 Ohio St. 239, 30 Am. Rep. 577.

Defendant did not pay full value for the lease.

Richardson v. Linney, 7 B. Mon. 572; *Wickiser v. Cook*, 85 Ill. 68; *Voltz v. Voltz*, 75 Ala. 555; *Noble v. Moses*, 81 Ala. 530, 60 Am. Rep. 175, 1 So. 217.

Plaintiff was not barred by the doctrine of laches or acquiescence.

Pom. Eq. Jur. § 965; *Woodruff v. North Bloomfield Gravel Min. Co.* 9 Sawy. 441, 18 Fed. 790; *Hall v. Otterson*, 52 N. J. Eq. 522, 28 Atl. 907; *Indiana & A. Lumber & Mfg. Co. v. Brinkley*, 91 C. C. A. 91, 164 Fed. 963; *Northern P. R. Co. v. Boyd*, 101 C. C. A. 18, 177 Fed. 823; *McIntire v. Pryor*, 173 U. S. 38, 43 L. ed. 606, 19 Sup. Ct. Rep. 352; *Gronna v. Goldammer*, 26 N. D. 122, 143 N. W. 394, Ann. Cas. 1916A, 165; *Taylor v. Sawyer Spindle Co.* 22 C. C. A. 203, 39 U. S. App. 257, 75 Fed. 301; *Bartlett v. Ambrose*, 24 C. C. A. 397, 42 U. S. App. 381, 78 Fed. 839; *Kelley v. Boettcher*, 29 C. C. A. 14, 56 U. S. App. 363, 85 Fed. 57; *Ide v. Trorlicht, D. & R. Carpet Co.* 53 C. C. A. 341, 115 Fed. 149; *London & S. F. Bank v. Dexter Horton & Co.* 61 C. C. A. 515, 126 Fed. 601; *Stevens v. Grand Central Min. Co.* 67 C. C. A. 284, 133 Fed. 31; *Brissell v. Knapp*, 155 Fed. 809; *Wilson v. Plutus Min. Co.* 98 C. C. A. 189, 174 Fed. 318; *Citizens' Sav. & T. Co. v. Illinois C. R. Co.* 105 C. C. A. 145, 182 Fed. 611; *Central R. Co. v. Jersey City*, 199 Fed. 237; *Schwartz v. Loftus*, 132 C. C. A. 464, 216 Fed. 325; *Northern P. R. Co. v. Boyd*, 228 U. S. 509, 57 L. ed. 943, 33 Sup. Ct. Rep. 554; *Fawcett v. Fawcett*, 85 Wis. 332, 39 Am. St. Rep. 844, 55 N. W. 405; *Michoud v. Girod*, 4 How. 561, 11 L. ed. 1102; *Townsend v. Vanderwerker*, 160 U. S. 171, 40 L. ed. 383, 16 Sup. Ct. Rep. 258.

Mr. Joseph B. Tomlinson, for appellee:

The transaction in question, having been supported by a valuable and adequate consideration, can be overthrown only by showing actual wrong on the part of defendant, which was not done.

Jenkins v. Pye, 12 Pet. 253, 9 L. ed. 1075; *Taylor v. Taylor*, 8 How. 200, 12 L. ed. 1047; *Conley v. Nailor*, 118 U. S. 127, 30 L. ed. 112, 6 Sup. Ct. Rep. 1001; *Ralston v. Turpin*, 129 U. S. 663, 32 L. ed. 747, 9 Sup. Ct. Rep. 420; *Mackall v. Mackall*, 135 U. S. 167, 34 L. ed. 84, 10 Sup. Ct. Rep. 705; *Towson*

v. Moore, 173 U. S. 17, 43 L. ed. 597, 19 Sup. Ct. Rep. 332.

Hook, Circuit Judge, delivered the opinion of the court.

This is a suit by *Emma P. Williams*, formerly *Canary*, against *James D. Canary*, to cancel an oil and gas mining lease of a tract of land in Oklahoma patented to her as a Cherokee allottee, and also a working contract supplemental to the lease, upon the ground that he obtained them by fraud and undue influence. At the hearing on the merits the trial court held the instruments valid and dismissed the petition. The plaintiff appealed.

The defendant is plaintiff's father, and had been the guardian of her estate during her minority, by appointment of the court having cognizance of such matters. A prior lease to an oil company, executed by him as her guardian, had just expired with her minority. There were at that time ten producing oil wells on the property. The lease and the contract in controversy were executed the day after the plaintiff became of age, and that circumstance is now principally relied on to invalidate them. The trial court found from the evidence that plaintiff voluntarily executed the instruments and fully understood their terms; also that their provisions were more advantageous to her than she could at the time have obtained from others or by her own operation of the property. We concur in this conclusion, and if further assurance were needed, it would appear from plaintiff's acquiescence in the transaction and the receipt of its substantial fruits for more than six years before this suit was brought, during the last four of which she was married and living apart from her father. The suit is quite without warrant or foundation in any fact aside from the time the lease and the contract were made.

A child, upon attaining majority, becomes clothed with contractual capacity, and that necessarily implies the power to pick both subject-matter and parties, and to bind him-

self equally with those with whom he deals. There is nothing in the law that fixes a further period of

Parent and child—validity of contract between parent and adult child.

disqualification for the parent. A contract between parent and major child cannot be said to be prima facie void in law, or for that reason to be so doubtful as to impose an affirmative burden of justification. *Jenkins v. Pye*, 12 Pet. 241, 9 L. ed. 1070. It is common experience, however, that the influence, personal confidence, and trust incident to that relation do not ordinarily end with minority, but continue in varying degrees and afford favorable opportunities for imposition and abuse. Because of this, the transaction, when assailed in a court

Equity—examination of contract between parent and child.

of equity, will be examined with a searching eye to discover whether in all the circumstances a fraudulent or unconscionable advantage has been taken, and in the inquiry its proximity to the time of majority will be regarded. But equity will not condemn in the face of perfect knowledge, understanding, free consent, and good faith by those concerned.

In the case of a transaction between guardian and ward at or near the time of emancipation, and while any of the guardianship duties are yet to be performed, the rule is more strict. Equity casts upon the

Evidence—burden of proof—fairness of transaction with ward.

guardian the burden of showing that the transaction was understood, was fair and reasonable, and that no advantage was taken. *Harper v. Taylor*, 113 C. C. A. 572, 193 Fed. 944, 2 Pom. Eq. Jur. § 961. As we have seen, that burden was discharged in this case.

There is a contention that, as a statute of Oklahoma provides that a guardian appointed by a court is not entitled to his discharge until a year after his ward's majority, the relation between plaintiff and defendant still existed at the time of the transaction, and therefore the latter was wholly disqualified to contract. But the statute was to provide a period for the orderly review of his acts during guardianship, and the settlement of his accounts. It was not intended as an extension of his authority over the ward's estate, or its accompanying disqualification. The same statute authorized the ward, upon coming to majority, to settle accounts with his guardian and give him a release which would be valid if obtained fairly and without undue influence. Okla. Rev. Laws 1910, §§ 3339-3341.

Guardian and ward—contract within statutory time for discharge—validity.

The decree is affirmed.

NOTE.

The decision in the reported case (*WILLIAMS v. CANARY*, ante, 726) is illustrative of those which hold that while a court of equity will watch conveyance from a child to a parent with jealousy, no presumption of undue influence arises from the mere fact of the relationship, and that such conveyances not only are not prima facie void, but rather should be regarded as prima facie valid, so as to cast upon the party attacking the same the burden of actually proving undue influence. This particular rule is treated in subdivision IV. of the annotation following *SHACKLEFORD v. SHACKLEFORD*, post, 744, which treats the general question of "Fraud or undue influence in conveyances from child to parent."

JOHN M. SHACKLEFORD et al., Appts.,

v.

ADA B. SHACKLEFORD.

Arkansas Supreme Court — June 7, 1920.

(— Ark. —, 223 S. W. 561.)

Evidence — burden of proof — deed of child.

1. A parent who takes a deed from his child soon after it reaches majority and while it is living under his roof has the burden of clearing the transaction of every suspicion, and establishing its fairness and good faith.

[See note on this question beginning on page 735.]

Deed — to parent — consideration — love and affection.

2. Love and affection are a sufficient consideration to support a deed

from child to parent, if the transaction is thoroughly understood and the conveyance voluntarily made.

[See 20 R. C. L. 588, 589.]

APPEAL by plaintiffs from a decree of the Pulaski Chancery Court (Martineau, Ch.) dismissing a suit brought to set aside and cancel certain deeds alleged to have been procured by defendant from plaintiffs through undue influence. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Samuel Frauenthal, Grover T. Owen, and John S. Gatewood, for appellants:

A conveyance by a child to its parent, just after arriving at its majority and while still residing with the parent, raises the presumption that undue influence was exercised.

Savery v. King, 5 H. L. Cas. 627, 10 Eng. Reprint, 1046, 25 L. J. Ch. N. S. 482, 2 Jur. N. S. 503, 4 Week. Rep. 571; *White v. Ross*, 160 Ill. 72, 43 N. E. 336; 6 Cyc. 335; *Caven v. Agnew*, 186 Pa. 314, 40 Atl. 480; *Jenkins v. Pye*, 12 Pet. 241, 9 L. ed. 1070; *Towson v. Moore*, 173 U. S. 17, 43 L. ed. 597, 19 Sup. Ct. Rep. 332; *Hays v. Feather*, 244 Ill. 172, 91 N. E. 97, 18 Ann. Cas. 538; *Cooley v. Stringfellow*, 164 Ala. 460, 51 So. 321.

Messrs. Price Shofner and Mehaffy, Donham, & Mehaffy, for appellee:

There was no undue or wrongful influence exerted by defendant in securing the deeds from plaintiff.

8 R. C. L. 1032; *Bowdoin College v. Merritt*, 75 Fed. 480; *Latham v. Udell*, 88 Mich. 238; *Re Halbert*, 15 Misc. 308, 37 N. Y. Supp. 757; *Sears v. Vaughan*, 230 Ill. 572, 82 N. E. 881; *Dowie v. Sutton*, 227 Ill. 183, 118 Am. St. Rep. 266, 81 N. E. 395; *Burt v. Quisenberry*, 132 Ill. 385, 24 N. E. 622; *Orr v. Pennington*, 93 Va. 268, 24 S. E. 928; *Hammond v. Welton*, 106 Mich.

244, 64 N. W. 25; *Adair v. Craig*, 135 Ala. 332, 33 So. 902; *Sanger v. McDonald*, 87 Ark. 148, 112 S. W. 365; 20 R. C. L. 591.

Natural love and affection between mother and daughter is sufficient consideration to sustain a conveyance.

Parr v. Campbell, — Wash. —, 186 Pac. 858.

Humphreys, J., delivered the opinion of the court:

This suit was instituted by appellants against appellee in the Pulaski chancery court to cancel deeds executed by appellants to appellee, conveying an undivided two-thirds interest in the west half of lots 1 and 2, in block 17, in Pope's addition to the city of Little Rock, Pulaski county, Arkansas, on the ground that they were procured by appellee from appellants through undue influence.

Appellee filed answer, denying that the deeds in question were procured by her through undue influence, but, on the contrary, were executed by appellants freely and of their own accord, and with a full understanding of all the facts.

The cause was submitted upon the pleadings and evidence, which resulted in a decree in the chancery

court dismissing the bill of appellants for want of equity. From that decree an appeal has been prosecuted to this court, and the cause is before us for trial de novo.

The facts, in substance, are as follows: John D. Shackelford and his wife, Ada B. Shackelford, appellee herein, had not lived together as husband and wife for several years prior to the purchase of the property in litigation by John D. Shackelford on October 13, 1911. He roomed with their two boys, John M. and Bill, and appellee roomed with their daughter, Ada Mae, and looked after all of them. At the time of the purchase of the property it was Shackelford's intention that his two children, appellants herein, should have the property. A settled hatred existed between Shackelford and his wife. He procured a divorce from her, without contest, on June 28, 1915. At that time the property in question and his farm were encumbered in the same mortgage for a large sum. A property settlement was arranged, by which appellee received the income from the home or property in question, and was to pay Shackelford \$25 per month to assist in meeting the interest payments on the mortgage. Appellee failed to meet her monthly payments, and requested the mortgagee to foreclose, planning to buy the home place in at the sale. Before suit in foreclosure was commenced, Shackelford arranged a loan, placing the city home and farm under separate mortgages. The home place was mortgaged for \$4,000 to a building and loan association. Appellee had fallen behind \$350 on her property settlement contract. Shackelford, who had remarried, desiring to assist his children, then approaching their majority, in such way that his former wife could not reap any benefit therefrom, after considerable negotiation, conveyed the home place, September 25, 1917, to appellants and appellee jointly, on condition that appellee pay him \$350 she owed under the original property settlement contract and assume the building and

loan mortgage on the property. The value of the property was about ten thousand dollars or twelve thousand dollars at the time the deed was executed. Appellee accepted the deed and assumed the mortgage under the advice of her attorney, who, at the time, advised her to get a deed from appellants before she put all her money into the place, suggesting that she might have to borrow money on the property, in which event, unless she did obtain such a deed, it would be necessary to get the children's consent, and that it was advisable anyway, as she did not know what might happen. Ada Mae had attained to the age of 18 on August 26th, just prior to the execution of the deed, and John M. reached his majority on November 20th thereafter. Ada Mae had resided continuously with her mother, and John M. also made his home with her, except when away at school, the training camp at Leon Springs, Texas, and in France. Both of them had been in sympathy and aligned themselves with their mother during the trouble which culminated in a divorce, and remained loyal to her until a short time before bringing this suit. John M. advised with his mother in the matter of divorce, and to some extent in the property adjustment which resulted in the conveyance of the property in question by John D. Shackelford to them jointly. Appellee procured a quitclaim deed from Ada Mae to her undivided interest in said property, in consideration of love and affection, on the 13th day of October, 1917, who was, at the time, residing with her; and from John M. to his undivided interest therein for the same consideration on the 1st day of December, 1917, while he was on a flying visit to her from the camp in Texas. He had resided in the home with his mother before going to the camp. Both deeds were executed by appellants without independent advice. The deed from Ada Mae was prepared by appellee's attorney in his office, and executed immediately in a near-by notary's office. The

deed from John M. was prepared by himself on a blank warranty deed form procured by him in a downtown abstract office, and signed at home, with directions to appellee to take it to a notary and have him fill out the acknowledgment.

Ada Mae testified that her mother possessed a violent temper; dealt harshly with her to such an extent that she had to do whatever her mother wanted her to; that she executed the quitclaim deed to her undivided one-third interest through the persistent entreaties and undue pressure of appellee, continuing daily through a period of about two weeks; that her entreaties partook of the nature of begging or pleading, crying, and manifestations of anger; that she said her lawyer advised the execution of the deed; that John M. thought it right, and was going to give his interest to her when he came home; that she was keeping up the taxes, repairs, and paying off the mortgage; that she cared for her when her father kicked her out; that unless she made the deed she would not be treating her right; and that a refusal to execute it would show that she was under the influence of her father. She denied that she had stated to anyone that she had voluntarily executed the deed, but, on the contrary, said that she would not have executed the deed of her own volition. She also testified that she heard most of the conversation between her mother and brother concerning the deed he executed to her, and that the understanding between them was that he should have his interest back when he came home from France; that when he returned from France appellee refused to make a deed conveying the property back to them, saying that if we got the property back it must be through the courts.

John M. Shackleford testified that appellee, his mother, was accustomed to weeping and begging to prevail upon him and his sister to do things they would not otherwise do, and, when she commenced crying and carrying on, she could always

get them to do anything she willed; that he came home from the camp at Leon Springs, Texas, on a visit to his mother, arriving at 10 o'clock P. M., November 30th, that the next morning his mother urged him to execute a deed to her for his interest in the property, assigning as a reason that he was going away to war and might never return; that in case of his death his father would inherit his interest and give her trouble; that, knowing it was the only patrimony he was to get from his father, he was reluctant to convey it away, and resented the suggestion of his mother; that she began to weep and entreat, saying, "Yes, you will; yes, you will; I am in a position I have to have it;" that she continued to cry and beg until he saw no way out of it, and yielded on condition she would convey his interest back to him when he returned from France; that he went to France soon afterward, returned in July, 1919, and, desiring to marry and engage in business, first requested, then entreated, his mother to reconvey his interest to him, which she refused to do on the ground that his demand was inspired by his father; that he explained his father had nothing to do with it, but that he wanted the property back because it was his, and he needed it, all to no avail.

Ada B. Shackleford, mother of appellants, testified that her attorney advised her to accept the joint deed from her former husband, John D. Shackleford, to the property, in consideration that she pay him \$350 in cash and assume the payment of the \$4,000 mortgage thereon, if she had confidence in her children, the appellants, who were to receive under the same deed an undivided two-thirds interest in the property unencumbered, but also advised that, as she was going to put all her money in the property, it would be best to get a deed from them conveying their interest to her; that she communicated the advice given her by her attorney to Ada Mae, and asked Ada Mae what she thought about it; that Ada Mae told her it was all right, that she

should have had the property from the beginning; that nothing more was said about the matter until they went to the attorney's office to execute the deed; that before going she told Ada Mae they had better go down and get it off their hands; that Ada Mae was in a happy mood and perfectly willing; that her attorney asked Ada Mae if she knew what she was doing, and Ada Mae responded she did; that after the deed was prepared they walked across the hall to a notary's office, where Ada Mae signed and executed it; that she paid nothing to Ada Mae for it; that she was of opinion that John M. felt as Ada Mae did about it; that she wrote to him concerning the matter, and he answered that when he came home they would talk the matter over; that when he came home they did talk the matter over, and he said, "Mother, that is all right, that is the best thing we can do;" that he remained a day or so, went to Fayetteville, and when he came back they talked over his trip to France; that just after dinner he started to town, at which time she requested him not to forget the deed he was going to sign; that he said, "All right," sat down and wrote it out and signed it at the dinner table; that after signing it he remarked that if his father knew that he had conveyed the property, to her, he would turn over in his grave; that he instructed her to take it to A. Letzkus, who would acknowledge it; that, in accordance with instructions, she took it to Letzkus, and then had it recorded; that she paid her son nothing for the property; that before she obtained the deeds from her children she paid \$350 she owed her husband, and \$1,000 on the mortgage indebtedness, and had since kept up the interest payments thereon; that after obtaining the deeds she expended \$1,000 in improvements on the property, and had collected and used the room rentals; that while in France John M. wrote a letter in which the following paragraph appears: "No; I have not heard a word from Dad in regard to the transaction between

you and I concerning that place, and I don't expect to either. I think he understands that I knew what I was about, although nothing has been mentioned about it. That is a matter, though, that will be adjusted between he and I when we see each other. I am perfectly satisfied, though, so he cannot disagree. You are looking after the place, so that is all that is necessary. I have not forgotten by any means that you are my mother, and that we are perfectly congenial and understand each other better than those who have broken their ties of relationship. We will take care of that proposition, so don't worry. We are looking out for each other's interest—so we are satisfied."

That when her son returned from France in July, 1919, he demanded a reconveyance of an undivided one-third interest in the property, insisting that it was so understood at the time he conveyed it to her; that he admitted nothing was said to the effect that she should reconvey it to him, but that he understood it that way; that she claimed there was no such understanding, and refused to reconvey the property to the appellants. Appellee further stated that her reasons for wanting the deeds from her children were, that if she wanted to borrow money or make improvements she did not want to ask them about it, and in order to prevent their father from influencing them to lose it.

Eva Shackleford testified that after John M. returned from France she heard a conversation between him and his mother, in which he claimed he had deeded it to her so that she, and not his father, might get it in the event he was killed, and that it was his understanding he was to have it back, whether anybody else understood it or not. His mother asked him how he could understand it that way when nothing was said about it, and he replied that he understood it that way whether anybody else understood it or not. She also testified that, after the institution of this suit, she heard

Ada Mae say that she deeded her property to her mother of her own free will and accord.

Mrs. H. B. Johnson testified that she was rooming at the house, and Ada Mae came to the room, and while there told her she had given the place to her mother; that it was her mother's place to have it, and that she did not want it; that after the suit was instituted she told her that "we want the place in our names, so if anything comes up we can use it," and in that connection said her father had told her, in case the place was deeded back to her, he would see that her mother always had a home.

Evidence was introduced pro and con to show that, after John D. Shackelford discovered that the children had deeded their interest in the property to their mother, he offered Ada Mae \$1,000 to get her to deed it back. John D. Shackelford's explanation in this regard was that he offered to bet his daughter \$1,000 she could not get her mother to deed it back, at a time when his daughter claimed that the mother would deed her interest back to her at any time she wanted it.

The record is voluminous, and contains much evidence not attempted to be detailed in this opinion. An attempt has been made to glean such evidence only from the record as is responsive to the issue of whether undue influence was used by appellee in procuring the deeds in question from appellants.

The standard governing transactions between parents and children who have recently attained their majorities is a high one. This court said, in the case of *Giers v. Hudson*, 102 Ark. 232, 143 S. W. 916 (quoting syllabi 1 and 2):

"Where a daughter, though of age, remains under her father's roof, any contract, conveyance, or business transaction between them will be closely scrutinized by the courts."

"A conveyance from a daughter to her father, made while she lived with him, will not be permitted to

stand unless the transaction is characterized by the utmost fairness and good faith on the father's part."

In that case, the language of Lord Chancellor Cranworth in the case of *Savery v. King*, 5 H. L. Cas. 627, 10 Eng. Reprint, 1046, was approved as accurately stating the controlling principle in this class of cases. The language of the chancellor was as follows: "The legal right of a person who has attained his age of twenty-one to execute deeds and deal with his property is indisputable. But where a son, recently after attaining his majority, makes over property to his father without consideration, or for an inadequate consideration, a court of equity expects that the father shall be able to justify what has been done; to show, at all events, that the son was really a free agent; that he had adequate independent advice; that he was not taking an imprudent step under parental influence; and that he perfectly understood the nature and extent of the sacrifice he was making, and that he was desirous of making it."

It follows from this language that the burden rests upon the parent, in this class of cases, to clear the transaction of every shadow of suspicion and to establish its fairness and good faith. The conveyances in the instant case were donations. No consideration was paid for them. They in no way benefited appellants. It is not contended that the consideration was other than love and affection. Such a consideration is sufficient to uphold conveyances, if thoroughly understood and voluntarily made. The conveyances were made only a short time after appellants attained their respective majorities, and while they remained under the mother's roof. Ada Mae had never resided elsewhere, and John M. only when away at school or in a soldiers' training camp. The mother had been advised not to assume the indebtedness

Evidence—
burden of proof
—deed of child.

Deed—to parent
—consideration
—love and
affection.

or make improvements without first obtaining a deed from her children. She wanted the deeds so that she would not have to consult them in case she wanted to borrow money or make improvements on the property, and for the additional reason that she did not want her husband to control or influence the children in the control or disposition of their undivided interest in the property. She communicated the advice she had received from her attorney to each of the children, and requested them to make deeds to their undivided interest to her. They received no independent advice concerning the transaction. The only advice or counsel they had was that of the mother. They both swear that she obtained the deeds through undue influence exercised over them by continuous entreaties, accompanied by weeping; that in making the deeds they yielded unwillingly to the overpowering influence of their mother. She denies their statements, but has no corroboration save that of two witnesses who testify that Ada Mae had told them she voluntarily gave her interest in the property to her mother, and that John M. admitted no definite promise had been made by appellee to deed the property back

to him, but that it was only his understanding at the time. Appellee's testimony thus slightly corroborated, when viewed in the light of appellee's admission that she had been advised to get a deed from them to the property, and that she wanted and asked them for their several interests, is not sufficient to overcome the positive evidence of appellants that they were induced to make the deeds through the constant entreaties and weepings of their mother. The letter written by John M. while in France, to his mother, does not necessarily indicate that he had irrevocably conveyed his interest to her. The letter contains expressions indicative of a contrary purpose, viz.: "You are looking after the place, so that is all that is necessary." "We are looking out for each other's interest—so we are satisfied."

For the error indicated, the decree is reversed and the cause remanded, with directions to cancel the deeds in question, and for such further proceedings as may be necessary to adjust the equities between the parties, not inconsistent with this opinion.

Petition for rehearing denied July 12, 1920.

ANNOTATION.

Fraud or undue influence in conveyance from child to parent.

- I. Scope, 735.
- II. Equitable jurisdiction, 735.
- III. Presumption of undue influence:
 - a. Rules stated, 737.
 - b. Evidence required to rebut presumption, 739.
 - c. Application of rules, 741.

I. Scope.

The present annotation is confined to cases dealing with the validity of conveyances from child to parent, as between such parties themselves. This limitation excludes that class of cases wherein conveyances from a child to his or her parent have been attacked as in fraud of grantor's cred-

- IV. View that there is no presumption of invalidity:
 - a. Rules stated, 744.
 - b. Application of rules, 745.
- V. True rule, 746.
- VI. Cases decided on facts without reference to specific rules, 751.

itors, and which are governed by distinctive rules.

II. Equitable jurisdiction.

It has been said that upon grounds of public policy, or, as it is sometimes expressed, of public utility, equity exercises a salutary jurisdiction in setting aside conveyances of property

made by a grantor, such as a child, to a grantee, such as a parent, who stands in a confidential or fiduciary relation to the child, and that the relief in such a case rests upon a general principle applicable to all relations in which dominion is exercised by one person over another. *Ashton v. Thompson* (1884) 32 Minn. 25, 18 N. W. 918. And that the jurisdiction of courts of equity, in cases of the kind under annotation, is founded upon grounds of public policy, see *Davies v. Davies* (1863) 4 Giff. 417, 66 Eng. Reprint, 769, 9 L. T. N. S. 162, 9 Jur. N. S. 1002, 11 Week. Rep. 1040, and *DeLong v. Mumford* (1878) 25 Grant, Ch. (U. C.) 586.

More specifically, it has been said that it is undoubtedly the duty of courts carefully to watch and examine the circumstances attending conveyances from child to parent, to discover if any undue influence has been exercised in obtaining the conveyance. *Jenkins v. Pye* (1838) 12 Pet. (U. S.) 241, 9 L. ed. 1070; *McAdams v. Bailey* (1907) 169 Ind. 518, 13 L.R.A.(N.S.) 1003, 124 Am. St. Rep. 240, 82 N. E. 1057; *Mueller v. Renkes* (1904) 31 Mont. 100, 77 Pac. 512.

So it has often been said that courts of equity must regard conveyances from a child to a parent as objects of jealousy, or that they will be watched with a jealous, critical, or searching eye.

United States.—*Taylor v. Taylor* (1850) 8 How. 183, 12 L. ed. 1040; *WILLIAMS v. CANARY* (reported herewith), ante, 726; *Slocum v. Marshall* (1809) 2 Wash. C. C. 397, Fed. Cas. No. 12,953; *Sullivan v. Sullivan* (1856) *Brunner, Col. Cas.* 642, Fed. Cas. No. 13,598.

Alabama.—*Noble v. Moses Bros.* (1883) 74 Ala. 619, on subsequent appeal in (1886) 81 Ala. 531, 60 Am. Rep. 175, 1 So. 217; *Cooley v. Stringfellow* (1909) 164 Ala. 460, 51 So. 321.

Illinois.—*Ferns v. Chapman* (1904) 211 Ill. 597, 71 N. E. 1106.

Iowa.—*Tucke v. Buchholz* (1876) 43 Iowa, 415.

Maryland.—*Highberger v. Stiffler* (1864) 21 Md. 338, 83 Am. Dec. 593.

Minnesota.—*Ashton v. Thompson* (1884) 32 Minn. 25, 18 N. W. 918.

Ohio.—*Berkmeyer v. Kellerman* (1877) 32 Ohio St. 239, 30 Am. Rep. 577.

Pennsylvania.—*Miskey's Appeal* (1885) 107 Pa. 611; *Clark v. Clark* (1896) 174 Pa. 309, 34 Atl. 610, 619.

West Virginia.—*Pusey v. Gardner* (1888) 21 W. Va. 469.

England.—*Cocking v. Pratt* (1749) 1 Ves. Sr. 400, 27 Eng. Reprint, 1105; *Hoghton v. Hoghton* (1852) 15 Beav. 278, 51 Eng. Reprint, 545, 21 L. J. Ch. N. S. 482, 17 Jur. 99; *Wright v. Vanderplank* (1856) 8 DeG. M. & G. 146, 44 Eng. Reprint, 340, affirming (1855) 2 Kay & J. 1, 69 Eng. Reprint, 669, 27 L. T. N. S. 91, 25 L. J. Ch. N. S. 753, 2 Jur. N. S. 599, 4 Week. Rep. 410; *Turner v. Collins* (1871) L. R. 7 Ch. 329, 41 L. J. Ch. N. S. 558, 25 L. T. N. S. 779, 20 Week. Rep. 305; *London & W. Loan & Discount Co. v. Bilton* (1911) 27 Times L. R. 184.

Canada.—*DeLong v. Mumford* (1878) 25 Grant, Ch. 586.

In *Pusey v. Gardner* (W. Va.) *supra*, the court said: "Contracts between parent and child are always watched with great jealousy, not only for the purpose of ascertaining that the one likely to be so influenced fully understood the act he was performing, but also for the purpose of ascertaining that his consent to perform the act was not obtained by reason of the influence possessed by the other; not that the influence itself, flowing from such relation, is either blamed or discountenanced by the courts; on the contrary, the due exercise of it is considered useful and advantageous to society; but the courts hold, as an inseparable condition, that this influence should be exerted for the benefit of the one subject to it, and not for the advantage of the one possessing it." And again in *Hoghton v. Hoghton* (1852) 15 Beav. 278, 51 Eng. Reprint, 545, the court said: "The court watches the whole transaction with great jealousy, not merely for the purpose of ascertaining that the person likely to be so influenced fully understood the act he was performing, but also for the purpose of ascertain-

ing that his consent to perform that act was not obtained by reason of the influence possessed by the person receiving the benefit; not that the influence itself, flowing from such relation, is either blamed or discountenanced by the court; on the contrary, the due exercise of it is considered useful and advantageous to society; but this court holds, as an inseparable condition, that this influence should be exerted for the benefit of the person subject to it, and not for the advantage of the person possessing it."

Likewise, it has often been declared that, in the case of a child's conveyance of its property to a parent, the circumstances attending the transaction should be vigilantly and carefully scrutinized by the court in order to ascertain whether there has been undue influence in procuring it.

United States.—*Towson v. Moore* (1899) 173 U. S. 17, 43 L. ed. 597, 19 Sup. Ct. Rep. 332.

Arkansas.—*Giers v. Hudson* (1911) 102 Ark. 282, 143 S. W. 916; *SHACKLEFORD v. SHACKLEFORD* (reported herewith) ante, 730.

Iowa.—*Knox v. Singmaster* (1888) 75 Iowa, 64, 39 N. W. 183.

Maryland.—*Withridge v. Withridge* (1892) 76 Md. 54, 24 Atl. 645.

Minnesota.—*Prescott v. Johnson* (1904) 91 Minn. 273, 97 N. W. 891.

Missouri.—*Miller v. Simonds* (1880) 72 Mo. 669, affirming (1878) 5 Mo. App. 33.

New York.—*Wood v. Rabe* (1884) 96 N. Y. 414, 48 Am. Rep. 640; *Bergen v. Udall* (1858) 31 Barb. 9; *Powers v. Powers* (1872) 48 How. Pr. 389; *Jurgenson v. Dana* (1913) 81 Misc. 431, 143 N. Y. Supp. 67, modified on other grounds in (1914) 162 App. Div. 42, 146 N. Y. Supp. 1001.

Oregon.—*Haldeman v. Weeks* (1918) 90 Or. 201, 175 Pac. 445.

In *Giers v. Hudson* (Ark.) *supra*, it was said that the rule which requires a close scrutiny of transactions of the character under consideration in this annotation "is not enforced for the purpose of defeating the contract between parties merely because confidential relationship exists, but it is

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enforced solely for the purpose of discovering what the real intention of the parties was, and to prevent one occupying such a relation of trust from securing an unfair advantage by reason thereof.

This is especially true where the conveyance is made recently after the child becomes of age, or while he or she is under the constant and immediate influence of the parent, as, for instance, residing with the parent, or while the child's property is in the parent's possession or control. *Ashton v. Thompson* (1884) 32 Minn. 25; 18 N. W. 918.

III. *Presumption of undue influence.*

a. *Rules stated.*

In a considerable number of cases, it has been broadly stated that in the case of a conveyance from a child to a parent, especially if it is a gift, the mere existence of the relationship raises a presumption of undue influence which, unless repelled by the facts and circumstances surrounding the transaction, will warrant a court of equity in setting the same aside. In most, at least, if not all of the following cases, there were facts or circumstances, in addition to the mere relation itself, tending to strengthen the inference of fraud or undue influence; and there are few, if any, cases in which the court was called upon to declare the rule upon a hypothesis which included nothing but the bare relationship, and excluded all other facts and circumstances, e. g.; the comparative ages, general condition of dependence or domination, existence or lack of consideration, and the like:

Alabama.—*Noble v. Moses Bros.* (1886) 81 Ala. 531, 60 Am. Rep. 175, 1 So. 217, expressly overruling the decision on former appeal (1883) 74 Ala. 819; *Cooley v. Stringfellow* (1909) 164 Ala. 460, 51 So. 321.

Illinois.—*Carter v. Tice* (1887) 120 Ill. 277, 11 N. E. 529; *Sayles v. Christie* (1900) 187 Ill. 420, 58 N. E. 480; *Ferns v. Chapman* (1904) 211 Ill. 597, 71 N. E. 1106; *McLaughlin v. McLaughlin* (1909) 241 Ill. 366, 89 N. E. 645; *Chapman v. Ferns* (1905) 118 Ill. App. 116.

Maryland.—*Whitridge v. Whitridge* (1892) 76 Md. 54, 24 Atl. 645. See also *Highberger v. Stiffler* (1864) 21 Md. 338, 83 Am. Dec. 593.

Minnesota.—*Ashton v. Thompson* (1884) 32 Minn. 25, 18 N. W. 918. But see dicta to the contrary in *Prescott v. Johnson* (1904) 91 Minn. 273, 97 N. W. 891.

Missouri.—*Bradshaw v. Yates* (1877) 67 Mo. 221; *Miller v. Simonds* (1880) 72 Mo. 669, affirming (1878) 5 Mo. App. 33.

New Jersey.—*Albert v. Haerberly* (1905) 68 N. J. Eq. 664, 111 Am. St. Rep. 652, 61 Atl. 380; *Albert v. Haerberly* (1906) 71 N. J. Eq. 587, 81 Atl. 660, affirmed in (1908) 74 N. J. Eq. 451, 70 Atl. 1100.

Oklahoma.—*PARKER v. PARKER* (reported herewith) ante, 720.

Oregon.—*Baldock v. Johnson* (1887) 14 Or. 542, 13 Pac. 434; *Halderman v. Weeks* (1918) 90 Or. 201, 175 Pac. 445.

Texas.—*Millican v. Millican* (1859) 24 Tex. 426 (undue influence may be inferred from the relation itself, in case of a "gift" from a child to a parent).

England.—*Archer v. Hudson* (1844) 7 Beav. 551, 49 Eng. Reprint, 1180, 13 L. J. Ch. N. S. 380, 8 Jur. 701, affirmed in (1846) 15 L. J. Ch. N. S. 211; *Savery v. King* (1856) 5 H. L. Cas. 627, 10 Eng. Reprint, 1046, 2 Jur. N. S. 503, 25 L. J. Ch. N. S. 482, 4 Week. Rep. 571; *Wright v. Vanderplank* (1855) 2 Kay & J. 1, 69 Eng. Reprint, 669, 27 L. T. N. S. 91, 2 Jur. N. S. 599, 4 Week. Rep. 410, 25 L. J. Ch. N. S. 753, affirmed in (1856) 8 DeG. M. & G. 146, 44 Eng. Reprint, 340; *Davies v. Davies* (1863) 4 Giff. 417, 66 Eng. Reprint, 769, 9 L. T. N. S. 162, 9 Jur. N. S. 1002, 11 Week. Rep. 1040; *Chambers v. Crabbe* (1865) 34 Beav. 457, 55 Eng. Reprint, 712, 11 Jur. N. S. 277, 12 L. T. N. S. 46; *Turner v. Collins* (1871) L. R. 7 Ch. 329, 41 L. J. Ch. N. S. 558, 25 L. T. N. S. 779, 20 Week. Rep. 305; *Bainbrigg v. Browne* (1881) L. R. 18 Ch. Div. 188, 50 L. J. Ch. N. S. 522, 44 L. T. N. S. 705, 29 Week. Rep. 782; *DeWitte v. Addison* (1899) 80 L. T. N. S. 207; *Powell v. Powell* [1900] 1 Ch. 243, 69 L. J. Ch. N. S. 164, 82 L.

T. N. S. 84; *London & W. Loan & Discount Co. v. Bilton* (1911) 27 Times L. R. 184.

Canada.—*Delong v. Mumford* (1878) 25 Grant, Ch. 586.

Likewise, it has been said that conveyances from a child to a parent labor under the suspicion of having been obtained by the parent by an abuse of the influence which the relation gives him or her over the child. *Gaither v. Gaither* (1856) 20 Ga. 709; *Manners v. Banning* (1709) 2 Eq. Cas. Abr. 282, 22 Eng. Reprint, 238. And see *Cocking v. Pratt* (1749) 1 Ves. Sr. 400, 27 Eng. Reprint, 1105. Also, that transactions of the character under consideration are "considered by courts of equity proper subjects for investigation." *Goodrick v. Harrison* (1895) 130 Mo. 263, 32 S. W. 661.

In fact, it has been said that since the law presumes that a conveyance from a child to a parent was obtained by undue influence, because of the probability thereof arising from the dominion or ascendancy of the parent, it requires that the influence in fact exercised shall be exerted for the benefit of the child, and not for the benefit of the parent. *Ashton v. Thompson* (1884) 32 Minn. 25, 18 N. W. 918.

And, of course, the presumption is stronger in the case of a gift than of a purchase or lease favorable to the recipient. *Delong v. Mumford* (1878) 25 Grant, Ch. (U. C.) 586.

Where the law raises a presumption against the validity of a conveyance from a child to or for the benefit of a parent, the parent claiming the benefit of the contract must prove its fairness, and that it is untainted with a violation of the confidence reposed or an undue exercise of the influence arising from the relation of the parties.

Alabama.—*Noble v. Moses Bros.* (1886) 81 Ala. 531, 60 Am. Rep. 175, 1 So. 217; *Cooley v. Stringfellow* (1909) 164 Ala. 460, 51 So. 321.

Illinois.—*Sayles v. Christie* (1900) 187 Ill. 420, 58 N. E. 480; *Ferns v. Chapman* (1904) 211 Ill. 597, 71 N. E. 1106; *McLaughlin v. McLaughlin* (1909) 241 Ill. 366, 89 N. E. 645; *Hays*

v. Feather (1910) 244 Ill. 172, 91 N. E. 97, 18 Ann. Cas. 538.

Maryland.—Whitridge v. Whitridge (1892) 76 Md. 54, 24 Atl. 645.

Minnesota.—Ashton v. Thompson (1884) 32 Minn. 25, 18 N. W. 918.

Missouri.—Bradshaw v. Yates (1877) 67 Mo. 221; Miller v. Simonds (1880) 72 Mo. 669, affirming (1878) 5 Mo. App. 33; Goodrick v. Harrison (1895) 130 Mo. 263, 32 S. W. 661. And see Moon v. Workman (1917) — Mo. —, 201 S. W. 94.

New Jersey.—Albert v. Haeberly (1905) 68 N. J. Eq. 664, 111 Am. St. Rep. 652, 61 Atl. 380; Albert v. Haeberly (1906) 71 N. J. Eq. 587, 81 Atl. 586; Fritz v. Fritz (1912) 80 N. J. Eq. 56, 83 Atl. 181, affirmed on opinion below in (1912) 80 N. J. Eq. 549, 85 Atl. 1134.

Ohio.—Berkmeyer v. Kellerman (1877) 32 Ohio St. 239, 30 Am. Rep. 577.

Oklahoma.—PARKER v. PARKER (reported herewith) ante, 720.

Oregon.—Baldock v. Johnson (1887) 14 Or. 542, 13 Pac. 434; Haldeman v. Weeks (1918) 90 Or. 201, 175 Pac. 445.

Texas.—Dean v. Dean (1919) — Tex. Civ. App. —, 214 S. W. 505 (doctrine said to be "well established").

England.—Archer v. Hudson (1844) 7 Beav. 551, 49 Eng. Reprint, 1180, 13 L. J. Ch. N. S. 380, 8 Jur. 701, affirmed in (1846) 15 L. J. Ch. N. S. 211; Savery v. King (1856) 5 H. L. Cas. 627, 10 Eng. Reprint, 1046, 2 Jur. N. S. 503, 25 L. J. Ch. N. S. 482, 4 Week. Rep. 571; Wright v. Vanderplank (1855) 2 Kay & J. 1, 69 Eng. Reprint, 669, 27 L. T. N. S. 91, 25 L. J. Ch. N. S. 753, 2 Jur. N. S. 599, 4 Week. Rep. 410, affirmed in (1856) 8 DeG. M. & G. 146, 44 Eng. Reprint, 340; Davies v. Davies (1863) 4 Giff. 417, 66 Eng. Reprint, 769, 9 L. T. N. S. 162, 9 Jur. N. S. 1002, 11 Week. Rep. 1040; Chambers v. Crabbe (1865) 34 Beav. 457, 55 Eng. Reprint, 712, 11 Jur. N. S. 277, 12 L. T. N. S. 46; Turner v. Collins (1871) L. R. 7 Ch. 329, 41 L. J. Ch. N. S. 558, 25 L. T. N. S. 779, 20 Week. Rep. 305; Bainbrigge v. Browne (1881) L. R. 18 Ch. Div. 188, 50 L. J. Ch. N. S. 522, 44 L. T. N. S. 705, 29 Week. Rep. 782; DeWitte v.

Addison (1899) 80 L. T. N. S. 207; Powell v. Powell [1900] 1 Ch. 243, 69 L. J. Ch. N. S. 164, 82 L. T. N. S. 84.

In connection with the cases cited to the last proposition, it should be noted that few of them make it clear whether the parent has the burden of proof in the sense of the risk of non-persuasion, or is merely under the obligation of going forward with the evidence. The latter would seem to be the correct position, even from the point of view of a court which indulges an initial presumption in favor of the child.

In Albert v. Haeberly (1905) 68 N. J. Eq. 664, 111 Am. St. Rep. 652, 61 Atl. 380, *supra*, the court said that where the relation of parent and child exists, and an irrevocable conveyance is made by the child to a parent who occupies a dominating position, the situation must be characterized by certain incidents, and that the burden of proof to show that it was so characterized is cast upon the recipient of the benefits of the transaction. And in Chambers v. Crabbe (1865) 34 Beav. 457, 55 Eng. Reprint, 712, *supra*, the master of the rolls (Sir John Romilly) said: "The influence of a father over a son, or a mother over a daughter, is, as must naturally be expected, very considerable, and where the parent derives a benefit from the child it must be clearly proved that this influence has not been exercised, in order to allow any such transactions to stand." And in Archer v. Hudson (Eng.) *supra*, it was said that, while equity does not interfere to prevent an act even of bounty between parent and child, "it will take care . . . that such child is placed in such a position as will enable him to form an entirely free and unfettered judgment, independent altogether of any sort of control."

b. Evidence required to rebut presumption.

Of course, the presumption of undue influence may be rebutted by any competent and sufficient evidence. Cooley v. Stringfellow (1909) 164 Ala. 460, 51 So. 321.

But this broad statement begs the

real question, so that it becomes necessary to determine what constitutes competent and sufficient evidence. And to the latter question a large variety of answers have been made.

Thus, it has been said that, to sustain the burden, the grantee must show "in the clearest and most satisfactory manner" that the conveyance was "one which is, in every particular, worthy of receiving the sanction of a court of equity." *Miller v. Simonds* (1880) 72 Mo. 669.

And that, in order effectually to rebut the presumption, "it must be shown very clearly that the act is entirely free from undue influence." *Delong v. Mumford* (1878) 25 Grant, Ch. (U. C.) 586.

And in *Berkmeyer v. Kellerman* (1877) 32 Ohio St. 239, 30 Am. Rep. 577, the court said that where a parent and guardian claims any benefit or advantage from a settlement with the child at majority, as, for instance, where the child conveys property to the parent, the burden of proof is on the latter to show that he made full disclosures, that he has exercised no undue influence, and that the settlement was fair and reasonable.

In *Potts v. Surr* (1865) 34 Beav. 543, 55 Eng. Reprint, 745, 13 Week. Rep. 909, it was said that to determine the validity of a conveyance from a child to a parent, two things must be examined into: First, whether the person who made the conveyance understood the full effect of it; and, second, whether, if he did so understand it, he was subjected to undue influence, or pressure, which induced him to execute the conveyance. And to the same effect, see *Hoghton v. Hoghton* (1852) 15 Beav. 278, 51 Eng. Reprint, 545, 21 L. J. Ch. N. S. 482, 17 Jur. 99, and *Turner v. Collins* (1871) L. R. 7 Ch. (Eng.) 329, 25 L. T. N. S. 779, 41 L. J. Ch. N. S. 558, 20 Week. Rep. 305.

So, it has been held that a conveyance from a child to or for the benefit of its parent can be supported only when the parent, previous to the conveyance, has made such a full disclosure of all the facts and circumstances which have come to his or her

knowledge as to enable the child to act on equal terms with the parent. *Noble v. Moses Bros.* (1886) 81 Ala. 531, 60 Am. Rep. 175, 1 So. 217. And in *Whitbridge v. Whitbridge* (1892) 76 Md. 54, 24 Atl. 645, it was said that a grantee parent must establish to the satisfaction of the court that the conveyance was "the free, voluntary, unbiased act" of the child, and that to set such a conveyance aside it is not necessary to aver or prove actual fraud, or that legal incapacity actually existed.

Also, it has been said that the parent may rebut the presumption of undue parental influence by showing not only that the child comprehended the transaction, i. e., fully understood it, and that the act was in accordance with his exact and correct intention, but how that intention was induced, and what influence, if any, was exercised by the parent in procuring the conveyance. *Cooley v. Stringfellow* (1909) 164 Ala. 460, 51 So. 321. So, in *Ferns v. Chapman* (1904) 211 Ill. 597, 71 N. E. 1106, it was said that the presumption of undue influence may be rebutted by evidence showing that the conveyance was voluntarily made, and was fully understood by the child, and was for his best interests.

In New Jersey, the rule is that, to rebut the presumption of undue influence in case of an irrevocable gift by a child to a parent occupying a dominant position, the donee must show that the donor had the benefit of competent and independent advice, explaining the effect of the challenged transaction. *Albert v. Haeberly* (1906) 71 N. J. Eq. 587, 81 Atl. 586, following *Albert v. Haeberly* (1905) 68 N. J. Eq. 664, 111 Am. St. Rep. 652, 61 Atl. 380; *Fritz v. Fritz* (1912) 80 N. J. Eq. 56, 83 Atl. 181, affirmed on opinion below in (1912) 80 N. J. Eq. 549, 85 Atl. 1134. So, in England, it has been held that one of the essentials to a rebuttal of a presumption of undue influence is that it must be shown that the child had adequate independent legal advice. *Savery v. King* (1856) 5 H. L. Cas. 627, 10 Eng. Reprint, 1046, 2 Jur. N. S. 503, 25 L.

J. Ch. N. S. 482, 4 Week. Rep. 571. *Bainbrigge v. Browne* (1881) L. R. 18 Ch. Div. (Eng.) 183, 50 L. J. Ch. N. S. 522, 44 L. T. N. S. 705, 29 Week. Rep. 782; *DeWitte v. Addison* (1899) 80 L. T. N. S. (Eng.) 207; *Powell v. Powell* [1900] 1 Ch. (Eng.) 243, 69 L. J. Ch. N. S. 164, 82 L. T. N. S. 84. And see *Kempson v. Ashbee* (1874) 10 Ch. (Eng.) 15, 44 L. J. Ch. N. S. 195, 31 L. T. N. S. 525, 23 Week. Rep. 38. And it has been held that a donee does not discharge this burden by showing that his own solicitor also acted for the child. *Powell v. Powell* (Eng.) supra. And the Canadian supreme court seems to be in line with the English authorities. See *Cox v. Adams* (1904) 85 Can. S. C. 393, wherein the court said that independent advice is essential to the validity of a transaction entered into by a daughter for the benefit of her father. However, there is direct authority to the effect that a showing of independent advice is not always essential to the validity of a conveyance from a child to a parent. *Cooley v. Stringfellow* (1909) 164 Ala. 460, 51 So. 321. And see *Whitridge v. Whitridge* (1892) 76 Md. 54, 24 Atl. 645.

It has often been said that the true test as to whether or not a conveyance from a child to his or her parent is proven free from fraud or undue influence is not whether the grantee knew what he or she was doing, but how the intention was produced. See *Bergen v. Udall* (1858) 31 Barb. (N. Y.) 9; *Davis v. Strange* (1890) 86 Va. 793, 8 L.R.A. 261, 11 S. E. 406; *Hoghton v. Hoghton* (1852) 15 Beav. 278, 51 Eng. Reprint, 545, 21 L. J. Ch. N. S. 482, 17 Jur. 99; *Turner v. Collins* (1871) L. R. 7 Ch. (Eng.) 329, 41 L. J. Ch. N. S. 558, 25 L. T. N. S. 779, 20 Week. Rep. 305. This doctrine seems to have been originally laid down by Lord Eldon, in *Huguenin v. Baseley* (1807) 14 Ves. Jr. 273, 33 Eng. Reprint, 526, 9 Revised Rep. 148, 276, 6 Eng. Rul. Cas. 834, which involved a voluntary settlement by a widow upon a clergyman.

c. Application of rules.

In *Chapman v. Ferns* (1905) 118

Ill. App. 116, in holding that the presumption of undue influence had been rebutted in the case under consideration, it was said that, when it appears that a conveyance from a child to a parent is reasonable, fair, for the best interests of the grantor, and was voluntarily and understandingly entered into, no ground of public policy demands that it be set aside as constructively fraudulent. And in *Moon v. Workman* (1917) — Mo. —, 201 S. W. 94, it was held that the burden of proof that a conveyance from a weak-minded son living under the domination of his father, to the latter, was not tainted by fraud or undue influence, was sustained by proof that after the son was burned out the father took both the son and his cattle, and cared for them, that he conveyed back a life estate, that he faithfully looked after the weak-minded son's money, and that the conveyance was not attacked until after the grantee's death. So, in *Patterson v. Johnson* (1885) 113 Ill. 559, where a daughter twenty-seven years of age conveyed her interest in certain real estate in trust for the benefit of her father, seventy-one years of age, and in embarrassed financial circumstances, of her own volition, and without the exercise of any influence by him, and after having had independent legal advice, it was held that the relations of the parties did not warrant the setting aside of the conveyance as involuntary and unreasonable. And in *Goodrick v. Harrison* (1895) 130 Mo. 263, 32 S. W. 661, where a daughter, shortly after reaching her majority, exchanged lands of about equal value with her father, who was also her guardian, it was held that equity would not avoid her deed on the ground of fraud and undue influence, although it was claimed that the daughter, at the time of the conveyance, was ignorant of her rights, the suit not having been brought for eight years after the conveyance, and it appearing that she could not have remained in ignorance of her rights for any great part of that period.

But in *Chambers v. Crabbe* (1865) 34 Beav. 457, 55 Eng. Reprint, 712, 11

Jur. N. S. 277, 12 L. T. N. S. 46, it was held that a voluntary conveyance to a mother by an inexperienced daughter just of age, pursuant to the suggestion of the mother, of the whole of her property, could not be sustained in the absence of clear proof that the child knew the nature and effect of the transaction, and that she was not in any respect influenced by the peculiar relations in which the parties stood toward each other. And in *De-long v. Mumford* (1878) 25 Grant, Ch. (U. C.) 586, where a well-educated daughter, on the day she became of age, transferred, without consideration and without independent advice, one quarter of her property to her stepfather, with whom she lived, it was held that the conveyance would be set aside on the theory that the presumption of undue influence had not been rebutted. Again, in *Davies v. Davies* (1863) 4 Giff. 417, 66 Eng. Reprint, 769, 9 L. T. N. S. 162, 9 Jur. N. S. 1002, 11 Week. Rep. 1040, it was held that a gift by a daughter of a large part of her property to her father, made shortly after the daughter reached majority and while the confidential relation of parent and child continued, could not be sustained, in the absence of a clear showing that parental influence did not subsist at the time of the gift. So, in *Turner v. Collins* (1871) L. R. 7 Ch. (Eng.) 329, 41 L. J. Ch. N. S. 558, 25 L. T. N. S. 779, 20 Week. Rep. 305, it was held that a voluntary deed of gift from a son to his father, executed soon after he became of age, would, if seasonably attacked, be set aside for undue influence,—at least, in the absence of a showing by the father that the grantor fully understood the character and effect of the transaction, and that the transaction was not the result of undue parental influence. Likewise, in *Savery v. King* (1856) 5 H. L. Cas. 627, 10 Eng. Reprint, 1046, 2 Jur. N. S. 503, 25 L. J. Ch. N. S. 482, 4 Week. Rep. 571, it was said that a conveyance of property by a son recently of age to his father, without adequate consideration, will be set aside in the absence of a showing by the father that the son was a free

agent, that he had adequate independent advice, that he was not taking an imprudent step under parental influence, that he perfectly understood the nature and effect of the transaction, and that he was desirous of making it. So, in *Wright v. Vanderplank* (1855) 2 Kay & J. 1, 69 Eng. Reprint, 669, 27 L. T. N. S. 91, 25 L. J. Ch. N. S. 753, 2 Jur. N. S. 599, 4 Week. Rep. 410, affirmed in (1856) 8 DeG. M. & G. 146, 44 Eng. Reprint, 340, where a daughter, shortly after arrival at her majority, but while still under the parental dominion, and without independent advice, made a gift to her parent, it was held that the gift could not be sustained in the absence of an affirmative showing of lack of exercise of parental influence. And in *Archer v. Hudson* (1844) 7 Beav. 551, 49 Eng. Reprint, 1180, 13 L. J. Ch. N. S. 380, 8 Jur. 701, affirmed in (1846) 15 L. J. Ch. N. S. 211, a conveyance by a niece to one who stood in loco parentis, executed but a few days after she reached majority without consideration or independent advice, and prior to complete emancipation from parental influence, and in fact as a result of the exercising of parental control, was set aside. And in *DeWitte v. Addison* (1899) 80 L. T. N. S. (Eng.) 207, where a daughter, shortly after reaching her majority and while still under the parental dominion, made a voluntary conveyance for the benefit of her father, who was in financial straits, without independent legal advice and at his solicitation, it was held that the transaction must be avoided, there being no adequate rebuttal of the presumption of undue influence. And in *Cocking v. Pratt* (1749) 1 Ves. Sr. 400, 27 Eng. Reprint, 1105, where a daughter, just of age and without a clear understanding of her rights, conveyed property to her mother, it was held that the conveyance should be set aside, it appearing that the mother, although she had more knowledge than the daughter, claimed to have concealed nothing from the latter. And in *Baker v. Bradley* (1855) 7 DeG. M. & G. 597, 44 Eng. Reprint, 233, 25 L. J. Ch. N. S. 7, 2 Jur. N. S. 98, 4 Week. Rep. 78, 18

Eng. Rul. Cas. 334, it was held that a showing that a deed of gift from a child to a parent was executed shortly after the child reached majority, and without independent advice, was sufficient to avoid the deed. So, in *Bury v. Oppenheim* (1859) 26 Beav. 594, 53 Eng. Reprint, 1028, where a daughter but a few months past majority made a gift of her entire property to her father, without independent advice and for no other purpose than to please him, it was held that the gift could not be supported. Likewise, in *Kempson v. Ashbee* (1874) 10 Ch. (Eng.) 15, 44 L. J. Ch. N. S. 195, 31 L. T. N. S. 525, 23 Week. Rep. 38, where a daughter scarcely over twenty-one executed a bond without consideration, for the purpose of protecting her father and while clearly under pressure from him, as well as ignorant of her rights, and without independent advice, the court set the same aside as having been obtained by the undue exercise of parental influence. And in *Baldock v. Johnson* (1887) 14 Or. 542, 13 Pac. 434, where a mother by importunity and misrepresentation obtained, without payment of any consideration, a deed from her seventeen-year-old daughter, who, although married, was still living at home, but in total ignorance of her rights, it was held that the deed could not be allowed to stand; at least, in the absence of any explanation by the grantee of her purpose in procuring the deed, or evidence tending to justify it. So, in *PARKER v. PARKER* (reported herewith) ante, 720, where a son mentally weak from continued drunkenness and completely under the influence of his father, who looked after most of his business, conveyed, apparently without consideration, valuable property to the father at the latter's request, it was held that the conveyance would be set aside, the grantee having failed to show that at the time of the execution of the deed the grantor was legally competent to execute the same, that a valuable consideration was paid, or that it was not brought about by the undue influence of the grantee. Again, in *Noble v. Moses Bros.* (1886) 81 Ala.

531, 60 Am. Rep. 175, 1 So. 217, where an unmarried daughter, shortly after reaching majority and while still residing with her father, made a conveyance for his benefit, it was held that the conveyance would be set aside as obtained by undue parental influence, he not having rebutted the presumption of such influence, and it not appearing that she acted with full knowledge of the facts, or had any independent advice. And in *Cooley v. Stringfellow* (1909) 164 Ala. 460, 51 So. 321, a conveyance from an unmarried daughter to her father of a large portion of her property, executed immediately upon obtaining her majority, was set aside as fraudulent, it appearing that the conveyance was the first business act of her life, and that the father exercised greater control and influence over her than any other person in the world, and that she had no independent advice. And in *Carter v. Tice* (1887) 120 Ill. 277, 11 N. E. 529, where a daughter eighteen years of age, living with her father who was also her guardian, and still under his dominion, executed a release of her property to him without consideration, at his solicitation and without knowing the effect of the paper or the extent of her rights, she having been kept in ignorance as to both the guardianship and her property, it was held that the release was invalid, as having been obtained by undue influence and as in fraud of the daughter's legal rights. And in *Ash-ton v. Thompson* (1884) 32 Minn. 25, 18 N. W. 918, where a child shortly after her majority, and while living with, wholly dependent upon, and under the domination of, her mother, who was also her ex-guardian, conveyed a considerable portion of her property, which had never been in her possession, to the mother for a grossly inadequate consideration, pursuant to the latter's solicitations, and without the benefit of disinterested advice, and while under false impressions as to her rights, it was held that equity would avoid the conveyance. In *Miller v. Simonds* (1880) 72 Mo. 669, affirming (1878) 5 Mo. App. 33, a conveyance by a daughter three years

past majority, but still living with her father who was also her former guardian, to him of her entire property, improvidently, hastily, and without independent advice, was set aside, it appearing that the conveyance arose from the suggestions of the father and a brother, and especially the latter, who urged it as a moral obligation, while at the same time concealing a personal and controlling motive. And in *Bradshaw v. Yates* (1877) 67 Mo. 221, where a stepdaughter, upon becoming of age, conveyed, without consideration, her estate to her stepfather and former guardian, with whom she lived, pursuant to a promise obtained from her while a minor by false statements of the grantee that she should make the conveyance to right a wrong, and under the belief that she was bound to keep her promise, it was held that the deed would be set aside as having been obtained by undue influence. And in *Williams v. Williams* (1885) 68 Md. 371, a trust deed of an estate of about \$250,000, executed by a dissolute and diseased son twenty-five years of age while acting under abject and unreasoning fear induced by third parties, to his father, was set aside, it also appearing that the deed, while highly beneficial to the trustee, cut the grantor's rights down to an income of \$2,000 per year. So, in *Berkmeyer v. Kellerman* (1877) 32 Ohio St. 239, 30 Am. Rep. 577, a gratuitous conveyance by a minor on the day she reached majority, of the whole of her estate to her mother and former guardian, while still under the latter's control, and at her direction, and without being informed of her rights, was set aside.

IV. View that there is no presumption of invalidity.

a. Rules stated.

It has often been said that the mere fact that a conveyance is from a child to a parent does not render it prima facie void.

United States. — *Jenkins v. Pye* (1838) 12 Pet. 241, 9 L. ed. 1070, reversing (1835) 4 Cranch, C. C. 541, Fed. Cas. No. 11,487; *Towson v. Moore* (1899) 173 U. S. 17, 43 L. ed. 597, 19

Sup. Ct. Rep. 332; *WILLIAMS v. CANARY* (reported herewith) ante, 726.

Alabama.—*Noble v. Moses Bros.* (1883) 74 Ala. 619.

Arkansas.—*Giers v. Hudson* (1911) 102 Ark. 232, 143 S. W. 916.

District of Columbia.—*Murray v. Hilton* (1896) 8 App. D. C. 281.

Kentucky.—*Couchman v. Couchman* (1895) 98 Ky. 109, 32 S. W. 283; *Hiles v. Hiles* (1904) 26 Ky. L. Rep. 824, 82 S. W. 580, rehearing denied in (1904) 26 Ky. L. Rep. 1264, 83 S. W. 615.

South Carolina. — See *Young v. Young* (1919) 111 S. C. 347, 97 S. E. 839.

West Virginia.—*Pusey v. Gardner* (1883) 21 W. Va. 469.

England. — *Manners v. Banning* (1709) 2 Eq. Cas. Abr. 282, 22 Eng. Reprint, 238.

In *Jenkins v. Pye* (U. S.) supra, the court said that it could not discover anything to warrant the broad and unqualified doctrine that a deed from a child to a parent ought, upon considerations of public policy growing out of the relation of the parties, to be deemed void.

And some courts have expressly ruled that no presumption of fraud or undue influence arises from the mere fact that the conveyance was from a child to a parent, but rather that such a conveyance is prima facie valid. *Ibid*; *Taylor v. Taylor* (1850) 8 How. (U. S.) 183, 12 L. ed. 1040; *Towson v. Moore* (1899) 173 U. S. 17, 43 L. ed. 597, 19 Sup. Ct. Rep. 332; *WILLIAMS v. CANARY* (reported herewith) ante, 726; *Ludwig v. Bressler* (1918) 165 C. C. A. 28, 253 Fed. 8, certiorari denied in (1919) 248 U. S. 585, 63 L. ed. 433, 39 Sup. Ct. Rep. 182 (dictum); *Sullivan v. Sullivan* (1856) *Brunner*, Col. Cas. 642, Fed. Cas. No. 13,598; *Davis v. Gates* (1916) 235 Fed. 192; *Murray v. Hilton* (1896) 8 App. D. C. 281; *Couchman v. Couchman* (1895) 98 Ky. 109, 32 S. W. 283; *Mueller v. Renkes* (1904) 31 Mont. 100, 77 Pac. 512; *Muzzy v. Tompkinson* (1891) 2 Wash. 632, 27 Pac. 456, 28 Pac. 652; *Pusey v. Gardner* (1883) 21 W. Va. 469. And see *Burton v. Burton* (1909) 82 Vt. 12, 71 Atl. 812, 17 Ann. Cas. 984. And see *Gardner v. Gardner*

(1900) 98 Va. 525, 36 S. E. 985, where-in it was held that, although the evidence in a suit to set aside a deed from a son to his father was sufficient to raise a strong suspicion that it was obtained by the grantee by fraud and undue influence, the court would not set it aside.

In *Towson v. Moore* (1899) 173 U. S. 17, 43 L. ed. 597, 19 Sup. Ct. Rep. 332, *supra*, Mr. Justice Gray, speaking for the court with reference to conveyance from a child to a parent, said: "The presumption is in favor of its validity; and, in order to set it aside, the court must be satisfied that it was not the voluntary act of the donor." And in *Pusey v. Gardner* (1888) 21 W. Va. 469, *supra*, the court stated the rule as follows: "A conveyance from a child to its parent, whether with or without a valuable consideration, is presumed to be valid, in the absence of any circumstances or proof tending to show fraud, misrepresentation, or undue influence, or reasonable grounds from which the court may presume that the act was not entirely free and voluntary on the part of the child."

Of course, in jurisdictions where a conveyance from a child to a parent is regarded as *prima facie* valid, the burden of proof is upon the party seeking to set such a conveyance aside for fraud or for undue influence. *WILLIAMS v. CANARY* (reported herewith) ante, 726; *Ludwig v. Bressler* (1918) 165 C. C. A. 28, 253 Fed. 8, *certiorari* denied in (1919) 248 U. S. 585, 63 L. ed. 433, 39 Sup. Ct. Rep. 182 (dictum); *Muzzy v. Tompkinson* (1891) 2 Wash. 632, 27 Pac. 456, 28 Pac. 652; *Pusey v. Gardner* (W. Va.) *supra*.

And if the terms of a conveyance from a child to its parent appear reasonable, it is enough to outweigh slight circumstances tending in some small degree to show undue influence. *Jenkins v. Pye* (1838) 12 Pet. (U. S.) 241, 9 L. ed. 1070, quoted with approval in *Couchman v. Couchman* (1895) 98 Ky. 109, 32 S. W. 283.

b. Application of rules.

A conveyance from a child to a par-

ent will not be condemned in the face of perfect knowledge, understanding, free consent, and good faith by those concerned. *WILLIAMS v. CANARY* (reported herewith) ante, 726. And in *Murray v. Hilton* (1896) 8 App. D. C. 281, the court refused to set aside as fraudulent a deed by a daughter who had but recently attained her majority, and who still lived with her mother, of her whole property to her mother without pecuniary consideration, she not being deficient in intelligence or education, and having fully understood the location and condition of the property and her rights with respect thereto, as well as the object and meaning of the deed at the time of its execution, and the mother not having practised any deception or exercised any coercion. So, in *Couchman v. Couchman* (1895) 98 Ky. 109, 32 S. W. 283, where a strong-minded girl over twenty-one years of age made a gift of her entire estate to one who stood in loco parentis to her (rules applicable to parent and child applied by court), and toward whom she entertained the tenderest and most affectionate regard, it was held that the gift would not be set aside as improvident and unreasonable and obtained by undue influence, it appearing that the donor fully understood the effect of the transaction, that the donee had not even solicited the same, and that the donor expected to be well taken care of by donee in the future.

But in *Taylor v. Taylor* (1850) 8 How. (U. S.) 183, 12 L. ed. 1040, a deed from a female child just of age and living with her parents, made to a trustee for the benefit of one of those parents, founded on no real consideration, executed under the influence of misrepresentation, and containing in its preamble a recital of false statements, was set aside as an unfair and involuntary transaction, which had been drawn from her by undue means and influence. And in *Slocum v. Marshall* (1809) 2 Wash. C. C. 399, Fed. Cas. No. 12,953, where a daughter who had always lived with her father, in whose advice and opinion she reposed unbounded confidence,

shortly before her marriage, at her father's request and in the mistaken belief, honestly induced by him, that it would benefit both parties and further and carry out the wishes of her mother, conveyed a large estate to him absolutely and without consideration, it was held that the court, to do justice, would rectify her mistake by setting the conveyance aside. And in *Gibson v. Holmes* (1919) 137 Ark. 336, 209 S. W. 285, a deed from a married female child who was partially blind, and who, although seventeen years old, had had but little education, to her stepfather at the solicitation of her mother, who failed to inform her fully as to the extent of her interest, and for a consideration grossly inadequate, was set aside as having been obtained by fraud and undue influence. And there seems to be no question that if ignorance of the rights conveyed, or undue influence, is detected in a conveyance from a child to a parent, it will be set aside. See *Sullivan v. Sullivan* (1856) Brunner, Col. Cas. 642, Fed. Cas. No. 13,598.

V. True rule.

The rule most consonant with reason would seem to be, not that there is always a presumption of undue parental influence in every case of conveyance from a child to parent, or that there is always a presumption of validity in such a case, but rather that courts of equity, in examining such transaction, will carefully search for suspicious circumstances having a tendency to show unfairness or undue influence, and, in case any such circumstances are found, will require the party claiming the benefit of the contract to clear the transaction of any such cloud.

This seems to be the purport of the decisions in *Giers v. Hudson* (1911) 102 Ark. 232, 143 S. W. 916, and in *SHACKLEFORD v. SHACKLEFORD* (reported herewith) ante, 730. In *Giers v. Hudson*, a conveyance from a daughter to her father was upheld as against a contention that it was obtained by undue influence, it appearing that, although she was living with him at the time, she was several years

past majority, was highly intelligent, and well educated except for lack of business experience, that she had been absent from home for two years and down until within a few months of the conveyance, and that the conveyance was not without consideration. And in *SHACKLEFORD v. SHACKLEFORD*, applying the rule that the burden rests upon the parent to clear a conveyance to him by his child of every shadow of suspicion, and to establish its fairness and good faith, a conveyance made without consideration a short time after reaching majority, by children who had no independent advice, to their mother at her solicitation, and while under her roof and influence, was set aside as having been obtained by her undue influence.

And, in *Kansas*, it was held that grossly inadequate consideration, coupled with the fact that the grantor was the stepson of the grantee, was sufficient to throw suspicion upon the transaction and cast upon the grantee the burden of showing that no advantage was taken, and that the transaction was fair and reasonable. *Stevens v. Stevens* (1900) 10 Kan. App. 259, 62 Pac. 714. In this case the court also found that the grantor was weak in body and mind, and that there were undue influence and false and fraudulent statements and misrepresentations.

And the Iowa decisions, when read as a whole, support the theory that the facts of each particular case control, and that no presumption of undue influence arises in all cases of conveyances from a child to a parent. On the one hand, it has been held that there is no such confidential relation between an adult child and its parent as will of itself render a conveyance from the former to the latter presumptively fraudulent, and that to avoid such a conveyance it must be made to appear that the grantor was led by fraudulent practices and deception into parting with title. *Burch v. Nicholson* (1912) 157 Iowa, 502, 137 N. W. 1066. And in *Chirurg v. Ames* (1908) 138 Iowa, 697, 116 N. W. 865, it was held that a woman of full age and far above the average in educa-

tion and intelligence, who seeks to set aside as obtained through fraud and mistake a conveyance to her mother which is fair on its face, "must make out her case by clear and satisfactory evidence," although it be admitted that she had absolute confidence in the grantee. On the other hand, it has been held that a conveyance by an inexperienced girl immediately upon becoming of age, to her parent, while still an inmate of his household and for a grossly inadequate consideration, will be viewed with distrust and cast upon the parent seeking to profit thereby "the burden of negating the inference of fraud and undue influence." *Eighmy v. Brock* (1905) 126 Iowa, 535, 102 N. W. 444. Moreover, in *Knox v. Singmaster* (1888) 75 Iowa, 64, 39 N. W. 183, in answering the contention that a deed was prima facie void because made without consideration by a child to a parent, the court said: "It is true that deeds of this character are closely scrutinized by courts of equity, especially where, as in this case, the child is but just released in law from parental control. In many cases, the fact that a deed was so executed would be sufficient to authorize a court of equity to set it aside. . . . But each case depends largely on its own facts,"—and proceeded to hold the deed under consideration valid, as having been free and voluntary, and made without undue influence for a praiseworthy object.

And in Pennsylvania the rule seems to be that the burden is not thrown upon the parent to whom a child has made a conveyance, by the mere fact of the relationship. At least, in *Miskey's Appeal* (1885) 107 Pa. 611, in holding that, where a child makes a voluntary gratuitous conveyance without power of revocation to a parent in whom he reposes confidence, the parent must prove affirmatively that the conveyance was the intelligent and deliberate act of the grantor, free from the exercise of the parental influence, the court said that the fact that the conveyance did not contain a power of revocation "throws the burden of proof upon the party

taking the benefit," so that, in the absence of a showing of distinct intention to make the gift irrevocable, the conveyance will be set aside, if the other circumstances of the case require it; and in *Clark v. Clark* (1896) 174 Pa. 309, 34 Atl. 610, 619, it was said, in argument, that the mere fact that a conveyance is from a child to a parent does not require the help of affirmative explanatory evidence in order that it may be sustained; while in *Coleman's Estate* (1899) 193 Pa. 605, 44 Atl. 1085, the court said that the case, on its facts, was distinguishable from the cases deciding that a deed to one occupying a fiduciary relation to the grantor was presumptively void because of that relation, and upheld a deed from a son to his mother, which was founded on a valuable consideration and was executed for legitimate reasons not induced by the mother, as to whom there was no evidence of overreaching or selfish grasping. In *Miskey's Appeal* (Pa.) supra, where a son made a voluntary conveyance (less an inadequate provision for his own son) of his entire estate to his father, mother, and sister, without any provision for his own wife, without power of revocation, and evidently without being conscious of the fact that the deed was irrevocable, he being at the time greatly impaired and enfeebled in both mind and body from excessive drunkenness, and there being evidence indicating with great force that the execution of the deed was procured by the active exertion of the parental influence of the father, and without the grantor having had any independent legal advice, the deed was set aside as fraudulent and void.

And in New York, while it has been said (*Bergen v. Udall* (1868) 31 Barb. (N. Y.) 9) that a parent relying upon a conveyance from his child "must show affirmatively not only that the person who made it understood its nature and effect and executed it voluntarily, but that such will and intention were not in any degree the result of misrepresentation or mistake, and were not induced by the exertion for selfish purposes, and for

his own exclusive benefit, of the influence or control which he possessed, as a father, over his daughter," a subsequent case (*Powers v. Powers* (1872) 48 How. Pr. (N. Y.) 389) declares that the courts have not gone so far as to establish any presumption of law against the validity of such transfers, although they will not sustain such a transaction where it appears that any advantage has been taken of the inexperience of the child, or of the confidence naturally reposed by a child in the suggestions, advice, and judgment of a parent; and a still later decision (*Toms v. Greenwood* (1890) 30 N. Y. S. R. 478, 9 N. Y. Supp. 666) expressly concedes the rule to be that "the mere relation of parent and child is not sufficient to create a presumption of fraud or undue influence so as to avoid a transfer of property, or to shift the burden of proof that the transaction was fair and equitable upon the person benefited;" but that "if such relation be established, and the circumstances proved show that the beneficiary has reaped an undue advantage, or if it appears that the capacity of the person is such that the parties did not deal on terms of equality, then the burden is shifted, and the transaction is presumed fraudulent unless it be affirmatively established that the stronger party practised no deception and used no undue influence." And the actual decisions in the cases bear out the conclusions stated in the *Powers* and *Toms* Cases. In *Bergen v. Udall* (N. Y.) *supra*, a conveyance by a daughter made a few days after reaching majority, to her father, was set aside, it appearing that the deed was without consideration, that it was obtained by the father through the undue influence of himself and friends, who concealed the daughter's actual rights, while she was sick and without time for reflection or consultation with a disinterested person. So, in *Powers v. Powers* (N. Y.) *supra*, a conveyance of valuable property made without consideration by a son shortly after reaching majority, to his mother, without independent advice or counsel, and pursuant to the impor-

tunities of the mother and a most intimate and confidential friend who lived in the family. And in *Toms v. Greenwood* (N. Y.) *supra*, a conveyance made by a daughter twenty-three years of age to her father, of valuable property, without consideration, and while sick and under fear induced by the father, upon whose advice she generally relied, of creditors (who did not exist) seizing the property, was set aside on the theory that such facts created a presumption of undue influence. And in *Jurgenson v. Dana* (1913) 81 Misc. 431, 143 N. Y. Supp. 67, modified on other grounds in (1914) 162 App. Div. 42, 146 N. Y. Supp. 1001, a deed fair on its face and for a valuable consideration, made by a son to his father, was upheld, no deception or fraud having been shown, and it appearing that the grantor knew his rights and made the conveyance with full knowledge of the facts.

And as a matter of fact it seems doubtful if the courts which have laid down the broad rule (treated *supra*, III.) that a conveyance by a child to its parent is presumptively invalid, because presumed to have been obtained by undue influence, so as to cast the burden of proof as to absence of undue influence upon the parent, would apply the rule in every case, without reference to the particular facts and circumstances involved, i. e., without reference to the age, mentality, and experience of the child, the existence and adequacy of the consideration for the conveyance, the respective financial condition of the parties, the emancipation of the infant from parental domination, the obtaining of independent advice, etc. This conclusion is supported by the decision and opinion of the court in *White v. Ross* (1895) 160 Ill. 56, 43 N. E. 336 (Illinois being a state the courts of which have often laid down the general rule), wherein a conveyance by a daughter to her mother was held presumptively fraudulent where it appeared that the relation of parent and child existed in full vigor; that although the daughter was several years past majority, the position of the mother was one of dominance and

authority, and of the daughter, of dependence; that the daughter confided in and trusted her mother implicitly; that the mother was already possessed of abundant means; that the property conveyed was of large value, and embraced the daughter's entire estate and substantially all her means of support; that the daughter was an invalid without any business, or acquaintance with business affairs, and wholly unable to earn her own living; that the conveyance was gratuitous; and that the daughter had no independent advice and did not understand that she was divesting herself absolutely of all her property rights. The court said that "the gift was improvident and unreasonable on the part of the daughter to make, and unconscionable on the part of the mother to accept, and that under such circumstances the presumption of undue influence arises, and that the conveyances in question were obtained by undue influence of the mother over the daughter, and that the burden of proof is on the mother, and those claiming under her, to show that the daughter acted independently, advisedly, and of her own free intelligent will and accord, uninfluenced by the recipient of so munificent a gift, and, no such proof having been made, that **independently of any question of actual fraud, the transaction must be held to be constructively fraudulent;**" and then discussed the general question of when such a presumption of undue influence will arise, as follows: "If a child possessing wealth should while under parental control, though past minority, make a deed of gift of property of substantial value to his indigent parent, sufficient to maintain such parent in comfort, and even elegance, the remainder of his life, but reserving sufficient for his own needs, thus eliminating from the transaction all improvidence, all unreasonableness, and all apparent unconscientiousness on the part of the parent, it might be justly contended that the rule would be a harsh one that would cast the burden of proof on the parent, or on those claiming under him, to prove that no undue influence was

resorted to, to obtain the gift. But where, as in this case, the transaction appears to have been an improvident and unreasonable one for the child to enter into, and one apparently involving the taking of an unconscionable advantage by the parent in accepting and retaining the property, there can be no doubt, from the standpoint of any well-considered case, that the burden of proof is cast upon the parent to prove that the transaction was, in the language often used, 'a righteous one.'" The court then proceeded to hold that, under the facts of the case under consideration, a gift by the daughter to the mother of an interest in certain valuable paintings was a "reasonable and proper one," which, in the absence of proof of improper influence, would not be defeated by any presumption thereof. And the court, in the subsequent Illinois case of *Hays v. Feather* (1910) 244 Ill. 172, 91 N. E. 97, 18 Ann. Cas. 538, seems to have had the same idea in mind, it having been held that where a parent obtains a deed for land from a child not strong mentally, and without consideration, the presumption is that the transaction was fraudulent.

So, in Oregon, it has been held that "the well-known rule of law that a court of equity will guard the rights of children while standing in the relation of parent and child, and will closely scrutinize gifts from child to parent, requiring the parent to prove that the transaction was bona fide, free from force, duress, or undue influence, and not manifest any gross detriment of the child's interest," does not apply to a conveyance which is not a gift. *Haldeman v. Weeks* (1918) 90 Or. 201, 175 Pac. 445.

And in Washington, in *Muzzy v. Tompkinson* (1891) 2 Wash. 632, 27 Pac. 456, 28 Pac. 652, in approving the rule that there is no presumption of invalidity in a transaction between parent and child which throws the burden upon a parent of showing that the transaction was fair and just and that the child was fully advised of its rights and interests, arising merely from proof of the relationship of the

parties, the court said that in the cases which lay down the broad rule that a conveyance from a child to a parent raises a presumption of undue influence, there was always some circumstance of actual undue influence, inadequacy of consideration, or other inequitable incident, moving the court to action.

And it is believed that even in England no presumption of undue influence is raised against a conveyance by a child to its parent, in the absence of facts, additional to the relationship, such, for instance, as that the conveyance was a gift, or that the child had just reached majority, or was not fully advised, etc. This conclusion is borne out by the fact that such a presumption seems not to have been raised in any case which did not involve facts detrimental to the child other than the mere existence of the relationship. For instance, in *Archer v. Hudson* (1844) 7 Beav. 551, 49 Eng. Reprint, 1180, affirmed in (1846) 15 L. J. Ch. N. S. 211, the master of the rolls (Lord Langdale) stated the rule as follows: "Nobody has ever asserted that there cannot be a pecuniary transaction between a parent and child, the child being of age, but everybody will affirm in this court that, if there be a pecuniary transaction between parent and child just after the child attains the age of twenty-one years, and prior to what may be called a complete 'emancipation,' without any benefit moving to the child, the presumption is that an undue influence has been exercised to procure that liability on the part of the child, and that it is the business and the duty of the party who endeavors to maintain such a transaction to show that that presumption is adequately rebutted; and that it may be adequately rebutted is perfectly clear." So, in *Bainbrigge v. Browne* (1881) L. R. 18 Ch. Div. (Eng.) 188, 50 L. J. Ch. N. S. 522, 44 L. T. N. S. 705, 29 Week. Rep. 782, where it appeared that a daughter above majority, but not entirely emancipated from parental control, executed without independent advice a deed for the benefit of her father, it was held that the "circumstances" were such as to raise

an inference of undue influence, and to cast upon the father the burden of showing that independent advice was received, and that the instrument was executed with full knowledge of the contents and with the free intention of giving to him the benefit which it conferred. And see *Savery v. King* (1856) 5 H. L. Cas. 627, 10 Eng. Reprint, 1046, 2 Jur. N. S. 503, 25 L. J. Ch. N. S. 482, 4 Week. Rep. 571, as quoted in *SHACKLEFORD v. SHACKLEFORD* (reported herewith) ante, 730. Again, in *London & W. Loan & Discount Co. v. Bilton* (1911) 27 Times L. R. (Eng.) 184, the court ruled that transactions in the nature of bounty from child to parent are regarded with the greatest jealousy, when taking place before the child is completely emancipated from parental control, and held that a showing that a mortgage was voluntarily executed by an unmarried daughter, of age, but living at home, for her father's benefit and at his solicitation, without independent advice, was presumptively invalid. And see to the same effect, *Manners v. Banning* (1709) 2 Eq. Cas. Abr. 282, 22 Eng. Reprint, 238; *Cocking v. Pratt* (1749) 1 Ves. Sr. 400, 27 Eng. Reprint, 1105; *Baker v. Bradley* (1855) 7 DeG. M. & G. 597, 44 Eng. Reprint, 233, 25 L. J. Ch. N. S. 7, 2 Jur. N. S. 98, 4 Week. Rep. 78, 18 Eng. Rul. Cas. 334; *Wright v. Vanderplank* (1855) 2 Kay & J. 1, 69 Eng. Reprint, 69, 27 L. T. N. S. 91, 25 L. J. Ch. N. S. 753, 2 Jur. N. S. 599, 4 Week. Rep. 410, affirmed in (1856) 8 DeG. M. & G. 146, 44 Eng. Reprint, 340; *Bury v. Oppenheim* (1859) 26 Beav. 594, 53 Eng. Reprint, 1028; *Davies v. Davies* (1863) 4 Giff. 417, 66 Eng. Reprint, 769, 9 L. T. N. S. 162, 9 Jur. N. S. 1002, 11 Week. Rep. 1040; *Chambers v. Crabbe* (1865) 34 Beav. 457, 55 Eng. Reprint, 712, 11 Jur. N. S. 277, 12 L. T. N. S. 46; *Turner v. Collins* (1871) L. R. 7 Ch. (Eng.) 329, 41 L. J. Ch. N. S. 558, 25 L. T. N. S. 779, 20 Week. Rep. 305; *Kempson v. Ashbee* (1874) 10 Ch. (Eng.) 15, 44 L. J. Ch. N. S. 195, 31 L. T. N. S. 525, 23 Week. Rep. 38; *DeWitte v. Addison* (1899) 80 L. T. N. S. (Eng.) 207; and *Powell v. Powell* [1900] 1 Ch. (Eng.) 243, 69 L. J. Ch. N. S. 164, 82 L. T. N.

S. 84,—all of which are set out supra, III. c. And further support for the above-stated conclusion is afforded by a few additional cases, wherein the courts do not seem to have recognized the existence of a presumption of undue influence. Thus, in *Blackborn v. Edgley* (1719) 1 P. Wms. 600, 24 Eng. Reprint, 534, a bond executed by a son to his father was upheld on the ground that it did not appear that it was not his free act, the court saying that, without any proof to impeach it, it should not be set aside in equity. And in *Melland v. Gray* (1843) 2 Younge & C. Ch. Cas. 199, 63 Eng. Reprint, 87, a bond and mortgage given by a son to his father was upheld, it appearing that there was an actual consideration. And in *Thornber v. Sheard* (1850) 12 Beav. 589, 50 Eng. Reprint, 1186, it was held that the mere fact that a daughter voluntarily paid a debt of her father, who was in difficulties, by conveying property, was not of itself ground for imputing undue influence to the father. And see also *Everitt v. Everitt* (1870) L. R. 10 Eq. (Eng.) 405, 39 L. J. Ch. N. S. 777, 23 L. T. N. S. 136, 18 Week. Rep. 1020.

VI. Cases decided on facts without reference to specific rules.

In *Bowen v. Hughes* (1892) 5 Wash. 442, 32 Pac. 98, the court said that every case depends largely upon the circumstances surrounding it, and, without stating any rules of law, held that a conveyance made by a daughter about two years past majority to her mother for an adequate consideration, and while not living with the grantee, was not subject to attack on the ground that it was obtained by undue influence, it also appearing that the grantor was well educated, perfectly competent to protect her own interests, and exceedingly independent, that there was no great amount of affection between them, that the conveyance was not attacked until some time after the grantor's marriage and after the value of the land had materially increased, and that the daughter was not the most interested party to the action.

But in the majority of the cases which have determined the validity of a conveyance from a child to a parent without laying down any specific rules for guidance, the particular conveyances under consideration have been held invalid. Thus, in *Brown v. Burbank* (1883) 64 Cal. 99, 27 Pac. 940, a conveyance by a girl nineteen years of age of her whole estate, without consideration, to her grandparents, with whom she had resided since infancy, being under their care and control, and who had purposely misled and kept her in ignorance of her rights, was set aside as fraudulent. And in *Given v. Masterson* (1898) 152 Ind. 127, 51 N. E. 237, where a stepson and wife, at the request of the stepfather, with whom he had always lived and in whom both the stepson and his wife reposed trust and confidence, were induced by misleading conduct and statements to execute a deed in the belief that it was a mortgage, it was held that the same would be set aside as having been procured by imposing upon the grantors through the parental influence of the grantee. So in *Rider v. Kelso* (1880) 53 Iowa, 367, 5 N. W. 509, where a daughter about twenty-six years old, who had always resided with her mother in whom she had confidence, and who had always managed her property, was induced by the fraudulent representations of the mother to sign a deed to the latter without consideration, and in the belief that it was a mortgage, it was held that the same should be set aside. And in *Young v. Peachy* (1741) 2 Atk. 254, 26 Eng. Reprint, 557, a conveyance obtained by a father from his daughter for one particular purpose, but which in fact was used for a different one, was set aside for fraud. And in *Tucke v. Buchholz* (1876) 43 Iowa, 415, the court set aside, as having been procured by fraud and undue influence, a deed by stepchildren who were not of ordinary intelligence, but who had reached majority, although not yet emancipated from the habit of obedience and deference, executed to their stepfather for a grossly inadequate consideration and without full knowledge of the ex-

tent of their interest, at his solicitation and upon requests that in effect were commands. So, in *Peek v. Peek* (1894) 101 Mich. 304, 59 N. W. 604, a deed of valuable property by adult sons to their father, made without consideration and obtained through fraud, was set aside, notwithstanding the fact that the grantors were in a sense parties to the fraud, it appearing that the father had unduly taken advantage of the natural trust relation existing between parent and child. And in *Oar v. Davis* (1911) — Tex. Civ. App. —, 135 S. W. 710, affirmed in (1912) 105 Tex. 479, 151 S. W. 794, where a stepfather obtained deeds from his wife's children by means of actual fraud, worked by reason of the confidence which the grantors reposed in him, the deeds were set aside. And in *Bailey v. Woodbury* (1877) 50 Vt. 166, where a father, taking advantage of the confidence reposed in him by his children, induced them to sign deeds conveying a fee to him instead of a life estate as he had represented to them, the court reformed the conveyance so as to conform to the actual agreement. And in *Davis v. Strange* (1890) 86 Va. 793, 8 L.R.A. 261, 11 S. E. 406, where a daughter reconveyed valuable property to her father without considera-

tion while in a situation of sudden surprise and emergency, without the advice of counsel, and when wholly unable to exercise a consenting mind because of the undue influence of her father and of his attorney, who pressed her with importunity and strong persuasions, and assurances that she would lose nothing by it when they were reasonably sure that the contrary was true, and while most powerfully moved by the evident distress and suffering of her aged and devoted father, occasioned him by the reproaches and importunate remonstrances of another daughter and her husband. And in *Beasley v. Magrath* (1804) 2 Sch. & Lef. (Ir.) 31, where a daughter, without independent advice, upon the advice of her stepfather, executed a bond to him while she was in great distress and laboring under the false impression that he had a right to demand it, the court decreed that the same be set aside as improvident and in fraud of her rights. And in *Heron v. Heron* (1741) 2 Atk. 160, 26 Eng. Reprint, 500, where it clearly appeared that a father took advantage of his son's necessities to which the father had reduced him, and secured a release of the son's orphanage rights, the release was set aside.

G. J. C.

ASHTON-JENKINS COMPANY

v.

WILLIAM H. BRAMEL, Judge of Third Judicial District Court of Utah.

Utah Supreme Court — July 27, 1920.

(— Utah, —, 192 Pac. 375.)

Constitutional law — due process — published notice of action to quiet title.

1. A provision for published notice to residents of the state whose whereabouts are unknown, in a proceeding to quiet title to real estate, does not deprive them of their property without due process of law.

[See note on this question beginning on page 772.]

Cloud — quieting title — proceeding in rem.

2. The state may, for the purpose of settling and quieting title to real property within its limits, authorize proceedings in the nature of actions in rem.

[See 5 R. C. L. 645.]

Constitutional law — absence of necessity for statute.

3. A statute cannot be declared unconstitutional because of absence of necessity, since that is a question for the legislature and not the courts.

[See 25 R. C. L. 809.]

(— Utah, —, 198 Pac. 375.)

— conferring judicial power on clerks.

4. A statute providing for registration of land titles is not unconstitutional for conferring judicial power upon the clerks of courts, if their

duties are merely ministerial, to be performed under direction of the court.

[See 23 R. C. L. 275.]

APPLICATION by plaintiff for a writ of mandate to compel the defendant judge to direct the clerk of the District Court, as registrar, to issue to plaintiff a certificate of title under the provisions of the "Uniform Land Registration Act." *Writ granted.*

The facts are stated in the opinion of the court.

Messrs. Moyle & Ray, for plaintiff:

The action to bring land within the operation of the Uniform Land Registration Act is an action in rem, and is consequently subject to the rules of law and procedure governing actions of that nature.

2 Freeman, Judgm. 606; Tyler v. Judges of Ct. of Registration, 175 Mass. 71, 51 L.R.A. 433, 55 N. E. 814; Arndt v. Griggs, 134 U. S. 326, 33 L. ed. 921, 10 Sup. Ct. Rep. 557; Roller v. Holly, 176 U. S. 398, 44 L. ed. 520, 20 Sup. Ct. Rep. 410; Grannis v. Ordean, 234 U. S. 385, 58 L. ed. 1363, 34 Sup. Ct. Rep. 779; Pennoyer v. Neff, 95 U. S. 714, 733, 24 L. ed. 565, 572; Herbert v. Bicknell, 233 U. S. 70, 58 L. ed. 854, 34 Sup. Ct. Rep. 562; Overby v. Gordon, 177 U. S. 214, 44 L. ed. 741, 20 Sup. Ct. Rep. 603; Hamilton v. Brown, 161 U. S. 256, 40 L. ed. 691, 16 Sup. Ct. Rep. 585.

So long as the manner and form of service of process authorized by the states is reasonable, the Supreme Court of the United States has, without exception, held that they do not come within the prohibition of the 14th Amendment.

Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; Overby v. Gordon, 177 U. S. 214, 44 L. ed. 741, 20 Sup. Ct. Rep. 603; Herbert v. Bicknell, 233 U. S. 70, 58 L. ed. 854, 34 Sup. Ct. Rep. 562; Roller v. Holly, 176 U. S. 398, 44 L. ed. 520, 20 Sup. Ct. Rep. 410; Dunlevy v. New York L. Ins. Co. 204 Fed. 670; Johnson v. Hunter, 127 Fed. 224; Connor v. Tennessee C. R. Co. 54 L.R.A. 687, 48 C. C. A. 730, 109 Fed. 936; Brand v. Brand, 116 Ky. 791, 63 L.R.A. 206, 76 S. W. 870; Grannis v. Ordean, 234 U. S. 392, 58 L. ed. 1368, 34 Sup. Ct. Rep. 779; Hook v. Hoffman, 16 Ariz. 544, 147 Pac. 724; Phillips v. Thompson, 73 Wash. 78, L.R.A.1918F, 599, 131 Pac. 463, Ann. Cas. 1914D, 672; Pinney v. Providence Loan & Invest. Co. 50 L.R.A. p. 577, note; Raher v. Raher, 35 L.R.A.(N.S.) 297, 11 A.L.R.—48.

note; Roberts v. Jacob, 154 Cal. 308, 97 Pac. 672; Ward Lumber Co. v. Henderson-White Mfg. Co. 107 Va. 676, 17 L.R.A.(N.S.) 324, 59 S. E. 476; Bryant v. Shute, 147 Ky. 268, 144 S. W. 28; Jennings v. Rocky Bar Gold Min. Co. 29 Wash. 726, 70 Pac. 136.

It is within the power of the state to fix any reasonable length of time within which a title by adverse possession may be acquired.

Wheeler v. Jackson, 137 U. S. 245, 34 L. ed. 659, 11 Sup. Ct. Rep. 76.

The Uniform Land Registration Act is not unconstitutional.

Tyler v. Judges of Ct. of Registration, 175 Mass. 71, 51 L.R.A. 433, 55 N. E. 812; People ex rel. Deneen v. Simon, 176 Ill. 165, 44 L.R.A. 801, 68 Am. St. Rep. 175, 52 N. E. 910; State ex rel. Douglas v. Westfall, 85 Minn. 437, 57 L.R.A. 297, 89 Am. St. Rep. 571, 89 N. W. 175; Title & D. Restoration Co. v. Kerrigan, 150 Cal. 289, 8 L.R.A.(N.S.) 682, 119 Am. St. Rep. 199, 88 Pac. 356; Robinson v. Kerrigan, 151 Cal. 40, 121 Am. St. Rep. 90, 90 Pac. 129, 12 Ann. Cas. 829.

All the subjects of an act mentioned in the title are within and germane to the main title.

State v. Erickson, 7 Utah, 454, 154 Pac. 948.

Mr. D. A. Skeen, for defendant:

The procedure outlined in the act, and the effect of the act, violate the 5th Amendment and § 1 of the 14th Amendment of the Federal Constitution; and § 7, art. 1, of the Constitution of the state of Utah, in that it takes property without due process of law.

State ex rel. Monnett v. Guilbert, 56 Ohio St. 575, 38 L.R.A. 519, 60 Am. St. Rep. 756, 47 N. E. 551; American Land Co. v. Ziess, 219 U. S. 47, 55 L. ed. 82, 31 Sup. Ct. Rep. 200.

Thurman, J., delivered the opinion of the court:

This is an application for a writ

of mandate to compel the defendant, as judge of the district court of Salt Lake county, to direct the clerk of said court, as registrar, to issue to plaintiff a certificate of title under the provisions of the "Uniform Land Registration Act," commonly called the "Torrens Law."

Defendant demurs to the complaint on the grounds that the act in question is obnoxious to the provisions of both the Federal and state Constitutions, which prohibit the taking of property without due process of law, and also violates other provisions of the state Constitution in that it attempts to confer judicial authority upon the county clerks, who are ex officio registrars of title.

Comp. Laws Utah 1917, §§ 4920 to 5008, inclusive, contain the provisions of the act, and the following provisions are deemed material to the questions here presented. The substance only will be stated:

(1) Exclusive original jurisdiction is conferred on the district courts of the state, with plenary powers, both in law and equity, in all matters pertaining to registration. (2) The proceeding is in rem, and a jury may be had by any interested party on demand. (3) Rehearing and appeal are allowed as in other cases. (4) County clerks shall be ex officio registrars of title, whose duties shall be performed under the direction of the court, and who shall perform such other duties as the court may prescribe. (5) The court shall appoint one or more attorneys at law to be examiners of title, prescribe their duties, and require them to report their findings of fact to the court. (6) Suits shall be brought by petition to the court, showing that petitioner is the owner of the land or has the power to dispose of it. (7) Infants and other persons under disability may sue or defend by guardian or trustee, and corporations by an officer duly authorized; nonresident petitioners shall appoint a resident agent upon whom process and notice may be served. (8) Except as otherwise provided in the

act, the suit shall be subject to the general rules of pleading and practice in such courts. (9) The petition must be signed and sworn to by the petitioner. (10) The petition must show the description of the land, with the improvements thereon, when, how, and from whom acquired, whether or not it is occupied, an enumeration of all liens, interests, and claims, adverse or otherwise, and the full names and addresses, if known, of all persons interested by marriage or otherwise, including adjoining owners and occupants. The petition shall also be accompanied by a plan made in accordance with the rules of the court. (11) Notice of lis pendens shall be filed with the petitioner. (12) Upon filing the petition the court must refer it to one of the examiners; the report of the examiner shall include an abstract of title and all other evidence that can be obtained by the examiner, also full extracts from the records, with names and addresses, as far as ascertained, of all persons interested in the land, as well as adjoining owners and occupants, showing their several interests, and indicating upon whom and in what manner process shall be served or notice given in accordance with the provisions of the act. (13) Notice to all persons named in the report, and "to all whom it may concern," shall be published and posted in the county where the land lies in the same manner and to the same effect as an order of publication in other proceedings in rem. (14) A copy of the order of publication shall be mailed by registered letter, demanding a return, to every interested party named in the petition or in the report of the examiner whose address is given or known. (15) An attested copy of the order must be posted in a conspicuous place on each parcel of the land, and the sheriff is required to go upon the land and ascertain and report to the court the names and addresses of any persons actually occupying the premises under claim of title. (16) If public rights or interests are in-

volved, the order of publication must be personally served upon the proper attorney of the state, county, or city. (17) The court may cause other or further notice to be given in such manner and to such person as it may deem proper. (18) Such personal service as is required in equitable actions shall also be made upon residents of the state, not under disability, who are made known to the court before final decree and can be reached by its process, unless such service be waived by appearance or otherwise. (19) The notices, except the last referred to above, shall be in lieu of personal service and binding on all the world. (20) Certificates of the registrar and sheriff, or their deputies, showing due execution of the order of publication and the mailing and posting of copies thereof, as required in the act, shall be filed in the cause and be conclusive proof of service. (21) After the expiration of at least fifteen days from the publication and posting of the order of publication, the cause shall be set down for hearing; thereupon the court shall appoint a competent attorney at law, of the county in which the land lies, as guardian ad litem for all persons under disability, not in being, unascertained, unknown, or out of the state, who may have, or appear to have, an interest in, or claim against the land. (22) Any person having any interest in, or claim against, the land, whether named in the petition and order of publication or not, may appear and file an answer at any time before final decree unless such person has been served personally with notice. The answer shall be under oath. (23) After the expiration of fifteen days from the publication and posting of the order of publication, the court may proceed to take such action as may be proper upon the report of the examiner, and all other evidence before it with reference to the rights of all persons appearing to have any interest in, or claim against, the land, and may refer the cause again for further proof. (24) If the court

after final hearing is of opinion that the petitioner has title proper for registration, a decree of confirmation and registration shall be entered, and such decree so entered shall bind the land and quiet the title thereto, except as provided in the act; it shall be forever binding and conclusive upon all persons, resident and nonresident, including the state, whether mentioned by name in the order of publication or included under the general description, "to all whom it may concern;" it shall not be attacked or opened or set aside by reason of the absence, infancy, or other disability of any person affected thereby, nor by any proceeding at law or in equity for rehearing or reversing judgments or decrees, except as provided by the act.

Provisions of the act subsequent to the decree will not be referred to, unless the same are deemed material in the course of this opinion.

The questions presented by the demurrer, as far as the act in question is concerned, have never before been called to the attention of the court, but similar statutes in other states have been the subject of judicial investigation many times during the last quarter of a century. It cannot be said that the case is one of first impression. The statutes of the several states which have adopted the principle of the Torrens Land Law are strikingly similar. They all have a common purpose. As stated in 3 Devlin, Real Estate, 3d ed. § 1439, "The object is to secure the evidence of title exclusively by a certificate issuing from public authority;" or, as stated by the court in *State ex rel. Douglas v. Westfall*, 85 Minn. at page 439, 57 L.R.A. 299, 89 Am. St. Rep. 571, 89 N. W. 175, "The basic principle of this system is the registration of the title of land, instead of registering, as the old system requires, the evidence of such title." A more terse statement, and one perhaps equally clear, is that contained in defendant's brief. "Its essential point is an official guaranty of title." Under the old system a deed absolute on its face is

only one link in the chain of evidence by which the holder must establish his title. Under the Torrens system, and statutes modeled thereon, the registered certificate is conclusive evidence of the holder's title. It imports the sanctity of a final adjudication by a court of competent jurisdiction. That is the ultimate purpose of the statutes. It is not our purpose, however, to attempt either a critical or historical review of the Torrens system. A very illuminating discussion in that regard is found in chapter 40, Devlin, *Real Estate*, supra, to which the reader's attention is invited.

The only question to be determined is the constitutionality of the law. The defendant's argument is exceedingly brief. The exact point of his objection as to the question of due process is not clearly defined. He calls our attention to the case of *State ex rel. Monnett v. Guilbert*, 56 Ohio St. 575, 38 L.R.A. 519, 60 Am. St. Rep. 756, 47 N. E. 551, and says the reasoning of that case aptly applies to the point raised in the case at bar. Defendant quotes at great length from the opinion mentioned, from which we conclude that he adopts not only the conclusions, but also the reasons, given by the court. The court in that case held the Ohio Torrens Act (Act April 27, 1896, 92 Ohio Laws, p. 220) to be unconstitutional on several grounds, among which are substantially those raised by the demurrer in the instant case. Before concluding, we will have occasion to compare the Ohio statute with that of our own state, for the purpose of determining to what extent the case relied on by defendant should be considered as persuasive on the questions here presented.

Defendant's first contention in the present case is that the act tends to permit the taking of property without due process of law. The contention seems to be that the notice to interested parties is insufficient and the manner of service inadequate; that it is not the usual common-law process contemplated by the Constitution in cases cognizable at

common law. In this connection, defendant, by implication at least, contends that the proceeding is an action in personam, in which personal service is required upon all interested persons residing within the state, notwithstanding the fact that the act itself declares the proceeding to be an action in rem. Whether or not the proceeding is in personam or in rem is, perhaps, a question upon which the authorities differ. We are not disposed to indulge in hairsplitting distinctions. It is sufficient to say that respectable authority can be found to the effect that the state has the power, for the purpose of settling and quieting title to real property within its limits, to authorize proceedings in

Cloud-quieting
title-proceed-
ing in rem.

the nature of actions in rem, and I assume it would be difficult to conceive of a logical reason against the exercise of such authority. In *Robinson v. Kerrigan*, 151 Cal. 40, 121 Am. St. Rep. 90, 90 Pac. 129, 12 Ann. Cas. 829, a California case arising under a statute similar to ours, and in which the same questions were raised, the court (151 Cal. at page 46) says: "The state has full control over the subject of the mode of transferring and establishing titles to property within its limits. For these purposes the state has power to provide a special proceeding, in the nature of a proceeding in rem, to fix the status of the land, and declare the nature of the titles and interests therein, and the person or persons in whom such titles and interests are at the time vested. It may do this whenever it may be considered necessary; or likely to promote the general welfare."

Concrete application of that doctrine was made in the case referred to, in which the form of notice and manner of service were substantially similar to those provided in the Utah statute.

Another case from the same state enunciating similar doctrine is that of *Title & D. Restoration Co. v. Kerrigan*, 150 Cal. 289, 8 L.R.A. (N.S.) 682, 119 Am. St. Rep. 199, 88 Pac.

356. This case arose under an "Act to Provide for the Establishment and Quieting Title to Real Property in Case of the Loss and Destruction of Public Records." The act was not modeled upon the Torrens Land Law, but the form of notice and manner of service are substantially the same as those complained of here, and the objection was made that it violated both the Federal and state Constitutions. In the course of its opinion, the court (150 Cal. at page 310) says: "While it is true, as a general proposition, that an action to quiet title is an action in equity, which acts upon the person, it is also true that the state has power to regulate the tenure of immovable property within its limits, the conditions of its ownership, and the modes of establishing the same, whether the owner be citizen or stranger. While a decree quieting title is not in rem, strictly speaking, it fixes and settles the title to real estate, and to that extent certainly partakes of the nature of a judgment in rem."

In *State ex rel. Douglas v. Westall*, 85 Minn. 437, 57 L.R.A. 297, 89 Am. St. Rep. 571, 89 N. W. 175, a Minnesota case arising under an act similar to ours, and in which the notice and manner of service are substantially the same, the court had occasion to deal with the identical question presented in the instant case. The court (85 Minn. at page 44) says: "It is now the settled doctrine of this court that the district courts of this state may be clothed with full power to inquire into and conclusively adjudicate the state of the title of all land within their respective jurisdictions, after actual notice to all of the known defendants within the jurisdiction of the court, and constructive notice, by publication of the summons, to all other persons or parties, whether known or unknown, having or appearing to have some interest in or claim thereto. The proceeding provided for by the act in question is such a one. It is substantially one in rem, the subject-matter of which is

the state of the title of land within the jurisdiction of the court, and the provisions of the act for serving the summons and giving notice of the pendency of the proceeding are full and complete, and satisfy both the state and Federal Constitutions. To hold otherwise would be to hold that the courts of this state cannot in any manner acquire jurisdiction to clear and quiet the title to real estate by a decree binding all interests and all persons or parties, known or unknown, for the provisions of this act are as full and complete as to giving notice to all interested parties as it is . . . possible to make them. That the courts of this state have jurisdiction to so clear and quiet title by their decrees is no longer an open question in this state." (Citing many cases.)

We see no escape from the logic of these opinions. To the writer it seems to be incontrovertible. Even counsel for defendant agrees with the fundamental proposition that the state has "jurisdiction over all persons and property within its territory, and has power to regulate the manner and conditions upon which property may be acquired, enjoyed, and transferred," but says "the power must be exercised in a proper and reasonable manner." He contends that the taking of property as contemplated by the Torrens Act, under the rules and procedure therein laid down, is not a reasonable exercise of power. Counsel, however, fails to state or point out to the court what more the legislature could have done, what provision it could have added or inserted to render the act invulnerable against the objections raised as to its constitutionality. The act provides for personal service upon residents of the state, not under disability, who are made known to the court before final decree, and who can be reached by its process. The question is, How can a resident of the state who is unknown, and whose whereabouts are unknown, be personally served with notice? If personal service in such cases is impossible, what better method can be

adopted than that provided in the act as notice to unknown persons and persons beyond the jurisdiction of the court? To hold that personal service must be made upon residents who are unknown is to require a palpable impossibility. To hold that unless the statute provides for personal service in such cases the statute is unconstitutional is equivalent to holding that any law modeled upon the Torrens system, no matter what its safeguards may be, is impossible under the American system of government. Such, however, in effect, is the holding of the Ohio court in the case to which we have referred. I apprehend the courts as a rule in this country will be very reluctant in arriving at any such conclusion. Such a conclusion, from every point of view, is incompatible with the power and dignity of a sovereign state. There must be somewhere lodged in the state the power to forever settle and quiet title to land within its territorial limits. When the state has done all that is within its power to provide process reasonably well calculated to give notice to interested parties, both within and without the state, for the purpose of settling and quieting title to lands within its territorial limits, to say that such process is in violation of the Constitution is, in effect, to deny the state a necessary sovereign power.

Constitutional
law—due
process—pub-
lished notice of
action to quiet
title.

It will not be contended that statutes of limitation and statutes conferring title by adverse possession are unconstitutional, notwithstanding they may deprive a person of vested rights without even the semblance of judicial proceeding. Such statutes are denominated statutes of repose, and notwithstanding their drastic effect they are considered as necessary and expedient for the general welfare.

But counsel for the defendant, in his criticism of cases upholding the Torrens system and statutes analogous, in his brief says: "It will be noted, and it is a significant fact,

that in almost every state where the Torrens Law has been upheld on this ground, there has been some emergency or exigency or necessity to which the court has turned as a justification for the exercise of the power of the state in this way."

Counsel then refers to the statute of Illinois, and the case of *Bertrand v. Taylor*, 87 Ill. 235, which referred to the destruction of records by the Chicago fire as a reason for upholding the act. In like manner counsel refers to the San Francisco earthquake, with its destructive consequences, as a reason why the court upheld the act. It is not an unusual thing for a court, in stating its reasons for upholding a law, to point to the necessity for it in the particular case, and, if there should happen to be an emergency to which the court can refer, it is quite probable that such emergency will not be overlooked. It does not follow, however, that because the court refers to a particular emergency that it thereby makes such emergency a controlling factor in deciding the case. One of the very cases to which counsel refers, *Title & D. Restoration Co. v. Kerrigan*, heretofore cited, illustrates the point we are attempting to make. The statute under review in that case was no doubt enacted primarily as a relief measure in consequence of the disastrous earthquake of 1906, in San Francisco, which destroyed the public records containing evidences of title to land. In determining the issues raised in that case, which were substantially the same as in the present case, the court, at page 305 of 150 Cal., says: "It is also matter of common knowledge that in the city and county of San Francisco, at least, if not in other counties, the disaster of April last worked so great a destruction of the public records as to make it impossible to trace any title with completeness or certainty. That some provision was necessary to enable the holders and owners of real estate in this city to secure to themselves such evidence of title as would enable them not only to defend their

possession, but to enjoy and exercise the equally important right of disposition, is clear. *These considerations are suggested, not with a view to arguing that the necessity for some act of this kind affords any ground for disregarding constitutional provisions, if the statute be found to conflict with such provisions, but rather as a guide to determine the real scope and purpose of the act, and to emphasize the rule, so often laid down by all the courts, that in passing upon the constitutionality of an act of the legislature every presumption and intendment in favor of the validity of the enactment are to be given effect.*" (Italics ours.)

This states the proposition in a nutshell. Besides this, since when did the courts of this country become possessed of the power to determine the necessity of a statute, or want of necessity, in any particular case, and make that the controlling factor in determining whether or not the statute was unconstitutional?

—absence of
necessity for
statute.

Such power does not belong to the courts.

It is forbidden ground, upon which they dare not tread. The proposition is elementary. Authorities need not be cited, but see *Rio Grande Lumber Co. v. Darke*, 50 Utah, 114, L.R.A. 1918A, 1193, 167 Pac. 241.

The courts of California and Minnesota are not the only ones in this country that have had occasion to pass upon the constitutionality of the principle involved in the Torrens Law. The Massachusetts statutes, as regards the form of notice to interested parties and manner of service, except as to personal service on known interested residents of the state, is almost identical with the corresponding provision of the Utah statute. In *Tyler v. Judges of Ct. of Registration*, 175 Mass. 71, 51 L.R.A. 433, 55 N. E. 812, the very questions presented here were thoroughly investigated, and determined in favor of the constitutionality of the law. Mr. Chief Justice Holmes delivered the opinion of the court,

and, after stating the provisions of the statute relating to notice, said:

"It will be seen that the notice is required to name all persons known to have an adverse interest, and this, of course, includes any adverse claim, whether admitted or denied, that may have been discovered by the examiner, or in any way found to exist. Taking this into account, we should construe the requirement in § 21 concerning the application, as calling upon the applicant to mention not merely outstanding interests which he admits, but equally all claims of interest set up, although denied by him. We mention this here to dispose of an objection of detail urged by the petitioner, and we pass to the general objection that, however construed, the mode of notice does not satisfy the Constitution, either as to persons residing within the state upon whom it is not served, or as to persons residing out of the state and not named.

"If it does not satisfy the Constitution, a judicial proceeding to clear titles against all the world hardly is possible; for the very meaning of such a proceeding is to get rid of unknown as well as known claims—indeed, certainty against the unknown may be said to be its chief end—and unknown claims cannot be dealt with by personal service upon the claimant. It seems to have been the impression of the supreme court of Ohio, in the case most relied upon by the petitioner, that such a judicial proceeding is impossible in this country. *State ex rel. Monnett v. Guilbert*, 56 Ohio St. 575, 629, 38 L.R.A. 519, 60 Am. St. Rep. 756, 47 N. E. 551. But we cannot bring ourselves to doubt that the Constitutions of the United States and of Massachusetts, at least, permit it as fully as did the common law. Prescription or a statute of limitations may give a title good against the world, and destroy all manner of outstanding claims, without any notice or judicial proceeding at all. Time, and the chance which it gives the owner to find out that he is in danger of losing rights, are due

process of law in that case. *Wheeler v. Jackson*, 137 U. S. 245, 258, 34 L. ed. 659, 664, 11 Sup. Ct. Rep. 76."

Then follows a lengthy discussion covering both the question of due process and whether or not the act confers judicial power upon ministerial officers, which was one of the grounds of objection. The proceeding was for a writ of prohibition to prevent the judges of the court of registration from proceeding under the act. The statute was upheld and the petition denied.

The supreme judicial court of Massachusetts upheld the statute of that state upon the question of due process against objections urged as to its constitutionality, notwithstanding personal service upon known residents of the state was not required. In that respect the process provided by the Utah statute is more complete and more in harmony with the process known at common law than is that provided by the statute of Massachusetts. The Massachusetts court of last resort is, and ever has been, one of the oldest, ablest, and most learned courts in this country. It is a court of remarkably high standing, and is not inclined to encourage innovations. Its decisions are usually entitled to great respect, especially on questions involving constitutional law. Mr. Justice Loring filed a dissenting opinion. This opinion, although dissenting from the views of the majority of the court, is one of the most learned and entertaining opinions of any we have read in the progress of our investigation. It is well worth careful consideration by anyone desiring a thorough understanding of both sides of this interesting question. Nevertheless, it is only a dissenting opinion, and therefore entitled to but little weight in determining the law as it exists at the present time in the several jurisdictions of the country. This is a country in which majority rule is the chief cornerstone of our political institutions. The principle applies to the decisions of our courts of last resort the same as it does to the ultimate conclusions

of other departments of the government, where the determination of questions is confided to the judgment of more than one.

It is true that this court is not absolutely bound by either the majority or unanimous opinion of the court of a sister state; neither would it be bound by the unanimous opinion of the courts of all the states. But it will not be denied that if the court in any given case can ascertain with reasonable certainty the preponderance of judicial opinion upon the particular questions involved, and will adopt that as its guide, it will not ordinarily go far astray in arriving at a correct conclusion.

There is an opinion from another jurisdiction not heretofore considered. The first state to adopt the Torrens system of registration was Illinois. Its first act, passed in 1895, was declared unconstitutional in *People ex rel. Kern v. Chase*, 165 Ill. 527, 36 L.R.A. 105, 46 N. E. 454. The objection was that the statute attempted to confer judicial power on the registrar, in violation of the state Constitution. After the decision in the Chase Case a second statute was enacted, intended to obviate the objection raised against the first. The constitutionality of the new statute was assailed in *People ex rel. Deneen v. Simon*, 176 Ill. 165, 44 L.R.A. 801, 68 Am. St. Rep. 175, 52 N. E. 910. The same objection was made as was made in the Chase Case, and in addition thereto it was contended that the act permitted the taking of property without due process of law. The process provided for bringing interested parties before the court is very similar to that provided in the Utah statute. In passing upon this objection the court said: "The second point insisted upon in the argument is that the provisions of the act permit the taking of private property without 'due process of law.' In the initial registration the provisions are for an application to a court of chancery, and that the fee must be first registered. To this application the following persons are to be made defendants:

The occupant, if the land is occupied by any other person than the applicant; the holder of any lien or encumbrance; other persons having any estate or claiming any interest in the land, in law or in equity, in possession, remainder, reversion, or expectancy. § 11. All other persons are to be made parties defendant by the name and designation of 'all whom it may concern.' § 16. Summons is to issue against all persons mentioned as defendants, and is to be served as in other cases in chancery. Notice is also to be published and mailed to such defendants substantially as in other chancery cases, and the court may direct further notice to be given. §§ 19-21. Upon a failure to answer, default may be entered, and upon the hearing a decree entered finding in whom the title is vested, and declaring the same subject to such liens, encumbrances, trusts, or interests, if any, as are shown to exist, and directing the registration to be made, §§ 23, 25. The exception taken to these provisions is that they authorize judgment to be taken against a resident of the state upon mere constructive service. It is certainly fundamental that no man shall be condemned unheard or without notice. While a substituted service is permitted in some instances, particularly in case of nonresidents, this is because of the necessities of the case. The act does contemplate, in some contingencies at least, actual personal service, and the general law provides for publication as to unknown owners and persons in interest and nonresidents. An applicant may proceed in this way, and in strict accordance with the act obtain a decree or finding as to his title which will be binding beyond all question, so that even if the proper construction of the provision were that it attempted to authorize judgment against a resident notified only by publication, yet the law can be given practical effect, in which event only the particular provision would fail, and not the whole law."

It thus appears the Illinois court

upon the question of due process—that is, the form of notice and the manner of service—upheld the act with some reservation. It did not sustain it to the full extent as did the courts of California, Massachusetts, and Minnesota, but it held that the law could be given practical effect even though some particular provision might fail.

As far as we have been able to ascertain, we have now briefly considered all the cases arising under statutes adopting the Torrens system, which tend to show the present state of judicial opinion. As suggested near the beginning, we have yet to make comparison between the Ohio Torrens Act and the Utah statute, for the purpose of determining the difference between the two as it relates to the question of due process. We do this because the case of *State ex rel. Monnett v. Guilbert*, supra, which declared the Ohio statute to be unconstitutional, is apparently the only case relied on by defendant. That decision appears to stand singly and alone on that side of the question, except as it is partially supported by the Illinois case to which we have referred.

The statute of Ohio provides that the application must contain an accurate description of the land, and, among other things, the full name and postoffice address of the person owning the adjoining property, the full name and address of the persons occupying the property to be registered, the kind and nature of the estate, with the full name and address of the persons holding such estates. The application shall contain such further statements as the act may require, or as may be required by the court. On the question of notice to interested parties after the application is filed, the statute provides, in effect, that notice shall be given by publication in some newspaper of general circulation in the county for the period of four consecutive weeks, to all whom it may concern. The notice shall state the name of the applicant, a description of the land, the time fixed for the hearing,

and notice that if the party has any claim or interest in or lien upon said land, or knows of any reason why such land should not be registered, or wishes to file objection thereto, he is required to appear and assert his claim, etc., or the said lands will be ordered registered. The publisher shall file with the court as many copies of the notice as the court may require for service, and the court shall require the applicant or some other competent person to serve each person named in the application residing within the county with a copy of said notice. And persons residing without the county must be served by sending a copy by mail. Proof of service is substantially the same as required by the Utah statute. Such is the character of process and the mode and manner provided in the Ohio law for bringing parties interested before the court.

The Utah statute, as we have seen, requires (1) a notice of *lis pendens* filed with the petition; (2) notice shall be published in the same manner and with the same effect as the other proceedings in rem, and shall be addressed to all persons named in the report of the examiners and "to all whom it may concern;" (3) the notice shall be published in the county where the land lies, and a copy of the order of publication shall be mailed by registered letter, demanding a return, to every interested party named in the petition or in the report of the examiner, whose address is given or known; (4) an attested copy of the order must be posted in a conspicuous place on each parcel of the land; (5) such personal service as is required in equitable actions must also be given to residents of the state, not under disability, who are made known to the court at any time before final decree, unless the service is waived; (6) the court may cause other or further notice to be given in such manner and to such persons as it may deem proper.

It requires no extended argument to demonstrate the fact that the Ohio statute might well be declared unconstitutional on the question of due

process, while the statute of Utah as to the same question might be upheld and sustained. The Ohio statute made no attempt whatever to provide for personal service on residents of the state except those within the county where the land is situated. It mentions no names of parties interested, but is addressed generally "to all whom it may concern." It makes no provision for posting notice on the land, nor does it provide that the court may direct other or further notice in such manner and to such persons as it may deem proper. We do not consider the Ohio case as authority in any sense persuasive on the question presented for determination.

As we understand the question, the real point of the objection is that personal service is not required on all residents of the state; that if residence in the state is not made known to the court before final decree, then such persons are placed in the same category as nonresidents of the state, and need only be served by publication.

In this connection it is pertinent to suggest that service by publication upon unknown parties, whether in the state or without, has been provided for and recognized by the statutes of this jurisdiction since long before the state was admitted into the Union. Utah Comp. Laws 1888, § 3210; Utah Rev. Stat. 1898, § 2951; Utah Comp. Laws 1907, § 2951; Utah Comp. Laws 1917, § 6551. The sections referred to all provide for publication of summons to unknown persons within or without the state, under the circumstances therein stated, and, as far as the writer's information extends, their constitutionality has never been questioned. This is not intended as a conclusive reason why the act in question should be upheld. The purpose of the act is to bind the whole world, and settle forever the title to the land against any and all persons whomsoever. For this reason it may be contended that the consequences are more drastic and more far-reaching than might neces-

sarily result from the operation of the statutes to which we have referred. In answer to this supposed contention, it is pertinent to remark that the statutes referred to were intended to have the same conclusive effect as to unknown parties as does the statute under which the present proceeding was commenced. The sections cited in all the compilations and revisions above referred to conclude as follows: "After the completion of service by such publication, the court shall have jurisdiction of such persons, and any judgment or decree rendered in the action shall apply to and conclude such persons with respect to such interest in the subject-matter of the action."

So that it must be conceded, if the so-called Torrens Act of Utah is unconstitutional in attempting to serve unknown residents of the state by publication only, that we have been handing down from compilation to compilation of our statutes for more than a quarter of a century a statute that is unconstitutional, and one in which the constitutionality has never been questioned. If the law under review is unconstitutional, the section referred to in the present compilation is unconstitutional, the knowledge of which tends to emphasize the grave importance of the question we are called upon to decide.

The only substantial reason that we can give for the justification of constructive service on nonresidents of the state outside the jurisdiction of the court is because it is the only way in which service can be made. The same reason can be invoked in case of a resident of the state who is unknown, and whose whereabouts are unknown, and who nevertheless may be in being and interested in the subject-matter of the suit.

Arndt v. Griggs, 134 U. S. 316, 33 L. ed. 918, 10 Sup. Ct. Rep. 557, a case arising under a statute of Nebraska enacted for the purpose of quieting title to lands within the state, contains an interesting discussion as to the power of a sovereign state to provide special proceedings

for quieting title to land within its limits. It is true that case relates to service upon nonresidents by publication, but if we are right in our contentions that the same reasons exist for similar service on a resident who is unknown and whose residence is unknown, especially in an action to settle and quiet title to land, then the case of *Arndt v. Griggs* is pertinent to the case at bar.

In that case the statute of Nebraska provided a special proceeding for the quieting of title to land within the state, and, among other things, provided for service upon nonresidents by publication. It was contended by counsel who invoked the Constitution against the sufficiency of the service that an "action to quiet title is a suit in equity; that equity acts upon the person; and that the person is not brought into court by service by publication alone." In response to this contention Mr. Justice Brewer, speaking for the court, said: "While these propositions are doubtless correct as statements of the general rules respecting bills to quiet title and proceedings in courts of equity, they are not applicable or controlling here. The question is not what a court of equity, by virtue of its general powers and in the absence of a statute, might do, but it is, What jurisdiction has a state over titles to real estate within its limits, and what jurisdiction may it give by statute to its own courts to determine the validity and extent of the claims of nonresidents to such real estate? If a state has no power to bring a nonresident into its courts for any purposes by publication, it is impotent to perfect the titles of real estate within its limits, held by its own citizens; and a cloud cast upon such title by a claim of a nonresident will remain for all time a cloud, unless such nonresident shall voluntarily come into its courts for the purpose of having it adjudicated. But no such imperfections attend the sovereignty of the state. It has control over property within its limits; and the condition of ownership of real estate there-

in, whether the owner be stranger or citizen, is subjection to its rules concerning the holding, the transfer, liability to obligations, private or public, and the modes of establishing titles thereto. It cannot bring the person of a nonresident within its limits,—its process goes not out beyond its borders,—but it may determine the extent of his title to real estate within its limits, and, for the purpose of such determination, may provide any reasonable methods of imparting notice. The well-being of every community requires that the title of real estate therein shall be secure, and that there be convenient and certain methods of determining any unsettled questions respecting it. The duty of accomplishing this is local in its nature; it is not a matter of national concern or vested in the general government; it remains with the state; and, as this duty is one of the state, the manner of discharging it must be determined by the state, and no proceeding which it provides can be declared invalid, unless in conflict with some special inhibitions of the Constitution, or against natural justice."

Hamilton v. Brown, 161 U. S. 256, 40 L. ed. 691, 16 Sup. Ct. Rep. 585, in my opinion, is more in point. That case arose under a statute of Texas providing for the escheat of lands of one who dies seised of real estate, leaving no heirs, etc. The act required notice to all persons named in the petition and to "all persons interested in the estate." This notice was to be published four weeks in a newspaper published within the state. In this proceeding judgment of escheat was entered, and the property sold as the statute provided. Years afterward, appellants, as heirs of the deceased owner, brought an action to recover the property from defendants, who were in possession under the escheat proceedings. Defendants answered and set up as a defense the escheat proceedings, including the form of notice and manner of service. Plaintiffs demurred to the answer and the demurrer was overruled. Plaintiffs

appealed. Mr. Justice Gray delivered the opinion of the court, in the course of which he said: "The purpose for which proceedings of this character are instituted is to have a judicial declaration, in the form of a solemn judgment made by a court having jurisdiction of the subject-matter, and of the persons in interest in so far as publication can give it, that the facts exist which, under the law, cast title upon the state to property which, at some former time (in case of lands), it had clothed a person with." On the same page the court said: "The proceeding, while not strictly a proceeding in rem, has many of its characteristics; yet the statute does not direct a seizure of the thing, which, in some cases, has been held to support a judgment strictly in rem."

Finally, on pages 274 and 275 of 161 U. S., the court says: "It was within the power of the legislature of Texas to provide for determining and quieting the title to real estate within the limits of the state and within the jurisdiction of the court, after actual notice to all known claimants, and notice by publication to all other persons." (Italics ours.)

We can conceive of no logical reason why a sovereign state claiming title to lands by escheat should have its title determined and quieted by a proceeding in court requiring constructive service only on residents of the state, and at the same time the state be powerless to provide a similar mode of service in other actions to quiet title. As I read the constitutional provisions relied on by the defendant, they make no exception in favor of a state. The state can no more disregard the requirements of due process, when seeking to quiet its own title to land as against a possible owner, than it can in the procedure adopted for quieting title as between individuals. When the Constitution declares that no person shall be deprived of property without due process of law, there is no exception to the inhibition; nor is there any immunity in favor of the state on account of its proprietary

interest in the subject-matter of the proceeding.

For the foregoing reasons we are inclined to the opinion that the act in question is not obnoxious to either the state or Federal Constitutions, so far as the form of notice and manner of service are concerned.

Another objection raised by the demurrer in this case is that the act attempts to confer judicial authority on the several county clerks of the state as ex officio registrars of title in violation of § 1 of article 5 of the state Constitution. There is no merit in this contention. The act specifically provides that "registrars of title and their deputies shall be authorized and required, under the direction of their respective courts" setting out the duties to be performed). It then provides that they

conferring
judicial power
on clerks.

shall "generally perform such other acts as the court may prescribe." Comp. Laws 1917, 4934. Their duties in every respect seem to be merely ministerial. No attempt is made to clothe them with judicial power.

The writer is of the opinion that the objections raised by the demurrer have not been sustained. The act in some respects is not as satisfactory as it might be made, without in any manner impairing its efficiency. The court is authorized, after the expiration of fifteen days from the publication and posting of the order, to set the case down for hearing. It is further provided that at such time the court may proceed to take such action as may be proper upon the evidence before it. If that should be construed to mean that at that time the court may enter its decree of confirmation and registration, it seems to the court the time is exceedingly short. Most of the states whose statutes we have examined allow a longer period of time. This, however, is a matter for the legislature, and we have no doubt it will receive such consideration as it deserves.

There appears, however, to have been an honest attempt on the part of the legislature to safeguard the interests of all persons concerned. An assurance fund is provided by the act for the purpose of indemnifying those who had no actual notice of registration. Utah Comp. Laws 1917, § 5002, provides that such persons, within two years from the time the right of action accrued, may institute suit and recover such damages as they may have sustained. The measure of damages is the value of the property at the time the right to bring such action first accrued. So that in any event the act cannot result in serious hardship, even if there is an occasional instance in which actual notice was not received by the owner of the property. Our own opinion is, if the court carefully exercises the cautionary powers conferred upon it by the act in regard to notice and proof, the instances in which persons may be deprived of their property for want of actual notice will be exceedingly rare.

The application for peremptory writ is allowed.

Corfman, Ch. J., and Weber and Gideon, JJ., concur.

Frick, J., concurring:

I concur in the conclusions reached by Mr. Justice Thurman. I feel constrained to add, however, that notwithstanding the very clear, logical, and convincing opinion of my associate, there are some provisions of the act which are not involved in this proceeding, and are not referred to by Mr. Justice Thurman in his opinion, which, to my mind, nevertheless, will be found difficult to harmonize with some of the provisions of our Constitution. Upon those questions I withhold my judgment until they shall be presented in some concrete case. The questions to which I refer, and upon which I withhold my judgment, are found in §§ 33, 39, 61, and 64 of the original act, being chapter 28, Utah Laws

1917, and which correspond to Utah Comp. Laws 1917, §§ 4952, 4958, 4980, and 4983. While there may be one or two other sections which are doubtful, it is not necessary to refer to them specifically at this time.

NOTE.

The constitutionality of the provisions of the "Torrens Law" for constructive notice is the subject of the annotation following *DRAKE v. FRAZER*, post, 772.

ANNE DRAKE et al.

v.

JOHN A. FRAZER, Appt.

Nebraska Supreme Court — September 27, 1920.

(*Drake v. Fraser*, — Neb. —, 179 N. W. 393.)

Real property — Torrens Act — effect on persons unknown.

1. Proceedings under the Torrens Act (Laws 1915, chap. 225) are quasi in rem, and the constructive notice provided is binding upon non-residents and upon unknown persons and persons whose residence is unknown and cannot with due diligence be learned, and such service constitutes "due process of law," as that term is used in the Federal and state Constitutions.

[See note on this question beginning on page 772.]

— conclusion of contingent remainders.

2. Where, by the provisions of a will, contingent remainders are created, and a proceeding is brought, under the Torrens Law, to adjudicate the question of the rights of the contingent remaindermen, some of whom are living and some of whom may yet be born, held that, where the living persons are made parties to the suit and are brought in by notice provided by the statute, and where the protection of their interests depends upon the identical questions as the interests of the unborn remaindermen, so that they have the same incentive to defend as the unborn remaindermen would have had if in being, the representation of the living parties is a virtual representation of the interests of those yet unborn, and the court has

jurisdiction to determine the interests of all contingent remaindermen.

[See 23 R. C. L. 583 et seq.]

— judicial powers.

3. Provisions of the statute imposing duties upon the registrar, under the Torrens Law, held not to bestow upon him judicial powers, in violation of the Constitution.

[See 23 R. C. L. 275.]

— denial of affirmative relief.

4. Defendants, in a registration proceeding under this law, are not denied the right to affirmative relief, and, were such right denied, the act of the legislature would not be rendered unconstitutional on that ground, as the state may control the manner in which remedies shall be allowed in its courts.

Constitutional law — Torrens Act — additional duties.

5. The act is not unconstitutional by reason of conferring additional duties upon the register of deeds.

Headnotes by FLANSBURG, J.

APPEAL by defendant from a judgment of the District Court for York County (Corcoran, J.) in favor of plaintiffs in an action brought to compel specific performance of a contract for the sale of land. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. McKillip & Barth, for appellant:

The unborn children of the children of the testator, John A. Boon, were not bound by the decree entered herein, or the reason that no service was had upon them.

Fox v. Fee, 24 App. Div. 314, 49 I. Y. Supp. 292; Thompson v. Adam, 95 Ill. 552, 69 N. E. 1; Gavin v. Curtin, 171 Ill. 640, 40 L.R.A. 776, 49 N. E. 23; Williams v. Hassell, 74 N. C. 434; Downey v. Seib, 185 N. Y. 427, 8 L.R.A. (N.S.) 49, 113 Am. St. Rep. 926, 8 N. E. 66.

The said Torrens Act is unconstitutional and void.

Civil Rights Cases, 109 U. S. 3, 27 L. ed. 836, 3 Sup. Ct. Rep. 18; Den ex em. Murray v. Hoboken Land & Improv. Co. 18 How. 276, 15 L. ed. 374; Allen v. Armstrong, 16 Iowa, 508; Irvine's Appeal, 16 Pa. 256, 55 Am. Dec. 499; Hoke v. Henderson, 15 N. C. 4 Dev. L.) 15, 25 Am. Dec. 677; Taylor v. Porter, 4 Hill, 146, 40 Am. Dec. 74; Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; Hurtado v. California, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 11, 292; State ex rel. Monnett v. Guilbert, 56 Ohio St. 575, 38 L.R.A. 519, 60 Am. St. Rep. 756, 47 N. E. 551; Brown v. Levee Comrs. 50 Miss. 468; Bardwell v. Collins (Bardwell v. Anderson) 44 Minn. 97, 9 L.R.A. 152, 20 Am. St. Rep. 547, 46 N. W. 315; 6 Am. Eng. Enc. Law, 43; Tyler v. Judges of Court of Registration, 175 Mass. 1, 51 L.R.A. 433, 55 N. E. 812; Cooley, Const. Lim. 5th ed. 356, 366, 499, 500; Shepherd v. Ware, 46 Minn. 174, 24 Am. St. Rep. 212, 48 N. W. 773; Hart Sansom, 110 U. S. 151, 28 L. ed. 101, Sup. Ct. Rep. 586; Vandever v. Freeman, 20 Tex. 334, 70 Am. Dec. 391; Black, Torrens System, p. 59; Dingler v. Paxton, 60 Miss. 1038; Baker v. Kelley, 11 Minn. 480, Gil. 358; Harding v. Butts, 18 Ill. 503; Eldridge v. Uehl, 27 Iowa, 160; Wynehamer v. People, 13 N. Y. 445; Cummings v. Missouri, 4 Wall. 328, 18 L. ed. 364; Limpton v. Somerset, 33 Vt. 283; King v. Hopkins, 57 N. H. 334; Francis Baker, 11 R. I. 103, 23 Am. Rep. 424.

The act violates § 1, art. 2, of the Nebraska state Constitution.

Cooley, Const. Lim. § 109; State ex rel. Monnett v. Guilbert, 56 Ohio St. 575, 38 L.R.A. 519, 60 Am. St. Rep. 756, 47 N. E. 551; Home Ins. Co. v. Morse, 20 Wall. 445, 22 L. ed. 365; 1 m. & Eng. Enc. Law, 664-667.

The act enages the state in insuring titles and indemnifying landowners for land taken.

State ex rel. Monnett v. Guilbert, 56 Ohio St. 575, 38 L.R.A. 519, 60 Am. St. Rep. 756, 47 N. E. 551.

The grandchildren of testator, both in being and unborn, are concluded by the decree.

Fox v. Fee, 24 App. Div. 314, 49 N. Y. Supp. 292; Thompson v. Adams, 205 Ill. 552, 69 N. E. 1; Gavin v. Curtin, 171 Ill. 640, 40 L.R.A. 776, 49 N. E. 23; Downey v. Seib, 185 N. Y. 427, 8 L.R.A. (N.S.) 49, 113 Am. St. Rep. 926, 8 N. E. 66.

Messrs. Thomas, Vail, & Stoner, for appellees:

Proceedings under the Torrens Act are quasi in rem; in such actions, it follows, from the inherent power of the state to control the ownership of real property within the state, and to clear and quiet titles thereto, that constructive service may be provided for, which shall be binding on non-residents and on unknown persons whose residence is unknown, and such service constitutes due process of law.

People ex rel. Deneen v. Simon, 176 Ill. 165, 44 L.R.A. 801, 68 Am. St. Rep. 175, 52 N. E. 910; Tyler v. Judges of Ct. of Registration, 175 Mass. 71, 51 L.R.A. 433, 55 N. E. 812; Arndt v. Griggs, 134 U. S. 316, 33 L. ed. 918, 10 Sup. Ct. Rep. 557; Tennant v. Fretts, 29 L.R.A. (N.S.) 625, note; Title & Document Restoration Co. v. Kerrigan, 150 Cal. 289, 8 L.R.A. (N.S.) 682, 119 Am. St. Rep. 199, 88 Pac. 356; Robinson v. Kerrigan, 151 Cal. 40, 121 Am. St. Rep. 90, 90 Pac. 129, 12 Ann. Cas. 829; Shepherd v. Ware, 46 Minn. 174, 24 Am. St. Rep. 212, 48 N. W. 773; State ex rel. Douglas v. Westfall, 85 Minn. 437, 57 L.R.A. 297, 89 Am. St. Rep. 571, 89 N. W. 175; People ex rel. Smith v. Crissman, 41 Colo. 450, 92 Pac. 949; White v. Ainsworth, 62 Colo. 513, 163 Pac. 959, Ann. Cas. 1918E, 179; Loring v. Hildreth, 170 Mass. 328, 40 L.R.A. 127, 64 Am. St. Rep. 301, 49 N. E. 652; Fowler v. Brown, 51 Neb. 414, 71 N. W. 54; Anheuser-Busch Brewing Asso. v. Peterson, 41 Neb. 897, 60 N. W. 373; Scarborough v. Myrick, 47 Neb. 794, 66 N. W. 867; West Nebraska Land Co. v. Eslick, 102 Neb. 761, 169 N. W. 729; Miller v. Miller, 69 Neb. 441, 95 N. W. 1010; Page v. Breese, 92 Neb. 241, 138 N. W. 138; Watson v. Ulbrich, 18 Neb. 186, 24 N. W. 732.

Even if the Torrens Act did not contain any provision for representation of contingent interests of persons not in being, nor any provision providing for barring same by limitation, still, all holders of any contingent interest in the property would be bound by a decree against persons in being, claiming in the same right, and with the same incentive to defend the action, under the general doctrine of virtual representation.

15 R. C. L. 1024, 1025; *Finch v. Finch*, 2 Ves. Sr. 492, 28 Eng. Reprint, 315; *Giffard v. Hort*, 1 Sch. & Lef. 408; *Gavin v. Curtin*, 171 Ill. 640, 40 L.R.A. 776, 49 N. E. 523; *Hale v. Hale*, 146 Ill. 259, 20 L.R.A. 247, 33 N. E. 868; *Ridley v. Halliday*, 106 Tenn. 607, 53 L.R.A. 477, 82 Am. St. Rep. 902, 61 S. W. 1025; 23 R. C. L. 584, 585; *Story*, Eq. Pl. § 145; *Mathews v. Lightner*, 85 Minn. 333, 89 Am. St. Rep. 558, 88 N. W. 992.

The Torrens Act is not unconstitutional.

People ex rel. Deneen v. Simon, 176 Ill. 165, 44 L.R.A. 801, 68 Am. St. Rep. 175, 52 N. E. 910; *People ex rel. Smith v. Crissman*, 41 Colo. 450, 92 Pac. 949; *State ex rel. Douglas v. Westfall*, 85 Minn. 437, 57 L.R.A. 297, 89 Am. St. Rep. 571, 89 N. W. 175.

Flansburg, J., delivered the opinion of the court:

Action for specific performance of a contract for the sale of land by the plaintiff to the defendant. Defendant refused to perform, alleging insufficiency of plaintiff's title. Decree for the plaintiff, and defendant appeals.

The title in this case depends upon a registration under the Torrens Land Act (Laws 1915, chap. 225). The certificate of registration was issued in May, 1917, more than two years prior to the commencement of this action.

Plaintiff is the daughter of John A. Boon, who died in 1899, seised of the land in controversy, and leaving a last will and testament which was duly probated. By this will he first devised to his widow, Hannah Boon, a life estate; then a life estate to the plaintiff, his daughter; and at plaintiff's death the property to descend to such of plaintiff's children as might then be living, and, if no chil-

dren then living, the rents from the property to be divided among the survivors of the testator's children and the heirs of any of such children then deceased, in equal shares.

The heirs at law, including the plaintiff, conveyed all their right, title, and interest in this property to Hannah Boon, the widow, and it is the contention of the plaintiff that by such conveyance the estate of the reversioners and the estate of the life tenants, all being parties to the deed, became merged, and that thereafter the contingent remainders to the children of the plaintiff and the further contingent remainders for the benefit of the surviving children and heirs of the deceased children of the testator were left without a particular estate to support them, and therefore lapsed and were cut off.

After these conveyances, Hannah Boon, the widow, conveyed the fee title to the plaintiff, reserving to herself a life estate. With the title to the land in this situation, plaintiff applied to the district court to register the fee-simple title in herself, subject to the life estate of Hannah Boon, and free of the claims of all contingent remaindermen.

In this proceeding all of testator's children and all the living children of the testator's children, including living children of plaintiff, were made parties defendant, as was also Hannah Boon, testator's widow and the tenant on the land. All parties "whom it may concern" were also designated as defendants. Service was had, as provided by the statute, upon all defendants named in the application, and notice was published as provided by law. The court ordered a registration of the title in the plaintiff, subject only to the life estate of Hannah Boon.

Subsequently Hannah Boon conveyed her interest to the plaintiff, and the certificate of registration was extended to show that plaintiff had a full fee-simple title. This was the condition of the title when plaintiff tendered performance.

Whether or not the trial court, in

the registration proceeding, right-fully held that the contingent remainders were destroyed by a failure of the particular estate to support them (see note in *Ann. Cas.* 1917A, 902 [*Love v. Lindstedt*, 76 Or. 66, 147 Pac. 935]), it is unnecessary to determine, for this is not an appeal from, but a collateral attack upon, that judgment. The essential question here is whether or not the decree in the registration proceeding, rendered against remaindermen before they came into being, is conclusive upon them, so as to bar them from at any time asserting their claims in future litigation.

The defendant contends that the contingent remainders were not destroyed by a merger of the reversion and life estates, and that the registration proceeding is insufficient to bar the claims of the contingent remaindermen who were at that time unborn; that the rights of these remaindermen could not be foreclosed in an action where they were neither parties nor where they had no opportunity to assert their rights, and that the decree of the court in pursuance of the power given by the statute deprives them of their interest in the property without due process of law.

The statute requires the issuance and service of summons upon all known defendants, residents of the state, whose names and addresses can, with care and diligence, be ascertained, as is required in civil cases generally. It further provides for publication of notice addressed to all known defendants by name and "to all whom it may concern," thus providing, so far as can be done with reasonable certainty, constructive notice to all persons in interest whose names or addresses cannot be ascertained, or who may be nonresidents. It is also further provided that a copy of this published notice shall be mailed to each defendant whose name and address is known and who is not served with process.

These provisions for notice are as

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full and broad as the legislature could reasonably be expected to devise as to all living persons and all unknown claimants, and, upon settled authority, constitute, as to all such persons, due process of law as that term is used both in the state and Federal Constitutions.

Real property
—Torrens Act—
effect on persons
unknown.

The state has full control over the subject and manner of establishing title to real property within its boundaries, and the Torrens Law provides a special proceeding in that regard, based upon well-recognized principles. The proceeding is substantially in rem to fix the status of the land, to declare the nature of the titles and interests therein, and to determine to what persons such titles and interests belong. The power of the state is not limited to the settlement of actual present controversies over title, but it may look to the future, and in a present proceeding determine anticipated controversies, and thus forestall and prevent future litigation, and make titles marketable for present generations.

Proceedings involving this principle are not new; for decrees probating wills and quieting titles to real estate against unknown heirs and unknown parties have been repeatedly held to be conclusive for all time and against all persons.

Statutes involving the Torrens system of land title registration have been sustained, where like objections were raised as to the sufficiency of the notice and conclusiveness of the decree, by courts in carefully considered opinions in Illinois, from which state our statute was virtually taken, and in other states. *People ex rel. Deneen v. Simon*, 176 Ill. 165, 44 L.R.A. 801, 68 Am. St. Rep. 175, 52 N. E. 910; *White v. Ainsworth*, 62 Colo. 513, 163 Pac. 959, *Ann. Cas.* 1918E, 179; *Robinson v. Kerrigan*, 151 Cal. 40, 121 Am. St. Rep. 90, 90 Pac. 129, 12 *Ann. Cas.* 829; *Tyler v. Judges of Ct. of Registration*, 175 Mass. 71, 51 L.R.A. 433, 55 N. E. 812; *State*

ex rel. Douglas v. Westfall, 85 Minn. 437, 57 L.R.A. 297, 89 Am. St. Rep. 571, 89 N. W. 175.

The general principle of constructive notice in proceedings of this nature has been recognized and fully discussed in *Arndt v. Griggs*, 134 U. S. 316, 33 L. ed. 918, 10 Sup. Ct. Rep. 557; *Title & Document Restoration Co. v. Kerrigan*, 150 Cal. 289, 8 L.R.A.(N.S.) 682, 119 Am. St. Rep. 199, 88 Pac. 356, 11 Ann. Cas. 465; *Shepherd v. Ware*, 46 Minn. 174, 24 Am. St. Rep. 212, 48 N. W. 773; note in 29 L.R.A. (N.S.) 625 (*Tennant v. Fretts*, 67 W. Va. 569, 140 Am. St. Rep. 979, 68 S. E. 387).

Though it is fundamental that the rights of a person may not be adjudicated in a proceeding to which he is not a party, nevertheless the legislature may provide, in the interest of justice, that a person's rights in real estate may be determined in proceedings where he is represented, though he is not in person an actual party to the suit. If that could not be done, then property interests under a will in the nature of contingent remainders in favor of unborn persons, as in this case, could not be passed upon by the courts, nor the status of title determined until all such persons having future interests should come into being. This would tie up real estate indefinitely.

In Massachusetts the legislature has provided in certain cases that the interest of persons not in being should be represented by guardian ad litem, and such representation has been in *Loring v. Hildreth*, 170 Mass. 328, 40 L.R.A. 127, 64 Am. St. Rep. 301, 49 N. E. 652, held sufficient.

In the statute under consideration it is provided that the life tenant in the property shall present and file claims in behalf of the contingent interests of unborn persons. As it happens in this case, the life tenant, in conjunction with the reversioners, has by her own act caused the interests of the contingent remaindermen to lapse and be cut off, and

is an adversary against them. She therefore would not have been a fit nor proper representative in behalf of their interests.

In this case it is unnecessary to rely upon the representation by the life tenant, as provided by the statute, as we find that the unborn remaindermen were represented in the registration proceeding under the doctrine known as virtual representation.

At the time of the proceeding for registration there were children living both of plaintiff and of the testator, all of whom were made parties and properly notified, as required by the statute. The interests of these living persons, who, upon future contingencies, might become remaindermen, rest upon the identical legal questions as do the interests of those unborn persons who also might become entitled to contingent remainders in the property. As the court had before it, at the time of registration, persons whose interests were the same as the interests of those not in being, the persons before the court, in representing and protecting their own interests, necessarily represented the interests of an identical nature of those remaindermen who were yet unborn. It follows that, the matters concerning all contingent remaindermen being fairly

—conclusion of
contingent
remainders.

and honestly represented, the court had full opportunity and jurisdiction to properly adjudicate all the interests involved. By the doctrine of virtual representation, the interests of those persons not in being actually had representation in the proceeding. Such rule is generally recognized in furtherance of justice and upon the general ground of public policy, as such controversies cannot await the coming into existence of all persons whose interests might be involved. To hold otherwise would prevent many cases from ever being brought to a final conclusion. *Gavin v. Curtin*, 171 Ill. 640, 40 L.R.A. 776, 49 N. E. 523; *Ridley v. Halliday*, 106 Tenn. 607, 53 L.R.A.

477, 82 Am. St. Rep. 902, 61 S. W. 1025; Mathews v. Lightner, 85 Minn. 333, 89 Am. St. Rep. 558, 88 N. W. 992; 15 R. C. L. 1024, § 498.

It is urged that the Torrens Law is unconstitutional, since it confers judicial powers upon the registrar. The act provides that, where a person files a mortgage or instrument to create a charge upon land, and it appears to the registrar that the person intending to create the charge has the title and right to do so, and is entitled to have the same registered, the registrar shall then register the instrument; and it is further provided that, when it is made to appear to the registrar that a party desiring to transfer property which has been registered has the right or interest proposed to be transferred, and is entitled to make the conveyance, and that the transferee has the right to have such estate transferred to him, the registrar shall make out a new certificate.

The mere fact that the registrar is required in these instances to exercise his judgment as to the rights of parties to file such instruments and have them registered does not mean that he is to act as a tribunal for the adjudication of disputes, but the judgment he is intended to exercise is purely incidental to his ministerial duties, and, though his act may be called quasi judicial in character, such duties given him are not imposed in violation of the Constitution. *People ex rel. Deneen v. Simon*, supra.

It is argued that the act provides for an ex parte hearing before an examiner, without notice to the parties interested, and which is binding upon them. On the contrary, the statute provides only for an investigation and report by the examiner. This report is not binding upon the court, and the court, it is provided (§ 24), "may require other or further proof."

Again, it is contended that the act does not provide affirmative relief for defendants. Provision is made,

however (§ 22), for filing a cross petition by defendants, and affirmative relief is thus afforded. But it is not necessary, ^{—denial of affirmative relief.} in order to meet the requirements of the Constitution, that affirmative relief be granted to a defendant in a suit, as the state has full control over that subject, and may determine in what manner remedies shall be provided through its courts. *People ex rel. Smith v. Crissman*, 41 Colo. 450, 92 Pac. 949.

Another contention is that the act creates a new office by bestowing new duties upon an officer already existing, and does not provide for the election of such officer. There is nothing in our Constitution limiting the power of the legislature in that regard as to the office of register of deeds, and the argument is untenable. *People ex rel. Smith v. Crissman* and *State ex rel. Douglas v. Westfall*, supra.

The act further provides that no person shall commence any action to recover any interest in the land, or make adverse entry upon the land, unless within two years after the entry of the order or decree. The unborn remaindermen in this case, as we have pointed out, were virtually represented in the proceeding and concluded by the decree of registration. That decree quieted the title as against the world, and no person has appeared, to this time, with any showing that he was not served with notice, as provided by the law, and that the decree for that reason is not binding on him. The decree itself being binding, there is nothing to invoke the operation of the two-year limitation mentioned, and that provision is therefore not involved in this case, and not before the court for determination.

Other objections are made as to the constitutionality of certain provisions of the law, but those questions bear upon parts of the act not at all involved in this controversy,

nor so connected with the act as a whole that to declare them invalid would vitiate the entire act, and are not, therefore, before the court.

The judgment of the lower court is affirmed.

Aldrich and Dean, JJ., not sitting.

ANNOTATION.

Constitutionality of provisions of Torrens Law for constructive notice.

It will be seen that it is held in *ASHTON-JENKINS CO. v. BRAMEL* (reported herewith) ante, 752, that the Utah (Torrens) Act for the registration of titles after constructive notice to unknown persons, whether residents of the state or not, does not transgress the constitutional provisions prohibiting the taking of property without due process of law; and that it is similarly held as to the Nebraska Torrens Act in *DRAKE v. FRAZER* (reported herewith) ante, 766.

The constitutional question under the Torrens Act, whether the judgment in a registration proceeding is subject to the objection that it deprives persons not personally served with notice of their property without due process of law, presents various phases as affecting unknown persons, wherever they may be, known non-residents, known persons within the state, and the occupant, if there be any occupant other than the applicant. It will be seen that the validity of the acts is grounded more or less by the courts upon the view that the registration proceeding is, as the acts in general provide, a proceeding in rem, and that, in the views hereafter given of the Ohio court and of Loring, J. (dissenting), in the Tyler Case in Massachusetts, the proceeding cannot be one in rem.

The first decision of the question was in *State ex rel. Monnett v. Guilbert* (1897) 56 Ohio St. 575, 38 L.R.A. 519, 60 Am. St. Rep. 756, 47 N. E. 551, holding that the Statute of Ohio of 1896 was unconstitutional as violating the constitutional provision that "every person, for an injury done him in his land, goods, person or reputation shall have remedy by due course of law." The act provided for notice by publication and mailing, and for personal service on residents of the

county, and declared that "the decree of the court ordering registration shall be in the nature of a decree in rem." The court pointed out that the notice to be served under the act (and which was to be addressed "To whom it may concern") was not a summons, and that it did not contain the names of the persons to be served, and that while the application was required to contain the name and address of adjoining owners and the name of the occupant, if the land was occupied, and the name of the holder of all easements and inferior estates of any kind, in law or in equity, it did not require that one known to claim the title of the land in fee simple adversely to the applicant should be named or notified, although his residence might be within the county and known. The court said, *inter alia*: "To say that the legislature may prescribe such notice as is appropriate to proceedings in rem, and thus invest the proceedings with that character, is to affirm its power to annul the constitutional requirement. In this aspect of the case, and considering the effect of registration upon interests adverse to those of the applicant, the proceeding to register does not, in any substantial respect, differ from a suit *quia timet* to settle title. It bears the least possible analogy to a proceeding in rem. The res is not taken into the possession of an officer of the court. No charge or lien is asserted against it. It is not to be sold with a view to the distribution of its proceeds, and it partakes, therefore, less of the nature of a proceeding in rem than does the foreclosure of a mortgage. . . . Except when the land is occupied by one who claims adversely to the applicant, the questions determined in registration are such as, both before and since the adoption of the Constitution, have

been determined by courts of equity; and their decrees, much more distinct than the judgments of courts of law, operate upon persons."

The Illinois Torrens Act of 1897 was in question in *People ex rel. Deven v. Simon* (1898) 176 Ill. 165, 44 R.A. 801, 68 Am. St. Rep. 175, 52 N.E. 910, which was an action upon information in the nature of a *quod arranto* against the defendant, requiring him to show by what authority

law he was exercising the powers and duties of the office of registrar of land in and for the county of Cook. The answer the defendant set up the Act of 1897; the relator filed a general demurrer to this answer on the ground that the act under which the defendant sought to justify was unconstitutional and void. The demurrer was overruled and the information dismissed; and this decision was affirmed upon appeal. The statute made the proceeding for registration a judicial proceeding or suit, the application to be made to a court of chancery, and requiring that there be made parties thereto the occupant, if other than the applicant; the holder of any lien or encumbrance; other persons having any estate or claiming any interest in the land, in law or in equity, in possession, remainder, reversion, or expectancy. All other persons were to be made parties defendant by the name and designation of "all whom it may concern." A summons was to issue against all persons mentioned as defendants, and was to be served as in other cases in chancery. Notice was also to be published and mailed to other defendants, substantially as in other chancery cases, and the court might direct further notice to be given. The court, sustaining the act, considered that it might not be entirely free from objection. Thus, it was held that an act providing for the registration of land titles after they are established in a court of equity might be upheld against all upon whom service of process has been properly made, although it contains a void provision admitting judgment against a resident of the state, notified only by publication; and also that the provision

making a judicial determination of title to land forever binding and conclusive upon all persons after the lapse of two years might be given effect against parties to the proceeding and persons who must bring legal proceedings to establish their rights, although it would be void in favor of persons in possession of all they claim, who were not parties to the proceeding.

The Massachusetts statute passed in 1898 provided for a proceeding in a court of registration; the application was to state the name and address of the occupant, if there was one, and to give the names and addresses, so far as known, of the occupants of all lands adjoining; after an examination by an examiner, who was to report to the court, the recorder, if the proceeding was continued by the applicant, was to publish a notice by order of the court, to be addressed by name to all persons known to have an adverse interest and to the adjoining owners and occupants so far as known, and to all whom it might concern; a copy was to be mailed to every person named in the notice whose address was known, and a copy posted on the land; further notice might be ordered by the court; it was also provided (by the amendment of 1899) that the proceeding should be one in rem. It will be noticed that there was no requirement for personal service. In *Tyler v. Judges of Ct. of Registration* (1900) 175 Mass. 71, 51 L.R.A. 483, 55 N.E. 812, the court denied a petition for a writ of prohibition against the judges of the court of registration established by the act, to prohibit them from proceeding further in registering the title to a certain parcel of land, and determining the boundaries between it and an adjoining parcel belonging to the petitioner, who claimed that the original registration provided for by the act would deprive all persons, except the registered owner of any interest in the land, of property without due process of law; that the statute gave judicial powers to the recorder and assistant recorders after the original registration, although they were not judicial officers under the Massa-

chusetts Constitution; and that there being no provision for notice before registration of transfers or dealings subsequently to the original registration, the effect was to deprive persons of their property without due process of law. It is to be regretted that the writer of the opinion of the majority of the court confused the actual decision by expressing at length what are confessedly his own individual views on the general subject, which, so far as we can judge, are not in accord with those of the majority of the court. This opinion, therefore, is, in general, not to be taken as authoritative except where he says: "For the purposes of decision, a majority of the court prefer to assume that in cases in which, under the constitutional requirements of due process of law, it heretofore has been necessary to give to parties interested actual notice of the pending proceeding by personal service or its equivalent, in order to render a valid judgment against them, it is not in the power of the legislature, by changing the form of the proceeding from an action in personam to a suit in rem, to avoid the necessity of giving such a notice; and to assume that, under this statute, personal rights in property are so involved and may be so affected that effectual notice and an opportunity to be heard should be given to all claimants who are known, or who, by reasonable effort, can be ascertained." Loring, J. (with whom Lathrop, J., concurred), dissented on the ground that the notice provided for was not sufficient; that one not personally notified was not given the right to have the judgment vacated on a writ of review; that "no person is barred by a judgment or decree in a proceeding the effect of which is to strip him of vested rights of property, unless he is named as a defendant;" that the act could not be valid as one starting the Statute of Limitations against an owner in possession; that the proceeding could not be supported unless it was one in rem; and that it was not one in rem. He said, *inter alia*, that the test of a proceeding in rem "is not, Are all the world barred? but it is: Is it

a proceeding to enforce a liability for which the res is liable, irrespective of who owns it,—such a liability that the res can be properly impleaded as the respondent who is liable? If it is, then a proceeding in rem lies, and all the world are barred; but if it is not such a proceeding, and is a proceeding to enforce an ordinary right of lien or of property only, the proceeding is not in its nature a proceeding in rem, and the legislature cannot make it so by providing that all the world shall be barred." The case was taken to the Supreme Court of the United States upon writ of error, by the applicant for the writ of prohibition, and that court held that the plaintiff in error could not raise the question as to the unconstitutionality of the act as lacking in notice where he himself had actual notice of the proceedings, although not a party to them; that is to say, he could not raise the question to the extent that his writ of error would be within the jurisdiction of the Supreme Court of the United States. Four of the judges dissented on the ground that the objection of the applicant was not as to the jurisdiction of the court over him personally, but as to its jurisdiction over the subject-matter. (1900) 179 U. S. 405, 45 L. ed. 252, 21 Sup. Ct. Rep. 206.

The Minnesota Torrens Act of 1901 was held not unconstitutional as depriving persons of their property without due process of law in *State ex rel. Douglas v. Westfall* (1902) 85 Minn. 437, 57 L.R.A. 297, 89 Am. St. Rep. 571, 89 N. W. 175, which was an information in the nature of *quo warranto* to determine the respondent's right to the office of examiner of land titles, to which he interposed a general demurrer. The court stated that the sole issue of law raised by the demurrer was whether the act was constitutional. That act provided that notice as to all known residents having claims or known to have any interest or claims to the land must be given by the service of a summons; nonresidents and unknown persons to be cited by publication, and in the case of known nonresidents, also by mailing; the decree to be conclusive upon

the world, except that persons having an interest, and not served or notified, may appear and answer within sixty days after entry of such decree, if no innocent purchaser for value had acquired an interest; and the decree was not to be opened by reason of absence, infancy, or other disability, or any proceedings at law reversing the judgment, except as provided in the act; the sixty-day period was not to apply where there was an innocent purchaser for value who had acquired an interest, and in such case the party aggrieved must look to the assurance fund mentioned in the act, and to any person who had secured the decree by fraud. The court, however, pointed out that "it is reasonably clear, and we so hold, that the particular provision of the act which, in effect, forbids the commencement of the defense, in opposition to the decree, of any action or proceeding to recover the land, brought more than sixty days after the entry of the decree, does not apply to an adverse claimant in the actual possession of the land, upon whom the summons is served; for, being in possession, he cannot bring such an action, and has no right to defend his possession and is in such a case cannot be made to depend upon his nonaction;" and said: "construed, the provision of the act, both as to the opening of the decree and as to the commencement of an action or proceeding to recover the land in opposition to the decree, is held as a statute of limitations."

In *Robinson v. Kerrigan* (1907) 151 Cal. 40, 121 Am. St. Rep. 90, 90 Pac. 12, 12 Ann. Cas. 829, it was held that the California (Torrens) Act of 1897, posing of the claims to property of persons whose claims and existence were not known, with no notice save publication, did not deprive such persons of their property without due process of law, nor did it fail to afford such persons the equal protection of the laws.

In *White v. Ainsworth* (1917) 62 Cal. 513, 163 Pac. 959, Ann. Cas. 18E, 179, it was held that a statute (Torrens Act) providing for the registration of the title to land, including

provisions for publication of the summons as against unknown-owners, does not constitute the taking of property without just compensation; that such a proceeding is not a condemnation proceeding.

There has been at least one case in which the question has directly arisen whether an occupant not notified is bound by the decree, and whether such a decree binding him would be due process of law. *Grey Alba v. De la Cruz* (1910) 17 Philippine, 49. In this case which, arose in the Philippines, it was held that the occupant of the land was not entitled to open a decree for registration, although he had not been named in the proceedings, and the statute required that the application should name the occupant, those applying for registration having omitted him because they honestly believed that he occupied the lands simply as their tenant, and that therefore it was unnecessary to name him. It was held that the occupant was not deprived of his property without due process of law, in violation of the Act of Congress of July 1st, 1902, known as the Philippine bill, which provides "that no law shall be enacted in the said Islands which shall deprive any person of life, liberty, or property without due process of law," as the proceeding for registration was one in rem, and the occupant was made a party by publication, the statute particularly providing that the decree should be conclusive upon and against all persons, whether mentioned by name or included in the general description, "to all whom it may concern."

It may be observed that the danger to vested rights involved in taking away a title without personal notice to the owner is not lessened by the judicial reassurance that the courts will protect the absent. Recently in *Re Sherman* (1919) 106 Misc.244, 175 N. Y. Supp. 627, the court, after referring to the doctrine that the Torrens Act was passed for the purpose of registering good titles, and not for the purpose of making bad titles good, observed: "The court can be relied upon to justly exercise the broad, equi-

table power conferred, and to rule be granted without real probability of
against applications which may not injustice." B. B. B.

CECIL LUMBER COMPANY, Appt.,

v.

JAMES MCLEOD.

Mississippi Supreme Court—June 14, 1920.

(— Miss. —, 85 So. 78.)

Master and servant — deaf servant — injury to fellow servant.

1. Where the servant is incompetent on account of deafness, and it is his duty to start and stop dangerous machinery where his fellow employees are at work, and on account of such deafness he fails to act, which failure caused or contributed to the injury of the coemployee, the master is guilty of negligence in knowingly hiring and retaining such incompetent servant.

[See note on this question beginning on page 783.]

— exposed gears — liability.

2. The master is guilty of negligence in failing to furnish the employee with a reasonably safe place in which to work, where the revolving gears or cogwheels were left uninclosed and exposed at the roller bed, where the employee, in performing his work, was compelled to lean his body over the roller bed, and was injured by the exposed cogwheel.

[See 18 R. C. L. 591.]

— incompetent servant — negligence.

3. The master is guilty of culpable negligence where he knowingly employs an incompetent servant and places him in control of dangerous machinery, and a coemployee is injured by the failure of the incom-

petent servant to stop the machinery when called upon by the coemployee in peril.

[See 18 R. C. L. 602, 720.]

— duty to stop machinery.

4. Employees in control of dangerous machinery, whose duty it is to start and stop it, owe a duty to their fellow employees working in close proximity with the same machinery to prevent injury to such coemployees when their perilous position is known to the employee in control and who has the opportunity to act; the master is guilty of negligence in knowingly employing an incompetent servant who is unable to act when a fellow servant is imperiled and injured, where such peril would have been known to a competent person.

[See 18 R. C. L. 720, 721, 726.]

Headnotes by HOLDEN, J.

(Smith, Ch. J., and Sykes, J., dissent.)

APPEAL by defendant from a judgment of the Circuit Court for Pearl River County (Cranford, Special J.), in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. McDonald & Marshall, Parker & Shivers, and Watkins & Watkins for appellant.

Messrs. Currie & Currie and Hall & Hall, for appellee:

As a matter of law the verdict and judgment are good, free from any reversible error, and should be upheld and affirmed.

23 Cyc. 696; Scott v. Peebles, 2

Smedes & M. 546; Roe v. Crutchfield, 1 Hen. & M. 361; Southern R. Co. v. Ganong, 99 Miss. 540, 55 So. 355; Hope v. Natchez, C. & M. R. Co. 98 Miss. 822, 54 So. 369; White v. Louisville, N. O. & T. R. Co. 72 Miss. 12, 16 So. 248; Kneale v. Dukate, 93 Miss. 201, 46 So. 715; Finkbine Lumber Co. v. Cunningham, 101 Miss. 292, 57 So. 916; Howd v. Mississippi C. R. Co. 50 Miss. 178;

Beers v. Isaac Prouty Co. 200 Mass. 19, 20 L.R.A.(N.S.) 39, 128 Am. St. Rep. 374, 85 N. E. 864.

Holden, J., delivered the opinion of the court:

This is an appeal from a judgment for \$5,000 recovered as damages for personal injuries received by the appellee while employed in appellant's sawmill. The recovery is based upon two grounds; namely, that the injury was caused by the negligent failure of the master to furnish a reasonably safe place in which to work, and that the culpable negligence of the master in knowingly employing an unfit and incompetent fellow servant caused or contributed to the injury of appellee. There were two other counts in the declaration charging negligence in the operation of the plant with a defective cogwheel line shaft, and that the master was negligent in operating the machinery with a defective control lever. These two counts, which are designated as the second and third counts of the declaration, were not sustained by the proof and were abandoned by the plaintiff.

The injury occurred in the manner and under the circumstances following:

Situated in appellant's sawmill is what is termed a "roller bed," the purpose of which device is to transfer lumber from one part of the mill to another. The "roller bed" consists of a table-like platform about 40 feet in length, a few feet wide, and approximately 30 inches in height above the mill floor. At various intervals across the top of the "roller bed" are rollers, over which are propelled pieces of lumber traveling from the saws to the points at which the pieces are desired to be deposited in the mill. Some of the rollers are called "dead rollers." They revolve only when the lumber resting upon them moves, and are designed to facilitate the movement of the lumber by curtailing friction. Other rollers of the "bed," referred to as "live rollers," are revolved by power transmitted from the machinery of the mill. The "live rollers"

perform the function of propelling the lumber along the "roller bed," to be dealt with at particular places as the circumstances require.

The power necessary to revolve the "live rollers" is transmitted to them from the engines of the plant by means of a horizontal transmission shaft, which runs along the length of the "roller bed," slightly lower than its top surface. Gears upon this shaft mesh with gears by cogwheel connections, attached to the ends of the "live rollers," so that revolution of the shaft impels revolution of the rollers. Since the tops of the rollers project but slightly above the surface of the roller bed, the gearing of the transmission shaft and the rollers are somewhat below the "roller bed's" surface.

The movement of the "live rollers" was controlled by means of a lever operated by an employee in the mill (who in this case is alleged to have been incompetent); the employee being also under the duty of operating a "jump saw," located at a point about 40 feet away from the point where the appellee was injured at the "roller bed." By manipulating the lever controlling the "live rollers" the operator could start, stop, or reverse the shaft and rollers. The operator could stop the movement of the rollers and cogwheels with the lever, and reverse the motion of the shaft and cogs very quickly.

At one side of the "roller bed," near the end, there stood an "edger," or trimming machine, the platform of which adjoins the "roller bed" on that side. An endless chain, propelled by the same power that operated the "live rollers," traverses the "roller bed" some little distance from the platform of the "edger." The purpose of this chain was to transfer certain pieces of lumber that moved down the "roller bed" to the platform of the "edger." As a piece appropriate for the "edger" machine approached along the "roller bed," the operator of the "edger" presses his foot upon the spring that elevates the chain 1½ inches above

the "roller bed." An employee in the mill (who was the appellee) was under the duty to stand near the "roller bed," opposite the platform of the "edger," and, as a piece to be transferred to the "edger" platform passes, to catch one end of the piece, and to throw or thrust this end of the piece from the "roller bed" to the "edger" platform, while the conveyor chain transfers the other end. It was while filling this position and performing this duty that the appellee received his injury.

At the point where the appellee was standing or leaning over for the purpose of shoving the lumber over to the "edger" platform, there was an exposed gearing or cogwheel revolving; and while he was performing the duty of his employment in shoving the lumber over, his body in a necessary leaning position, his overalls were caught in the cogwheel gearing and gradually drew his body into the cogs, which resulted in serious permanent injury to the private parts of his person. When his clothes were first caught in the cogs he began to cry aloud to the employee named Jones, a negro boy, who was in charge of the controlling lever about 40 feet away, to stop the machinery. Jones, whose back was to the appellee, was deaf and could not hear the call of appellee. Other employees heard the loud appeals of appellee, and one of them, who was about 40 feet distance away, ran to the appellee and attempted to pull him loose from the machinery before it had begun to actually crush his flesh, but, failing in the attempt, this employee went on then a distance of 40 feet farther to where the deaf employee, Jones, was in charge of the lever, brushed him aside, and quickly stopped and reversed the machinery, releasing appellee and preventing further injury to him.

The appellant lumber company knew that the employee Jones was deaf when it hired him to fill the position at the jump saw and to control the lever which started, stopped, and reversed the revolving shaft and

cogs. The testimony of the witnesses, as well as the physical facts in evidence, shows that the master failed to furnish the appellee with a reasonably safe place in which to work, in this: that the revolving gears or cogwheels were uninclosed and exposed at the point of the "roller bed" where the appellee was compelled to work and lean his body over in order to perform the duties of his employment. This was a dangerous situation in which to place the employee, and the master was chargeable with negligence, as decided by the jury.

Master and servant—exposed gear—liability.

The appellant urges a reversal of the judgment upon two grounds: First, that the court erred in granting instructions 1 and 2 for the appellee, both of which contain the same alleged infirmity to be mentioned later; second, that it was error in granting instruction No. 4, for the appellee. We here set forth said instructions Nos. 1 and 4, granted the appellee:

No. 1: "The court instructs the jury for the plaintiff that it is immaterial, as a matter of law, how the plaintiff was dressed or who reversed the live roller lever, if you believe from the evidence in the case the defendant was guilty of any negligence as charged in the declaration which contributed in whole or in part to the plaintiff's injury, if you believe from the evidence in the case the plaintiff was injured, it is the sworn duty of the jury to find for the plaintiff and assess his damages, if any, at such sum as you may believe from the evidence in the case a reasonable compensation to him for the injuries sustained on account of such negligence, not to exceed the amount sued for."

Instruction No. 4: "The court instructs the jury for the plaintiff that it was the duty of the defendant to furnish the plaintiff with reasonably competent and skilled fellow servants with whom to work, and if the jury believes from the evidence in the case the plaintiff's fellow servant

ie Jones, or 'Dummy,' operated a live roller lever, and was deaf so that he could not hear the plaintiff when he was caught in said cogwheels and called out to said Jones stop or reverse said rollers, if you believe the plaintiff was caught in said cogwheels and did call out to said Jones, and that the said Jones did not and did not hear plaintiff account of deafness, and that the said Ollie Jones was not, on account of said deafness, a competent employee to do the particular work at which he was put by the defendant, it is, to operate said live roller lever, and that the defendant knew could have known of said incompetency by the exercise of the care and caution required of it, and that the plaintiff received his injuries, whether in whole or in part, as a proximate and direct result of incompetency of said employee, if you believe he was incompetent, then it is the sworn duty of the jury to find for the plaintiff."

Complaint is made of instruction No. 1 because it tells the jury that they believe the appellant "was guilty of any negligence, as charged in the declaration, which contributed in whole or in part to the plaintiff's injury," it should find for the plaintiff; whereas the second and third counts of the declaration were not proved and were abandoned by the plaintiff.

We agree with counsel for the appellant that the instruction is technically erroneous and should not have been given. *J. J. Newman Lumber Co. v. Dantzler*, 107 Miss., 64 So. 931. The error of the instruction was not cured by failure of the appellant to have the court instruct the jury to disregard the guilty count under § 777, Code of 1906 (§ 560, Hemingway's Code), because the statute has no application to erroneous instructions granted by the court.

But we think the granting of the instruction was harmless error for several reasons. In the first place, it clearly appears that no testimony was offered to the jury in support of

counts 2 and 3 of the declaration. Jurors are presumed to be men of ordinary intelligence, and we may safely assume that they did not consider or act upon counts 2 and 3, because they heard no proof supporting these counts. We think that it is reasonable to say that the jury was not misled or confused by this instruction. Rule 11 (72 So. vii.). Furthermore, the real issues in the case were presented by counts 1 and 4, and were covered by the instructions given, which, taken as a whole, limited the issues to counts 1 and 4, and the jury must have so understood it. We are further convinced in this regard when it is considered that the appellant received and used only one instruction on the issues presented, which instruction narrowed the question of liability of appellant to the proposition as to whether the appellee was furnished a reasonably safe place in which to work. We here quote the instruction granted the appellant: "The court instructs the jury that the law of Mississippi does not require the defendant to make or keep the gears in question absolutely safe, or to guarantee the safety of its employees working near said gears, and that the defendant is not liable for accidents to employees that could not reasonably have been expected or anticipated; the defendant being given the right by the law to expect its employees to use the faculties with which nature has endowed them for their self-preservation. If the gears, considering their natural dangers and the fact that employees could escape injury from them by the exercise of ordinary watchfulness and prudence, were reasonably safe, the jury should find its verdict for the defendant."

It is urged by the appellant that instruction No. 4, granted the appellee, is erroneous because it was not negligence on the part of the appellant to employ a deaf man to control and operate the lever, since he was competent to perform that duty, and that appellant was not bound to employ a servant in antic-

ipation of an injury to the appellee by the machinery controlled by the deaf servant. In other words, it is contended that the master could not reasonably anticipate that this deaf servant would ever be called upon to stop the machinery when a fellow servant might be caught in it; that the deaf servant employed was competent to perform the duties for which he was hired; and that his failure to respond to the call of the injured fellow servant when in peril could not be reasonably anticipated, and therefore his employment was not culpable negligence.

We must disagree with the position taken by appellant in this respect. The master knowingly

—incompetent
servant—
negligence.

employed this incompetent servant and placed him in control of the operation of dangerous machinery where his fellow servants were employed. The duty of this deaf employee was to start, stop, and reverse the dangerous machinery where his fellow servants were at work, as well as to operate the "jump saw." And while he was not specially charged with the duty of watching out for injuries that might be received by his fellow servants, and to stop the machinery in order to prevent such injury, yet it must be inferred that, since he was placed in control of the lever which operated the dangerous shaft and cog-wheels that injured the appellee, it was his duty to stop the machinery when called upon to do so by a fellow servant in peril. *Beers v. Isaac Prouty Co.* 200 Mass. 19, 20 L.R.A. (N.S.) 39, 128 Am. St. Rep. 374, 85 N. E. 864.

If the servant Jones, in charge of the lever, had not been incompetent on account of deafness, he could have heard the cry of appellee to stop the machinery, and would have stopped it in time and prevented the injury when the appellee's overalls only were engaged in the cogs, and before the cogs had reached his flesh. It will be remembered that another fellow servant, named Boothe, went a distance of 40 feet

to the appellee when he called, and attempted to pull him out of the machinery. At that time it appears there was no serious injury to appellee, and Boothe went on 40 feet farther to the lever, shoved the deaf man aside, and reversed the machinery, stopping it quickly. So it is plain that no substantial injury would have occurred in this case had the servant in charge of the lever been a competent man and responded to the call of the appellee when he first became in a perilous position.

The employment of this incompetent and unfit servant certainly increased the danger of injury further than the work necessarily entailed; and the failure of the incompetent servant to respond and prevent the injury after the appellee was in peril contributed to the actual injury, if it did not in fact wholly cause it. A capable and competent employee in charge of such dangerous machinery would have heard the call and prevented the injury. The incompetent servant here was placed at work with his back to the appellee, who was at work at and with machinery exposed and manifestly dangerous,—being in charge of the lever controlling the movement of this dangerous machinery. he was placed in a position where he could not see appellee, and the master knowing at the same time that he could not hear. We think that the appellant, under these circumstances, was negligent in the employment of this incompetent servant, and that the injury resulted from or was contributed to by such negligence.

—deaf servant
—injury to fellow servant.

In vol. 3, § 1079, Mr. Labatt says: "The obligations of a master to see that the servants hired by him possess the qualifications, mental, moral, and physical, which will enable them to perform their duties without exposing themselves and their coemployees to greater dangers than the work necessarily entails are, in their broad features, similar to the obligations which are incumbent up-

on him with regard to the other agencies of his business. . . . The hiring or retention of a servant whose unfitness for his duties, whether it arises from his want of skill, his physical and mental qualities, or his bad habits, is known, actually or constructively, to the master, is culpable negligence, for which the master must respond in damages to any other servants who may suffer injury through that unfitness."

The position taken by the appellant that the work engaged in by the deaf employee imposed no duty upon him to hear and respond to the call of a fellow servant in peril, in our opinion, is not well taken in this case. From the facts and circumstances shown in this case it is unquestionably true that the deaf servant, Jones, was under duty to stop the machinery as well as to start it by manipulating the lever. This duty was part of the service to be rendered by him in the work he was employed to do. It is true he did not cause the injury by any affirmative act on his part, but his omission to act when called upon, which would have prevented or minimized the injury, resulted in contributing to or increasing the injury to appellee. The incompetency of Jones defeated the last clear chance of the employee escaping after knowledge of peril, thus increasing the danger of injury beyond the ordinary hazards where competent co-employees are serving.

The duties of Jones, the deaf co-employee, required him to operate the "jump saw," and also to manipulate the lever controlling the stopping and starting of the rollers and cogs on the "roller bed" at which appellee worked. It was his duty to stop the revolving gearing and cogs when requested to do so by his co-employee working in close proximity to him, in order to prevent the injury or stop its further progress.

In 18 R. C. L. § 204, p. 726, the rule is stated as follows: "Incompetency consists in qualities and characteristics calculated to cause

reasonable apprehension that the admission to the service or the retention therein of the incompetent will or may imperil the safety of other employees. . . . It goes to reliability in all that is essential to make up a reasonably safe person, considering the nature of the work and the general safety of those who are required to associate with such person in the general employment. A competent man is a reliable man."

The appellee had the right to assume that the fellow servant employed to work with him and about him and in control of the dangerous machinery would not be lacking in those attributes which would make him an ordinary safe coworker. The appellee could act upon the theory that he would be free from the danger of the want of capacity of his fellow laborer to perform his duties when called upon to do so. 18 R. C. L. § 202, p. 725.

Employees in control of dangerous machinery owe a duty to prevent injury of their fellow employees when their perilous position is known and ^{—duty to stop machinery.} they have opportunity to act; and the master is guilty of negligence in knowingly employing an incompetent and unfit servant who is unable to act when the perilous position would be known to a competent person. It would be an unreasonable rule that would permit the master to knowingly employ a blind or deaf person and put him in charge of dangerous machinery with which a fellow worker is working and is injured on account of the incompetency of the "dummy" in failing to prevent an injury when called upon to do so by his fellow employee in peril.

In this case the deaf servant, Jones, was working but a few feet away from the appellee, and was the only person in control of the lever, which, it is true, was not primarily designed as a safety device, but which should have been used to prevent the injury when it was known or should have been known by Jones, if competent, and his failure to act

was negligence chargeable to the master on account of his known unfitness to perform the duties for which he was employed; namely, to control and operate, by starting and stopping, the revolving machinery which injured the appellee, and to operate a "jump saw" impelled by the same machinery, all in close proximity to the place where the appellee was injured.

The judgment of the lower court is affirmed.

Smith, Ch. J., dissenting:

The alleged acts of negligence of the appellant on which the appellee claims to be entitled to recover are: First, leaving unguarded the cogs in which the appellee was caught and injured; and, second, employing an incompetent servant.

It appears from the evidence without conflict, that all of the cogs under the bed of rollers were guarded except the particular ones by which the appellee was caught and injured, but the evidence was in sharp conflict as to whether or not these particular cogs were guarded; consequently that issue was necessarily submitted to the jury. It also appears from the evidence, without conflict, that the rollers were for the purpose of conveying the lumber, one board at a time, from the circular saw to a point near the "edger," and when it reached that point it was the duty of the appellee to assist in transferring the board from the rollers to the "edger." This duty in no way required the stopping of the rollers, and in so far as the appellee was concerned their motion might have been continuous.

Between the circular saw and the edger there was a button saw for the purpose of cutting the ends of the boards in proper shape for the "edger." This saw was operated by a man by the name of Jones, who was deaf. His duties required him to watch the boards as they came from the circular saw, and when any of them that needed trimming before being transferred to the "edger" reached the button saw, to stop the rollers, thereby stopping the

board, elevate the button saw, and cause it to cut off the end of the board. When this was done he would start the rollers again, and the board would continue its journey to the "edger." In order properly to discharge his duties it was necessary for him to face the circular saw and to keep his eyes on the approaching board, and in order so to do his back would necessarily be towards the "edger." The lever controlled by him was for the purpose of enabling him to start and stop the rollers so that he might cut off the ends of the boards before they reached the "edger," and was not intended as a device for the safety of the appellee; that being intended to be provided for by guarding the cogs, and but for the button saw it seems that this lever would have served no necessary purpose. Jones was thoroughly competent to run this button saw, and neither his nor the appellee's duties required any communication between them, and their co-operation in getting the boards to the "edger" was only such as has been hereinbefore set forth.

The appellee's fourth instruction permitted the jury to find for him, although the cogs in which he was caught were guarded, if they believed from the evidence that Jones was "deaf so that he could not hear the plaintiff when he was caught in said cogwheels and called out to said Jones to stop or reverse said rollers," and "that the said Jones was not, on account of said deafness, a competent employee to do the particular work at which he was put by the defendant; that is, operate said live roller lever." This instruction should not have been given, for, as hereinbefore set forth, Jones was thoroughly competent to run the button saw—the only duty he was employed to discharge—and to operate the lever for that purpose, and the obligation of the master to his servants to employ only competent servants is limited to the employment of such as possess the qualifications necessary to enable them to

(— *Miss.* —, 85 So. 78.)

perform their duties without exposing themselves and their fellow servants to greater dangers than the work necessarily entails. If the cogs were properly guarded, as this instruction assumes, then the appellant complied with its duty to the appellee in furnishing him a safe place to work, and it was not called on to provide for the stopping of the

machinery in event he should be caught in the cogs without negligence on its part.

For the error in granting this instruction my brother Sykes and I are of the opinion that the judgment of the court below should be reversed.

Suggestion of error overruled July 12, 1920.

ANNOTATION.

Negligence of master toward fellow servant in employing a servant who is physically deficient.

While, as stated in 18 R. C. L., p. 712, apart from statutory modification, "no general principle of law has been more firmly established than that a master or employer is not responsible to those engaged in his employment for injuries suffered by them as the result of the negligence, carelessness, or misconduct of other servants of the same employer, engaged in the same common or general service or employment," the master is, nevertheless, in duty bound to exercise reasonable care and diligence to employ and retain in his employment none but competent servants, and in case of failure to do so will be held liable to a servant for injuries resulting from the incompetency of a coemployee to perform the duties assigned to him.

Applying specifically this exception to the fellow-servant doctrine, the general rule is to the effect that a master who knowingly employs a servant who is so physically deficient as to cause a reasonable apprehension that he will be unable to perform his duties without exposing his fellow servants to unnecessary danger is guilty of negligence which will render him liable for injuries to the fellow servants of the physically deficient servant, resulting from such unfitness. *Anderson v. New York & T. S. S. Co.* (1891) 47 Fed. 38, affirmed in (1892) 1 C. C. A. 529, 1 U. S. App. 176, 50 Fed. 462; *CECIL LUMBER CO. v. MCLEOD* (reported herewith) ante, 776; *Tucker v. Missouri & K. Teleph. Co.* (1908) 132 Mo. App. 418, 112 S. W. 6; *Baird v. New York*

C. & H. R. R. Co. (1901) 64 App. Div. 14, 71 N. Y. Supp. 734, affirmed without opinion in (1902) 172 N. Y. 637, 65 N. E. 1113; *Irwin v. Brooklyn Heights R. Co.* (1901) 59 App. Div. 95, 69 N. Y. Supp. 80; *Rhatigan v. Brooklyn Union Gas Co.* (1910) 136 App. Div. 727, 121 N. Y. Supp. 481; *Texas & N. O. R. Co. v. Lee* (1903) 32 Tex. Civ. App. 23, 74 S. W. 345; *Harding v. Ostrander R. & Timber Co.* (1911) 64 Wash. 224, 116 Pac. 635. In the reported case (*CECIL LUMBER CO. v. MCLEOD*, ante, 776), the court held that a master who knowingly employed a servant, incompetent on account of deafness, to work in a sawmill and have charge of the stopping and starting of dangerous machinery around which other employees were working, was guilty of culpable negligence, and liable for personal injuries to a fellow servant, resulting from the incompetent servant's failure to hear a call to stop the machinery after the former's clothing had become caught therein. And in *Anderson v. New York & T. S. S. Co.* (Fed.) supra, a master who employed a deaf person to operate a winch used in unloading a vessel according to whistle signals was liable for personal injuries to a sailor, resulting from a failure of the deaf winchman to properly respond to signals. Again, in *Harding v. Ostrander R. & Timber Co.* (Wash.) supra, the court applied the rule that a servant may recover damages from the master where he is injured through the incompetency of a fellow servant, and

the master knew and the servant did not know of such incompetency, holding that a servant who was injured as a result of the deafness of his assistant could recover. In *Irwin v. Brooklyn Heights R. Co.* (1901) 59 App. Div. 95, 69 N. Y. Supp. 80, a street railway company which employed a motorman who was blind in one eye and could see but little with the other was held negligent in employing an incompetent servant, the theory being that the exercise of reasonable diligence upon the part of the master would have revealed its servant's incompetency. And see *Louisville & N. R. Co. v. Lile* (1908) 154 Ala. 556, 45 So. 699, wherein it was held that an allegation that a servant, "because of being blind in one eye was not a fit or proper person" to perform the duties for which he was employed, and, therefore, was incompetent, sufficiently alleged that the lack of one eye imperiled the servant's efficiency. In *Baird v. New York C. & H. R. R. Co.* (1901) 64 App. Div. 14, 71 N. Y. Supp. 734, affirmed without opinion in (1902) 172 N. Y. 637, 65 N. E. 1113, it was held negligence upon the part of a railroad company to knowingly employ and retain in its employ a brakeman who, by reason of epileptic fits, was often unable to perform the duties of his position. And see *Tucker v. Missouri & K. Teleph. Co.* (1908) 132 Mo. App. 418, 112 S. W. 6, which also involved the question whether or not the fact that a servant was an epileptic rendered him incompetent, so as to render the master liable in hiring and retaining him in his employ. In *Rhatigan v. Brooklyn Union Gas Co.* (1910) 136 App. Div. 727, 121 N. Y. Supp. 481, a master was held liable upon the theory that he had hired an incompetent servant, it appearing that, in unloading a boat, a tackle and bucket were used; that the bucket was controlled by a guy, one end of which was held by a workman whose duty was to take in or let out the slack as the fall or hoist of the bucket required; that the master had placed a one-armed man in charge of such guy; that the duties of such position required the use of two arms; and that a fellow workman was in-

jured as a result of the guy tender's failure to take in slack. In *Texas & N. O. R. Co. v. Lee* (1903) 32 Tex. Civ. App. 23, 74 S. W. 345, a railroad company knowingly employed on its section gang a man having a rupture, and his inability to do heavy labor resulted in injury to a fellow section hand.

However, to render the master liable, the physical defects which render the servant incompetent must be known to the master, or must be of such a nature that, by the exercise of ordinary care, they would have been discovered by him. See *Jungnitsch v. Michigan Malleable Iron Works* (1895) 105 Mich. 270, 63 N. W. 296, wherein it was held that a master was not negligent in hiring a boy with a crooked arm to work in a foundry, where there was nothing to put the master on guard as to any such defect. In *Monanhan v. Worcester* (1890) 150 Mass. 439, 15 Am. St. Rep. 226, 23 N. E. 228, an action for personal injuries alleged to have resulted from the hiring of an incompetent fellow servant of the plaintiff, it was held that evidence that the servant whose hiring was complained of was generally reputed to be infirm in sight, hearing, and physical strength was competent as tending to show that the master did not exercise reasonable care in employing him, it also appearing that such servant was, as a matter of fact, physically weak, and that his sight and hearing were seriously impaired.

And, of course, where the physical defect is not such as to render the servant incompetent to perform the duties for which he is employed, the employment does not constitute negligence upon the part of the master. At least, in *Chicago & A. R. Co. v. Du Bois* (1896) 65 Ill. App. 142, it was held that it was not negligence to employ, for the purpose of testing a boiler for broken stay bolts, an inspector who was partially deaf in one ear, but whose hearing was good enough to determine whether a bolt struck with a hammer was sound or broken. And in *Wing v. L. A. Bradstreet & Sons Co.* (1916) 114 Me. 481, 96 Atl. 782, reaffirmed on subsequent appeal in (1916) 115 Me. 394, 99 Atl.

36, it was held that a master was not negligent in hiring a man who had lost his right leg to run a hoisting engine which operated an elevator, where all that he had to do with his feet was to use his left foot on the brake, there being no other evidence of incompetency. And in *Texas & P. R. Co. v. Harrington* (1884) 62 Tex. 597, it was held that the fact that one was injured by a locomotive driven by a nearsighted engineer did not of itself establish negligence on the part of the company in retaining the engineer in its employment, the court taking the position that the fact that a person is nearsighted does not necessarily render him incompetent to be engineer of a locomotive, if he can see with glasses and uses them. And see *Keys v. Pennsylvania Co.* (1886) 1 Sadler (Pa.) 316, 3 Atl. 15, for an inference that the fact that a locomotive engineer has but one eye does not render him incompetent, so as to cast

responsibility upon the company for having hired him.

In *Louisville & N. R. Co. v. Davis* (1890) 91 Ala. 487, 8 So. 552, where a servant was injured by reason of the fact that a one-armed man was acting as brakeman and failed to stop a car, but in which the question was not one "of the negligence of the defendant company in the employment of" the crippled servant, he having been employed as assistant yardmaster, but of such servant's "own negligence in failing to put a competent and physically capable brakeman on the car," which caused the injury complained of, the court said that, pertinent to the question whether the assistant yardmaster was a competent brakeman, was his physical capacity; and that the fact that he had only one arm was evidence from which the jury might justifiably infer his incapacity to act as brakeman. G. J. C.

ENGELS COPPER MINING COMPANY

v.

INDUSTRIAL ACCIDENT COMMISSION et al.

California Supreme Court (In Banc)—September 17, 1920.

(— Cal. —, 192 Pac. 845.)

Workmen's compensation — injury as result of disease.

1. Injury as the result of disease is within the operation of a constitutional provision authorizing the creation of liability to compensate employees "for any injury" incurred in the course of employment.

[See note on this question beginning on page 790.]

— injury through voluntary act.

2. Injury suffered by an employee in voluntarily doing something entirely outside of his employment, even though of benefit to his employer, is not suffered by him in the course of his employment, within the meaning of the Workmen's Compensation Act.

— caring for influenza patients.

3. Services of a mining engineer, by direction of the superintendent, in caring for mine operatives who have been attacked by influenza, are within the course of his employment, within the meaning of the Workmen's Compensation Act.

11 A.L.R.—50.

Evidence — burden of proof — exposure to disease.

4. One claiming compensation under the Workmen's Compensation Act for injury alleged to have resulted from illness contracted because of exceptional exposure in the course of his employment has the burden of showing that it in fact resulted from such exposure.

Workmen's compensation — illness from exposure in course of employment — sufficiency of proof.

5. A mining engineer who is directed by his superintendent to care for mine operatives ill with influenza may

be found to have himself contracted the disease because of exceptional exposure in the course of his employment, although the disease was raging in the community, and many persons were attacked, where he was compelled to come into close contact with the patients, and himself became ill within the incubation period after such exposure, and the evidence shows a much larger percentage of attacks

among persons so exposed than among the community generally.

Evidence — sufficiency of evidence that illness was contracted because of employment.

6. To justify an award under the Workmen's Compensation Act for injury caused by illness contracted in the course of the employment, proof that the illness was contracted because of the employment, to an actual certainty, is not necessary.

PETITION for a writ of certiorari to review an award by the Industrial Accident Commission to claimant in a proceeding under the Workmen's Compensation Act to recover compensation for injury caused by illness alleged to have been contracted in the course of employment. *Award affirmed.*

The facts are stated in the opinion of the court.

Messrs. R. P. Wisecarver and Redman & Alexander for petitioner.

Mr. A. E. Graupner, for respondents:

Claimant contracted the disease of influenza as a result of and in the course of his employment.

Hartford Acci. & Indemnity Co. v. Industrial Acci. Commission, 32 Cal. App. 481, 163 Pac. 225; Turvey v. Brintons [1904] 1 K. B. 328, 73 L. J. K. B. N. S. 158, 68 J. P. 193, 52 Week. Rep. 195, 6 W. C. C. 4, 89 L. T. N. S. 660, 20 Times L. R. 129; Scott v. Pearson [1916] 2 K. B. 61, 85 L. J. K. B. N. S. 825, 114 L. T. N. S. 833, [1916] W. N. 151, W. C. & Ins. Rep. 128, 32 Times L. R. 412, 60 Sol. Jo. 428, 9 B. W. C. C. 229; Alloa Coal Co. v. Drylie [1913] S. C. 549, 50 Scot. L. R. 350, [1913] W. C. & Ins. Rep. 213, 6 B. W. C. C. 398, 1 Scot. L. T. 167, 4 N. C. C. A. 899; Cunningham v. Donovan, 93 Conn. 313, 105 Atl. 622; United Paperboard Co. v. Lewis, 65 Ind. App. 356, 117 N. E. 276; Hurler's Case, 217 Mass. 223, L.R.A.1916A, 279, 104 N. E. 336, Ann. Cas. 1915C, 919, 4 N. C. C. A. 527; H. P. Hood & Sons v. Maryland Casualty Co. 206 Mass. 223, 30 L.R.A.(N.S.) 1192, 138 Am. St. Rep. 379, 92 N. E. 329; Fisher's Case, 220 Mass. 581, 108 N. E. 361; Dove v. Alpena Hide & Leather Co. 198 Mich. 132, 164 N. W. 253; Balzer v. Saginaw Beef Co. 199 Mich. 374, 165 N. W. 785; Plass v. Central New England R. Co. 169 App. Div. 826, 155 N. Y. Supp. 854; Hiers v. Hull, 178 App. Div. 353, 164 N. Y. Supp. 767; Hart v. Wilson & Co. 186 App. Div. 926, 172 N. Y. Supp. 896; Vennen v. New Dells Lumber Co. 161

Wis. 370, L.R.A.1916A, 273, 154 N. W. 640, Ann. Cas. 1918B, 293, 10 N. C. C. A. 729; Sunnyside Coal Co. v. Industrial Commission, 291 Ill. 523, 126 N. E. 196; Belton Oil Co. v. Duncan, 60 Tex. Civ. App. 257, 127 S. W. 884; Henneberry v. Doyle [1912] 2 Ir. R. 529, 46 Ir. L. T. 70, 5 B. W. C. C. 580.

Olney, J., delivered the opinion of the court:

This proceeding is one seeking the annulment of an award of the Industrial Accident Commission. One Rebstock was taken ill with influenza while in the employ of the petitioner, a mining company, resulting in an affection of the heart which incapacitated him for anything but light work. For this he claimed and was awarded compensation. Two grounds are advanced for the annulment of the award: First, that injury by disease is not an injury for which compensation could be awarded under § 21 of article 20 of the Constitution,¹ as it read before its recent amendment and at the time Rebstock contracted influenza; and, second, that the disease was not incurred by him as the result of his employment.

The case markedly resembles what is known as the Slattery Case, San

¹ The legislature may, by appropriate legislation, create and enforce a liability on the part of all employers to compensate their employees, irrespective of the fault of either party.

(— Cal. —, 191 Pac. 845.)

Francisco v. Industrial Acci. Commission, — Cal. —, 191 Pac. 26, decided by us since the submission of the present case, and the question presented by the first ground urged for annulment, which is purely a question of law, was there discussed

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and determined adversely to the contention of the petitioner here. No discussion, therefore, of that question, is necessary other than a reference to that decision, and the statement that we adhere to the views there expressed.

The question presented by the second ground urged, that Rebstock did not contract the disease as the result of his employment, is, of course, a question of fact, and cannot be so summarily disposed of, although the substantial facts of the case are in most respects the same as those of the Slattery Case. Rebstock was employed at the company's mine in Plumas county as a "safety engineer." His duties in that capacity did not require him to give attention to or come in contact with sick employees of the company, at least aboveground. The epidemic which prevailed throughout the country in the fall of 1918 did not omit the little settlement at the company's mine, and a very considerable number of its employees were attacked. The company attempted to care for these cases in its hospital and in temporary accommodations for that purpose. Among the places so used was Rebstock's office. The number of regular medical attendants and nurses of the company was insufficient to meet the emergency, and in this situation Rebstock practically gave up his regular duties, and for some five or six days devoted himself to caring for the influenza patients, bathing them, giving them food and medicine, attending to their wants generally, and having the closest personal contact with them. At the end of that time he himself was taken with the disease, resulting finally in his permanent industrial impairment, as al-

ready stated. The period of incubation of the disease is from two to five days, so that Rebstock in all probability contracted the disease during the period when he was exposed to the contagion in an exceptional manner because of his attendance upon influenza patients.

The company's first claim is that the exceptional exposure to which Rebstock was subjected, and by reason of which alone it can be claimed that he contracted his illness in the course of his employment, was incurred by him, not in the performance of the duties for which he was employed, but in the performance of services outside his duties, voluntary in nature, and not so much for the benefit of his employer as for that of the little community of which he was a part. The second claim of the company is that, in any case, there is nothing to show that Rebstock contracted his disease by reason of the exceptional exposure to which he was subjected; that it is not at all improbable that he acquired it by reason of the general exposure to which every member of the community was subjected at the time; that it is not possible to determine with any reasonable certainty whatever which exposure was the cause of his illness, and to endeavor to do so is but guessing; and that the award of the commission cannot be justified by a mere guess, but, in order to be valid, requires for its support an affirmative showing which takes the determination out of the realm of mere conjecture.

As to the first claim, it is true that an injury suffered by an employee in voluntarily doing something entirely outside of his employment, even though of benefit to his employer, is not an injury suffered by him in the course of his employment, and if the facts of this case were only those we have stated, it might be that the award would have to be annulled on that ground. But there was evidence in the case which would justify the commission in believing that the further fact was

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tary act.

present that the company's superintendent had directed Rebstock to assist in caring for the company's influenza patients. This fact, for we must take it to be the fact, at once took Rebstock's services in that respect out of the class of purely voluntary services. Although the services were exceptional, and without the usual scope of Rebstock's employment, they were within its actual scope at the immediate time, because rendered in response to the company's direction. *Miner v. Franklin County Teleph. Co.* 83 Vt. 311, 26 L.R.A.(N.S.) 1195, 75 Atl. 653; *Sunnyside Coal Co. v. Industrial Commission*, 291 Ill. 523, 126 N. E. 196, and authorities there cited. This is sufficient to justify the award so far as this particular point is concerned.

As to the second contention of the company, it is, of course, true that the burden rested upon Rebstock to show that his illness resulted from the exceptional exposure to which he was subjected in caring for the patients of the company. It is likewise true that, in order to meet this burden, he had to show facts sufficiently cogent to take the determination of the question out of the realm of pure conjecture. It is also true that it cannot be said from the facts of the case that it is certain that Rebstock contracted the disease because of his exceptional exposure to it. But, as was said in the *Slattery Case*, — Cal. —, 191 Pac. 29: "Certainty is not required. It is not even required that the award be, in our judgment, in accord with the preponderance of the evidence, in order that we be not at liberty to annul it. We cannot disturb the award unless we can say that a reasonable man could not reach the conclusion which the commission did."

The test so stated in the last sentence just quoted is that which must be applied here.

Upon the point as to how the disease was contracted by the employee,

whether because of the exceptional exposure to which he was subjected or because of the exposure to which he was subjected in common with the rest of the community, the material facts are the same as those of the *Slattery Case*. The medical evidence in the *Slattery Case* is by stipulation made a part of the record here, and the discussion upon this point in the *Slattery Case* will suffice for the discussion in this. That discussion was: "If there had been no epidemic in San Francisco at the time, and it appeared that *Slattery*, as hospital steward, had been exposed directly to a considerable number of influenza patients, and was not known to have been exposed otherwise, and had come down with the disease within the period of incubation after his exposure, the conclusion that the disease was due to his exposure in the course of his work could hardly be questioned. But these are the actual facts, with the single exception that an epidemic was raging. To the extent of the severity of this epidemic the strength of the conclusion is weakened. It may well be that if the epidemic were so severe that the proportion of the general public who were attacked was anything like as great as the proportion of those exposed as was *Slattery*, the question of whether he was attacked because of the exposure incident to his employment or because of the exposure general to the public would be so much a matter of conjecture and speculation as not to warrant a definite conclusion as the basis of an award. But the actual fact is that, of persons exposed as was *Slattery*, the proportion of those attacked was from five to eight times as great as the proportion of those not so exposed. This ratio is so great that it cannot be said that the commission was not justified in concluding from it, in connection with the other facts, that *Slattery's* illness was due to the peculiar exposure of his employment. Its conclusion is the more justified by the fact that it coincides with the conclusions of most

—caring for
influenza
patients.

Evidence—
burden of proof
—exposure to
disease.

the physicians who testified. Their opinions upon a point of this character are entitled to consideration, since it is a part of their vocation to observe diseases and how they spread, and to draw conclusions from their observations."

There was one particular in which perhaps it might be said that the facts here differ from those of the Slattery Case. The evidence there might be taken to show that Slattery's exposure to the disease, out of that incident to his employment, was less than the similar exposure of Rebstock. The testimony Slattery's wife was that during the probable period of incubation he had been confined pretty strictly to home and to the hospital where he was employed. This factor is absent in the present case. But, as the foregoing quotation shows, the reasoning by which we reached the conclusion that the finding of the commission that Slattery's illness had been contracted because of exceptional exposure should be sustained did not proceed upon the assumption that he was not also exposed as a member of the community or that his exposure in that respect was less than that to which the community in general was subjected. The contrary, it proceeds on the assumption that he was exposed in the same respect like anyone else, and the conclusion reached is justified by reason of the very great difference between the respective proportions of those attacked in the community

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at large and those attacked in the class exposed in the exceptional manner in which were both Slattery and Rebstock. The proportion of the latter from five to eight times as great, this was deemed, and we deem it sufficient to remove from the realm of pure conjecture the conclusion that a person so exceptionally exposed, and contracting the disease, contracted it in the course of his exposure. There was urged upon us in the

Slattery Case, and there is urged upon us now, the authority of *Martin v. Manchester Corp.* [1912] W. N. 105, 106 L. T. N. S. 741, 76 J. P. 251, 28 Times L. R. 344, [1912] W. C. Rep. 289, 5 B. W. C. C. 259, and it is well, perhaps, for us to express our views concerning it. It was there held that the conclusion was not justified that an employee of a scarlet fever hospital, particularly exposed to the disease in the course of his employment, and who was attacked by it, acquired the disease through such exposure. It is said that he might have acquired it in some other manner. It is, of course, true that he might have acquired the disease in some other manner, but that he actually did so would seem to be quite improbable. The decision practically requires absolute certainty as to the fact that the disease was contracted because of the employment, and in no other manner. This is not possible or necessary. All that is required is, that degree

Evidence—
sufficiency of
evidence that
illness was con-
tracted because
of employment.

of certainty upon which men may reasonably act, and by which their affairs may reasonably be determined. It would seem well-nigh beyond argument that, for the practical conduct and governance of human affairs, the conclusion that a man attacked with scarlet fever had incurred the infection by his exposure to it in a scarlet-fever hospital would appear with sufficient certainty when it appeared that he had been employed in the hospital during the period when he must have been infected, and there daily brought into close contact with patients suffering from the disease, and it did not appear that he had been particularly exposed in any other manner. We cannot follow the decision mentioned, holding to the contrary.

Award affirmed.

We concur: Angellotti, Ch. J.; Lennon, J.; Lawlor, J.; Shaw, J.; Wilbur, J.; Sloane, J.

Petition for rehearing denied October 14, 1920.

ANNOTATION.

Workmen's compensation: right to compensation for results of exposure to contagious disease.

This annotation is confined to diseases contracted from other human beings, and is not concerned with industrial diseases, .e. g., anthrax directly traceable to infection from materials employed in the manufacture of goods.

It will be observed that, in the reported case (*ENGELS COPPER MIN. CO. v. INDUSTRIAL ACCI. COMMISSION*, ante, 785), the finding that the employee contracted influenza as the result of his employment was held justified where it appeared that he was employed as an engineer at a mine located in a small settlement; that, although his usual duties did not require him to give attention to sick employees, there was evidence that the superintendent directed him to assist in caring for the company's servants during an epidemic of influenza, and that he gave up his office for use as a hospital, and devoted himself for five or six days to caring for influenza patients, at the end of which time he was himself taken ill with the disease and thereby incapacitated. It was argued that the services performed in caring for the sick were outside his duties, voluntary in their nature, and not so much for the benefit of the employer as for that of the community; but the court decided otherwise, and also held that the evidence was sufficient to justify a reasonable man in reaching the conclusion that the employee contracted the disease by reason of the exceptional exposure to which he was subjected, and that certainty of proof was not required.

And in *San Francisco v. Industrial Acci. Commission* (1920) — Cal. —, 191 Pac. 26, it was held that the conclusion was justified that the deceased contracted the influenza in the course of his employment, where there was evidence that he was employed as steward in a municipal hospital; that an epidemic of influenza was raging in the city; that the disease was highly infectious and was so general that

one out of every ten in the city contracted it, and everyone was more or less exposed to it, and that the deceased, within the period of incubation prior to the time he was taken sick, was exposed in the course of his duties to a number of developed cases of influenza, and was taken ill with it and died. The court here said: "It is also contended, and truly, that compensation is not due merely for injury by disease contracted by an employee while employed. The injury must be one arising out of the employment; and where the injury is by disease, there must exist the relation of cause and effect between the employment and the disease. It is also true that, to justify an award, there must be an affirmative showing of a case within the statute; or, concretely, it must affirmatively appear here that Slattery contracted the disease from which he died because of his employment.

"On the other hand, the evidence showed that the incubation period of the disease is from one to four days; that Slattery, in the course of his duties, during the five days preceding his being taken ill, had had to handle and had been exposed to at least twelve developed cases of influenza; that, so far as known, he was not exposed to any cases except in the course of his employment; that he lived only half a block from the hospital where he was employed, and during the two weeks preceding his illness had been working very hard, and had gone directly from his home to his work and from his work to his home, and had not been out; that his exposure because of his work was far greater than that of the average person, and that among the nurses in the hospitals of the city,—a class exposed in much the same degree as Slattery,—the proportion who contracted the disease ran from 50 to 85 per cent, as against 10 per cent for the community in general. The preponderance of the medical testimony also was to the effect that Slattery

contracted the disease as a result of his peculiar exposure to it, incidental to his employment.

"It, of course, cannot be said that from these facts it is certain that Slattery contracted his sickness because of his employment. But certainty is not required. It is not even required that the award be, in our judgment, in accord with the preponderance of the evidence, in order that we be not at liberty to annul it. We cannot disturb the award unless we can say that a reasonable man could not reach the conclusion which the commission did. This we cannot say in the present case.

"If there had been no epidemic in San Francisco at the time, and it appeared that Slattery, as hospital steward, had been exposed directly to a considerable number of influenza patients, and was not known to have been exposed otherwise, and had come down with the disease within the period of incubation after his exposure, the conclusion that the disease was due to his exposure in the course of his work could hardly be questioned. But these are the actual facts, with the single exception that an epidemic was raging. To the extent of the severity of this epidemic the strength of the conclusion is weakened. It may well be that if the epidemic were so severe that the proportion of the general public who were attacked was anything like as great as the proportion of those exposed as was Slattery, the question of whether he was attacked because of the exposure incidental to his employment, or because of the exposure general to the public, would be so much a matter of conjecture and speculation as not to warrant a definite conclusion as the basis of an award. But the actual fact is that, of persons exposed as was Slattery, the proportion of those attacked was from five to eight times as great as the proportion of those not so exposed. This ratio is so great that it cannot be said that the commission was not justified in concluding from it, in connection with the other facts, that Slattery's illness was due to the peculiar exposure of his employment."

It will be noted that in the reported case (*ENGELS COPPER MIN. CO. v. INDUSTRIAL ACCI. COMMISSION*, ante, 785), the court, with respect to the question whether disease was an injury for which compensation might be awarded, followed the decision in *San Francisco v. Industrial Acci. Commission* (Cal.) supra, where, as before stated, an employee in a hospital contracted influenza, and it was held that an injury suffered by reason of a disease contracted by an employee while at work was an injury for which compensation might be awarded under § 21 of article 20 of the California Constitution, providing that the legislature might, by appropriate legislation, create and enforce a liability on the part of all employers to compensate their employees "for any injury incurred" by them. The court, after reaching the conclusion that "injury" might have either a narrow or a broad meaning, either of which might be reasonable, stated that when the legislature has once construed the Constitution, the courts should not place a different construction upon it, and declare a statute invalid unless it can be said that the legislation is certainly opposed to the Constitution, and said: "In the present case, the legislature has construed the Constitution, and has placed upon the word 'injury' the broader meaning possible to it. Section 6 of the Workmen's Compensation Act (Stat. 1917, p. 831) provides that compensation shall be given by an employer 'for any injury sustained by his employee arising out of and in the course of the employment and for the death of any such employee if the injury shall proximately cause death.' Subdivision 4 of § 3 of the act defines injury as follows: '(4). The term "injury," as used in this act, shall include any injury or disease arising out of the employment. In case of aggravation of any disease existing prior to such injury, compensation shall be allowed only for such proportion of the disability due to the aggravation of such prior disease as may reasonably be attributed to the injury.' The Constitution cannot be given the more limited meaning contended for

by the city without declaring this provision in the statute void. This we cannot do, unless there is a plain and unmistakable conflict between the statute and the Constitution. But there is no such plain and unmistakable conflict, since the statute does no more than adopt what is at least a possible and not unreasonable construction of the Constitution. This being the case, it must be held that the provision of the Compensation Act whereby a disease arising out of employment is declared to be an injury for which compensation shall be paid, is not unconstitutional, but is operative and controlling."

And in *Martin v. Manchester Corp.* (1912) 5 B. W. C. C. (Eng.) 259, where there was evidence that the workman was porter in a scarlet-fever hospital, whose duty was to clean out the mortuary; that he had influenza in February of a certain year which prevented him from working until March 22; that on April 1, while cleaning the mortuary, he was taken sick, and in about four days developed scarlet fever, which incapacitated him,—it was held that the evidence was insufficient to justify a finding that the injury resulted from an accident arising out of and in the course of the employment. Buckley, L. J., said: "The contraction of the disease is an injury. That injury may or may not be by accident. In order that the man may succeed, it is necessary he should show that the disease was contracted by accident. It is for the workman to establish the accident. The workman must show how, when, where, to the satisfaction of the tribunal, the circumstances took place which constituted an accident. The most that can be said here is that this man was employed in a scarlet-fever hospital, and it may be more probable that he contracted the complaint in the place where there were scarlet fever patients than in the street or his aunt's house. But that will not do. You must not say, 'It is very likely that I did contract it here;' you must show that you did contract it there. Even if he contracted it in the hospital, it is not enough, because you must show

that he contracted it by accident. If, in order to prevent infection, it was his duty to wash his hands with a particular solution, and if, by accident, he took a wrong soap or wrong solution, and so contracted the disease, it might be that he then would have contracted the disease by accident. There is nothing of that sort in this case. Here it is quite insufficient to say, 'I was in a place where there was scarlet fever, and I had scarlet fever, and therefore I contracted an injury by accident.' All that he shows is that he had an injury, and then he must show that the injury arose by accident. That is, showing how he contracted it. In my view, there is no evidence at all here on which the judge could infer an injury by accident."

But *Richardson v. Greenberg* (1919) 188 App. Div. 176 N. Y. Supp. 651, is distinguishable because of the form of the statute, it being held that the contraction of glanders by a stable employee from a horse affected with that disease, which he was required to lead, was not an "accidental personal injury" arising out of his employment. The court said: "Had it been the intention of the legislature to include within the meaning of 'injury,' or 'personal injury,' all diseases of whatever nature, it would not have been necessary expressly to mention, in addition to 'accidental injuries,' 'such disease or infection as may naturally and unavoidably result therefrom.' This express mention of a disease which is the consequence of injury would seem to exclude all diseases which are not. The particular disease must 'result' from 'accidental injury,'—that is to say, it must be preceded by such injury,—and therefore cannot constitute the injury which it follows. Evidently 'disease' and 'accidental injury' are in contrast with each other, so that the former is never comprehended by the latter. The Workmen's Compensation Law was drawn with painstaking care, and it cannot be supposed that words and phrases found therein, particularly in the defining clauses, were needlessly, meaninglessly, or obscurely used. The plain meaning of its words, with-

out the aid of judicial interpretation, induces the conclusion that the legislature intended to make compensation no condition of death resulting from disease, unless the disease itself followed a traumatic injury or other injury not partaking of the nature of a disease."

It will be observed from the state-

ment at the beginning of this annotation that this case is not strictly within the scope of the note; but, on account of its similarity to the cases dealing with contraction of diseases from human beings, it has been included for what it may be worth on the question here discussed.

J. T. W.

FEDERAL TRADE COMMISSION

v.

ANDERSON GRATZ et al., Doing Business under the Firm Name and Style of Warren, Jones, & Gratz, et al.

United States Circuit Court of Appeals, Second Circuit—May 14, 1919.

(169 C. C. A. 330, 258 Fed. 314.)

Unfair trade — scope of Federal act.

1. The statute creating the Federal Trade Commission and giving it authority to prevent unfair methods of competition does not apply to unfair methods of competition between individuals merely.

[See note on this question beginning on page 797.]

— refusal to sell articles separate from others.

2. The Federal Trade Commission has no authority to prevent the refusal to sell cotton ties without a corresponding amount of bagging of

a particular make, where the practice is not general, but was resorted to only in a few instances, for a particular purpose.

[See note in 6 A.L.R. 366.]

PETITION to review and set aside an order of respondent directing petitioners to desist from using alleged unfair methods of competition. *Reversed.*

The facts are stated in the opinion of the court.

Argued before Ward, Hough, and Manton, Circuit Judges.

Mr. T. F. Wagner for petitioners.

Mr. John Walsh, for respondent:

The order of the commission does not deprive petitioners of their constitutional rights to the equal protection of the law.

United States v. Keystone Watch Case Co. 218 Fed. 502; Cincinnati, H. & D. R. Co. v. Interstate Commerce Commission, 206 U. S. 142, 51 L. ed. 995, 27 Sup. Ct. Rep. 648; Illinois C. R. Co. v. Interstate Commerce Commission, 206 U. S. 441, 51 L. ed. 1128, 27 Sup. Ct. Rep. 700; Pennsylvania R. Co. v. International Coal Min. Co. 230 U. S. 184, 57 L. ed. 1446, 33 Sup. Ct. Rep. 893, Ann. Cas. 1915A, 315; Mitchell Coal & Coke Co. v. Pennsylvania R. Co. 230 U. S. 247, 57 L. ed.

1472, 33 Sup. Ct. Rep. 916; Morrisdale Coal Co. v. Pennsylvania R. Co. 230 U. S. 304, 57 L. ed. 1494, 33 Sup. Ct. Rep. 938; Atchison, T. & S. F. R. Co. v. United States, 232 U. S. 199, 58 L. ed. 568, 34 Sup. Ct. Rep. 291; Interstate Commerce Commission v. Goodrich Transit Co. 224 U. S. 194, 56 L. ed. 729, 32 Sup. Ct. Rep. 436; Louisville & N. R. Co. v. Garrett, 231 U. S. 298, 58 L. ed. 229, 34 Sup. Ct. Rep. 48; Portland R. Light & P. Co. v. Railroad Commission, 229 U. S. 397, 57 L. ed. 1248, 33 Sup. Ct. Rep. 820.

The Federal Trade Commission has the right to pass on questions of unfair methods of competition, and issue orders to prevent the same, where the property rights of certain individuals are not involved.

Armstrong Cork Co. v. Ringwalt

Linoleum Works, 153 C. C. A. 665, 240 Fed. 1022; 28 Am. & Eng. Enc. Law, 2d ed. 348; Nims, Unfair Business Competition, p. 1; Sperry & H. Co. v. Louis Weber Co. 161 Fed. 219; Even-son v. Spaulding, 9 L.R.A.(N.S.) 904, 82 C. C. A. 263, 150 Fed. 517; Stand-ard Oil Co. v. Doyle, 118 Ky. 662, 111 Am. St. Rep. 331, 82 S. W. 271; Com-mercial Acetylene Co. v. Avery Port-able Lighting Co. 152 Fed. 642; Standard Oil Co. v. United States, 221 U. S. 43, 55 L. ed. 638, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; International News Serv-ice v. Associated Press, 248 U. S. 215, 63 L. ed. 211, 2 A.L.R. 293, 39 Sup. Ct. Rep. 68; Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 62 L. ed. 260, L.R.A.1918C, 497, 38 Sup. Ct. Rep. 65, Ann. Cas. 1918B, 461; United States v. Patterson, 205 Fed. 292.

The findings of fact made by the commission authorize or justify the order made by it, directing the defend-ants to cease and desist.

United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540.

Ward, Circuit Judge, delivered the opinion of the court:

This is a petition of Anderson Gratz, a member of the firm of War-ren, Jones, & Gratz, under § 5 of the Act of September 26, 1914, chap. 311, 38 Stat. at L. 719, Comp. Stat. § 8836e, 4 Fed. Stat. Anno. 2d ed. p. 577, creating the Federal Trade Commission, to review the following order of the commission:

Therefore, it is ordered, that the respondents, Anderson Gratz and Benjamin Gratz, copartners, doing business under the firm name and style of Warren, Jones, & Gratz, P. P. Williams, W. H. Fitzhugh, and Alexander Fitzhugh, copartners, do-ing business under the firm name and style of P. P. Williams & Com-pany, and C. O. Elmer, their officers and agents, cease and desist from re-quiring purchasers of cotton ties to also buy, or agree to buy, a propor-tionate amount of American Manu-facturing Company's bagging, and, further, that the respondents cease and desist from refusing to sell cot-ton ties unless the purchasers buy or agree to buy from them correspond-

ing amounts of American Manufac-turing Company's bagging, or any amount of cotton bagging of any kind.

By the Commission,

[Seal.] L. L. Bracken, Secretary.

If Anderson Gratz has not suf-ficient standing to file this petition, counsel for the commission has very fairly waived the objection and in-vided the court to dispose of the questions raised.

The first count of the complaint served on the respondents, which is the only one involved, is as follows:

"Paragraph 1. That the respond-ents Anderson Gratz and Benjamin Gratz are copartners, doing busi-ness under the firm name and style of Warren, Jones, & Gratz, having their principal office and place of business in the city of St. Louis, and state of Missouri, and are engaged in the business of selling, in inter-state commerce, either directly to the trade, or through the respond-ents hereinafter named, ties made and used for binding bales of cotton, and which steel ties are manufac-tured by the Carnegie Steel Com-pany of Pittsburgh, Pennsylvania, and also selling, in the same manner, jute bagging, used to wrap bales of cotton, and which jute bagging is manufactured by the American Manufacturing Company, of St. Louis, Missouri.

"Paragraph 2. That the respond-ents P. P. Williams, W. H. Fitzhugh, and Alexander Fitzhugh are copar-tners, doing business under the firm name and style of P. P. Williams & Company, having their principal office and place of business in the city of Vicksburg, and state of Mis-sissippi, and the said last-named respondents and the said respondent Charles O. Elmer, who is located and doing business at the city of New Or-leans, and state of Louisiana, are the selling and distributing agents of the said firm of Warren, Jones, & Gratz, and sell and distribute the ties and bagging, manufactured as aforesaid, in interstate commerce, principally to jobbers and dealers,

who resell the same to retailers, cotton ginnerers, and farmers.

"Paragraph 3. That with the purpose, intent, and effect of discouraging and stifling competition in interstate commerce in the sale of such bagging, all of the respondents do now refuse, and for more than a year last past have refused, to sell any of such ties unless the prospective purchaser thereof would also buy from them bagging to be used with the number of ties proposed to be bought; that is to say, for each 6 of such ties proposed to be bought from the respondents the prospective purchaser is required to buy 6 yards of such bagging."

The respondents filed an answer admitting the facts stated in paragraphs 1 and 2, but denying the facts stated and the conclusion therefrom contained in paragraph 3. They appeared and offered testimony before the commission.

The commission's material findings of fact and its conclusions of law are as follows:

"Paragraph 2. That within three years last past respondents, Anderson Gratz and Benjamin Gratz, copartners, doing business under the firm name and style of Warren, Jones, & Gratz, P. P. Williams, W. H. Fitzhugh, and Alexander Fitzhugh, copartners, doing business under the firm name and style of P. P. Williams & Company, and C. O. Elmer, adopted and practised the policy of refusing to sell steel ties to those merchants and dealers who wished to buy them from them unless such merchants and dealers would also buy from them a corresponding amount of jute bagging.

"Paragraph 4. . . . The dominating and controlling position occupied by said respondents in the sale and distribution of ties made it possible for them to force would-be purchasers of ties to also buy from them bagging manufactured by the American Manufacturing Company, and in many instances, said respondents refused to sell ties unless the purchaser would also buy from them a corresponding amount of bagging,

and such purchasers were oftentimes compelled to buy bagging manufactured by the American Manufacturing Company, from said respondents, in order to procure a sufficient supply of steel ties used for the purpose aforesaid.

"Conclusions of Law."

"That the methods of competition set forth in the foregoing findings as to the facts, in paragraphs 1, 2, 3, and 4, and each and all of them, are, under the circumstances therein set forth, unfair methods of competition in interstate commerce, against other manufacturers, dealers, and distributors of jute bagging, and against other dealers and distributors in the material known as sugar bag cloth, and against manufacturers, dealers, and distributors of the bagging known as re-woven bagging and secondhand bagging, in violation of the provisions of § 5 of an act of Congress approved September 26, 1914, entitled, 'An Act to Create a Federal Trade Commission, to Define its Powers and Duties, and for Other Purposes,' and that there is not sufficient proof submitted in the hearings to sustain the paragraph in the complaint charging a violation of § 3 of an act of Congress known as the Clayton Act (Act October 15, 1914, chap. 323, 38 Stat. at L. 731, Comp. Stat. § 8835c, 9 Fed. Stat. Anno. 2d ed. p. 733)."

By agreement between the parties the commission filed a transcript of the entire record in the proceeding before it. This court is given power by the act to affirm, modify, or set aside such an order, the commission's finding of fact to be conclusive if supported by testimony.

There is testimony to support the findings of fact, and therefore the question before us is whether they do support the commission's conclusion of law that the method of competition forbidden is unfair within the meaning of § 5 of the Act of September 26, 1914.

It seems to us that unfair methods of competition between individuals

are not contemplated by the act. Congress could not have intended to submit to the determination of the commission such questions as whether a person, partnership, or corporation had treated or bribed the employees of a competitor for the purpose of inducing them to betray their employer. We think the unfair methods, though not restricted to such as violate the Anti-trust Acts, must be at least such as are unfair to the public generally. It seems to us that § 5 is intended to provide a method of preventing practices unfair to the general

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public, and very particularly such as, if not prevented, will grow so large as to lessen competition and create monopolies, in violation of the Anti-trust Acts. Such a preliminary inquiry and determination constitutes a most important supplement in carrying out the public policy which those acts are intended to vindicate. This view is confirmed by the language of the section: "Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and a place therein fixed at least thirty days after the service of said complaint."

No authority is given to any individual to present his grievances, and the commission is to interpose only in the interest of the public.

That the commission did not find sufficient proof to sustain the second count in the complaint, viz., that the method of the respondent found to be unfair violated § 3 of the Act of October 15, 1914, known as the Clayton Act, which makes unlawful any condition, agreement, or under-

standing that may lessen competition or tend to create a monopoly, shows that the method found to be unfair must have been unfair in certain individual transactions. And we discover no evidence to support the finding in paragraph 2 that the respondents "adopted and practised the policy of refusing to sell steel ties to those merchants and dealers who wished to buy them from them unless such merchants and dealers would also buy from them a corresponding amount of jute bagging." It is the natural and prevailing custom in the trade to sell ties and bagging together, just as one witness testified it is to sell cups and saucers together. Such evidence as there is of a refusal to sell is a refusal to sell at all to certain persons with whom the respondents had previous unsatisfactory relations, and a refusal to sell ties without bagging at the opening of the market in 1916 and 1917, when there was fear that, owing to the scarcity of ties and the prospect of large crops, the marketing of the cotton crop might be endangered by speculators creating a corner in ties. The evidence is that, with these exceptions, the respondents sold ties without any restrictions to all who wanted to buy, and, indeed, made extraordinary efforts to induce the manufacturers of ties to increase their output so that all legitimate dealers and all cotton raisers should get enough ties and bagging at reasonable rates to market their cotton. It is only these exceptional and individual cases, which established no general practice affecting the public, that can sustain the findings in paragraph 4.

—refusal to sell
articles
separate from
others.

Counsel for the commission calls our attention to the opinion of the circuit court of appeals for the seventh circuit, *Sears, R. & Co. v. Federal Trade Commission*, 6 A.L.R. 358, 169 C. C. A. 323, 258 Fed. 307. The practice there prohibited as unfair was extensive advertising containing false and misleading statements calculated to deceive all

purchasers and to discredit all competitors. It was clearly a method unfair to the public generally.

As we think there is no evidence to support any general practice of the respondents to refuse to sell ties unless the purchaser bought at the same time the necessary amount of the American Manufacturing Com-

pany's bagging, and that the Commission has no jurisdiction to determine the merits of specific individual grievances, the order is reversed.

Affirmed by the Supreme Court of the United States June 7, 1920, 253 U. S. 421, 64 L. ed. 993, 40 Sup. Ct. Rep. 572.

ANNOTATION.

Validity and construction of statute creating Federal Trade Commission.

The earlier cases discussing the validity and construction of the act of Congress creating the Federal Trade Commission (Act of September 26, 1914, chap. 311, 38 Stat. at L. 717, Comp. Stat. § 8836a, 4 Fed. Stat. Anno. 2d ed. p. 575) are reviewed in the annotation in 6 A.L.R., at page 366. The present note considers only the recent cases on the subject.

In no case decided since the original annotation was prepared does the question of the validity of the statute seem to have been raised. Several late cases, however, have considered the act and its provisions from the point of view of construction or practice, the principal question being what constitute "unfair methods of competition."

In the reported case (*FEDERAL TRADE COMMISSION v. GRATZ*, ante, 793), which is cited in the note in 6 A.L.R. 366, the court fails to discover any evidence to support certain of the findings of the commission on which was based the charge of unfair methods of competition. The decision in the reported case (*FEDERAL TRADE COMMISSION v. GRATZ*, ante, 793), was affirmed by the United States Supreme Court in (1920) 253 U. S. 421, 64 L. ed. 993, 40 Sup. Ct. Rep. 572. The court set out a proper method of procedure for action by the commission under § 5 of the act, as follows: "When proceeding under § 5, it is essential, first, that, having reason to believe a person, partnership, or corporation has used an unfair method of competition in commerce, the commission shall conclude a proceeding 'in

respect thereof would be to the interest of the public;' next, that it formulate and serve a complaint stating the charges 'in that respect,' and give opportunity to the accused to show why an order should not issue, directing him to 'cease and desist from the violation of the law so charged in said complaint.' If, after a hearing, the commission shall deem 'the method of competition in question is prohibited by this act,' it shall issue an order requiring the accused 'to cease and desist from using such method of competition.' If, when liberally construed, the complaint is plainly insufficient to show unfair competition within the proper meaning of these words, there is no foundation for an order to desist,—the thing which may be prohibited is the method of competition specified in the complaint. Such an order should follow the complaint; otherwise it is improvident, and, when challenged, will be annulled by the court." The court, discussing the words "unfair method of competition," pointed out that it was for the courts, and not for the commission, to determine, as a matter of law, what was included therein, and it was further said thereof: "They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud, or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. The act was certainly not intended to fetter free and fair competition as commonly understood and

practised by honorable opponents in trade." The first count in the charge as formulated by the Trade Commission alleged an attempt to stifle competition by a refusal to sell ties for binding cotton unless the purchaser would take a corresponding amount of bagging. No monopoly of ties or bagging, either in existence or in prospect, being alleged, it was held that no violation of the act was constituted thereby.

New Jersey Asbestos Co. v. Federal Trade Commission (1920) — A.L.R. —, — C. C. A. —, 264 Fed. 509, was a petition to review an order of the Federal Trade Commission, which found that the Asbestos Company was violating the Federal Trade Commission Act by reason of unfair methods of competition, in that the company had "been lavishly giving gratuities, such as liquor, cigars, meals, theater tickets, and entertainment to employees of customers as an inducement to influence their employers to purchase or to contract to purchase from" the Asbestos Company. The court took judicial notice of the fact that the acts complained of had been an incident of business from time immemorial, and pointed out that the practice had been recognized by income tax regulations which allowed the deduction of spending or treating money advanced to traveling salesmen, in a return of income tax. It was said that even payments of money or gifts of valuable presents for the same purpose "would be a matter between individuals, and not one so affecting the public as to be within the jurisdiction of the commission, under the decision" in the reported case (*FEDERAL TRADE COMMISSION v. GRATZ*, ante, 793).

In *Beech-Nut Packing Co. v. Federal Trade Commission* (1920) — C. C. A. —, 264 Fed. 885, there was also involved a determination of what constituted unfair competition within the meaning of the Federal Trade Commission Act. The Beech-Nut Packing Company, manufacturers of food products, maintained and operated an elaborate system of enforcing certain resale prices, refusing to sell their goods to those who failed to comply

with their directions as to prices, and the Federal Trade Commission held this to be unfair competition within the act. The question was said by the court to be one affecting the public generally, and within the jurisdiction of the commission. But it was held, in view of the decision in *United States v. Colgate & Co.* (1919) 250 U. S. 300, 63 L. ed. 992, 7 A.L.R. 443, 39 Sup. Ct. Rep. 465, that such a method of preventing competition as to resale prices between purchasers constituted merely the exercise of a man's right to do what he will with his own, and was not a violation of the act in question.

In *National Harness Mfrs. Asso. v. Federal Trade Commission* (1919) 261 Fed. 170, the question before the court was whether one petitioning for a review of a decision of the Federal Trade Commission [made pursuant to § 5 of the Act of Congress of September, 1914] might be allowed to dispense with printing the record. The court recited the procedure under the act as follows: "By the provisions of this act, the commission conducts a general investigation and takes proofs; there is no judicial regulation of the reception of evidence. Thereupon the commission makes a finding of facts and an order. If the order is not observed, the commission may apply to this court for a mandatory order of enforcement, and files in this court a copy of the entire record and of its finding of facts. In case of such application, there is a provision for taking further testimony, to be ordered by this court, at the request of either party. In case the defendant feels aggrieved by the order of the commission, he may file a petition in this court for review, and the commission is required to file the transcript of the record. The court then has the same duty of review as if the commission had brought the matter here." The court said that rule 19 (118 C. C. A. xv., 202 Fed. xiii.), providing for the printing of all records, "should not be interpreted so as to require printing at large such a record as this." And following the analogy of general equity rule 75 (115 C. C. A. xl., 198 Fed.

xl.), it was ordered "that the petitioner, within thirty days, prepare and serve upon the commission a statement of such parts of the record as the petitioner thinks should be printed, including a condensed narrative of so much of the testimony as is material to the points to be raised; that within thirty days thereafter the commission propose such amendments to such statement and narrative as it thinks proper; and that, if the parties do not thereupon promptly reach an agreement as to the record necessary to be printed, the matter be brought to the further attention of the court."

The case of *United States v. Ford* (1920) 263 Fed. 449, while not within the scope of this note, is of interest as bearing on the activities of the Federal Trade Commission. It was held therein that, under § 25 of the National Defense Act (40 Stat. at L. 276,

chap. 53, Comp. Stat. § 3115½q, Fed. Stat. Anno. Supp. 1918, p. 191), the President was empowered, not required, to exercise his authority to regulate the prices and production of coal through the Federal Trade Commission in each instance. The court said: "The authority of the commission, under the thirteenth paragraph of the section, is to fix local prices only after direction by the President to make the investigation authorized by the eleventh paragraph. The grant of powers to the commission is contingent, and does not become effective until that direction is given. Such grant does not, therefore, require the construction of the first paragraph to the effect that the President can act only through the commission, for which the defendant contends."

R. S.

SIDNEY CHANOCK, Alias Sidney Jordan, Alias S. J. Colby, Alias George Lewison, Appt.,

v.

UNITED STATES OF AMERICA.

District of Columbia Court of Appeals—June 1, 1920.

(— App. D. C. —, 267 Fed. 612.)

Larceny — conversion of guest's property by hotel clerk.

1. A hotel clerk to whom valuables are intrusted by a guest to be placed in the hotel safe is not within a statute providing that an innkeeper who converts anything of value intrusted to him by a guest for safe-keeping shall be guilty of embezzlement, and he may therefore be convicted of larceny.

[See note on this question beginning on page 801.]

— change of possession of property.

2. The bare custody of a hotel clerk, to whom valuables are intrusted by a guest to be placed in the hotel safe, does not change the possession of the property so as to prevent the wrongful conversion of the property by the clerk from being larceny.

[See 17 R. C. L. 10.]

Indictment — taking property of different persons — single offense.

3. The wrongful conversion by a hotel clerk of property of a guest, his wife, and daughter, at one time by the same act, constitutes but one offense, and should be so charged in the indictment.

[See 17 R. C. L. 54.]

APPEAL by defendant from a judgment of the Supreme Court, holding the Criminal Court, convicting him of larceny. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. M. E. O'Brien and W. J. Lambert for appellant.

Messrs. John E. Laskey and Morgan H. Beach, for appellee:

Where several articles of property are stolen at the same time and place, the stealing constitutes but one offense, and should be so charged in the indictment.

Hoiles v. United States, 3 MacArth. 372, 36 Am. Rep. 106; Henry v. United States, — App. D. C. —, 263 Fed. 459.

The offense was larceny, not embezzlement. Constructive possession was in the guests; custody, only, in the hotel.

Hale, P. C. 506; Talbert v. United States, 42 App. D. C. 1; Weisberg v. United States, 49 App. D. C. 28; Clark & M. Crimes, p. 454; People v. Montaral, 120 Cal. 691, 53 Pac. 355.

Mr. Justice Van Orsdel delivered the opinion of the court:

This appeal is from a judgment based upon a verdict finding the appellant guilty of the crime of larceny.

It appears that defendant was bookkeeper and clerk in the Dewey Hotel in this city. One Arnold, with his wife and daughter, registered at the hotel as guests. Arnold gave defendant two envelopes containing securities and money, to be placed in the hotel safe. During the following night defendant opened the safe, took the securities and all of the money but \$10 from the envelopes, and absconded. When arrested, the property was found in his possession.

The judgment is challenged chiefly upon the ground that the indictment charged larceny, while the proof established embezzlement. Section 837 of the District Code provides: "Any person intrusted with anything of value, to be carried for hire, or being an innkeeper and intrusted by his guest with anything of value for safe-keeping, who fraudulently converts the same to his own use, shall be deemed guilty of embezzlement and punished as provided in section eight hundred and thirty-four." [31 Stat. at L. 1325, chap. 854.] Section 834 relates to embezzlement by agent, attorney, clerk, or servant."

Defendant occupied none of these relations to Arnold, nor was he an innkeeper as defined in § 837. He was a mere employee of the hotel.

The securities and money were committed to the custody of defendant for a specific purpose, namely, to be placed in the safe for safe-keeping until called for by the owner. The power of defendant over the property extended to placing it in the safe and returning it when requested by the owner. In *People v. Montaral* (1898) 120 Cal. 691, 694, 53 Pac. 355, where one of two roommates intrusted the other with his money for safe-keeping, and the latter placed it in his trunk subject to the former's call, the taking by the custodian was held to be larceny. On this point, the court, referring to and affirming a former decision (*People v. Johnson*, 91 Cal. 265, 27 Pac. 663), said: "Where the owner puts his property into the hands of another to do some act in relation to it in his presence, he does not part with the possession of it, and the conversion of it *animo furandi* is larceny, and not embezzlement."

The bare custody with which defendant was vested did not change the possession of the property. It constructively remained in the owners. In *Clark & Marshall on the Law of Crimes*, pp. 454, 455, it is said: "There is a well-settled distinction in law between the possession of goods and the mere charge, or custody, and this distinction plays an important part in the law of larceny. The owner of goods may deliver them to another in such a manner or under such circumstances as to give the other the bare custody, without changing the possession in the eye of the law. The possession in such a case remains constructively in the owner, and, if the person having the 'custody' converts the goods to his own use with felonious intent, he takes them from the constructive posses-

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sion of the owner, and commits a trespass and larceny. And it can make no difference, in such a case, when the felonious intent was first formed."

Nor is the position of defendant tenable that he was charged with three separate and distinct felonies in a single count. Part of the property stolen is alleged to be owned by Arnold, part by his wife, and part by the daughter; but it clearly appears that the articles were taken at the same time and from the same place, and constituted a

single offense. "It is a rule of criminal pleading that, where articles of property are stolen at the same time and place, the stealing constitutes but one offense, and should be so charged in the indictment or information. It is regarded as a single act and the result of one intention." *Hoiles v. United States*, 3 MacArth. 370, 36 Am. Rep. 106; *Henry v. United States*, — App. D. C. —, 263 Fed. 459.

Indictment—
taking property
of different
persons—single
offense.

The judgment is affirmed.

ANNOTATION.

Distinction between larceny and embezzlement.

- I. Scope of note, 801.
- II. Possession gained lawfully or unlawfully, 801.
- III. Possession gained by virtue of trust or otherwise, 805.

I. Scope of note.

In the collation of cases on the distinction between larceny and embezzlement, this note cites only those decisions which actually discuss that distinction, and those which pass specifically on a contention that particular acts constitute one of these crimes rather than the other. No attempt is made to review the cases holding merely that larceny or embezzlement is or is not shown by particular facts, though the holding that one crime is shown may imply the exclusion of the other. For example, the cases which refer to the existence of *animus furandi* at the time of taking, as a distinguishing feature between larceny and embezzlement, are cited, but not those which hold only that *animus furandi* then existing is essential to larceny.

For the purpose of this note, the term "embezzlement" is construed as including the statutory crimes denominated in some states "larceny by bailee," or "larceny after trust."

II. Possession gained lawfully or unlawfully.

The crimes of larceny and embezzlement are distinguishable in that, in
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the latter, the property comes lawfully into the possession of the taker, and is unlawfully appropriated by him, whereas, in the former, the property is unlawfully taken and retained.

United States.—*United States v. Lee* (1882) 12 Fed. 818; *United States v. Harper* (1887) 33 Fed. 476, approved in *United States v. Breese* (1904) 131 Fed. 920, reversed on other grounds in (1906) 74 C. C. A. 388, 143 Fed. 250; *Moore v. United States* (1895) 160 U. S. 269, 40 L. ed. 423, 16 Sup. Ct. Rep. 294, 10 Am. Crim. Rep. 283.

Delaware.—*State v. Lyons* (1911) 3 Boyce, 72, 80 Atl. 976 (charge to jury); *State v. Curtin* (1914) 5 Boyce, 518, 95 Atl. 232 (charge to jury).

Georgia.—*Carter v. State* (1915) 143 Ga. 632, 85 S. E. 884.

Illinois.—*Spalding v. People* (1898) 172 Ill. 55, 49 N. E. 993.

Kansas.—*State v. Yeiter* (1894) 54 Kan. 283, 38 Pac. 320.

Maryland. — *Williams v. United States Fidelity & G. Co.* (1907) 105 Md. 490, 66 Atl. 495.

Massachusetts. — *Com. v. King* (1852) 9 Cush. 284.

Missouri.—*State v. Burgess* (1916) 268 Mo. 407, 188 S. W. 135.

Nebraska.—*Ford v. State* (1895) 46 Neb. 390, 64 N. W. 1082; *Cohoe v. State* (1907) 79 Neb. 811, 113 N. W. 532, 114 N. W. 286.

Oklahoma.—*Ennis v. State* (1917)

13 Okla. Crim. Rep. 675, L.R.A.1918A, 312, 167 Pac. 229.

Pennsylvania.—*Hutchinson v. Com.* (1876) 82 Pa. 472, 2 Am. Crim. Rep. 362, 4 Mor. Min. Rep. 208.

West Virginia. — *State v. Moyer* (1905) 58 W. Va. 146, 52 S. E. 30, 6 Ann. Cas. 344. And see the cases cited throughout this note.

"Embezzlement differs from larceny precisely in this: that it does not depend upon a violation of possession." *United States v. United States Brokerage & Trading Co.* (1920) 262 Fed. 459.

"There is a distinction between embezzlement and larceny. The distinguishing element of the latter crime is the taking and carrying away, or asportation, of the property the subject of the larceny. In embezzlement, the property is lawfully in the possession of the accused by reason of some fiduciary relation between the accused and the owner." *People v. Ehle* (1916) 273 Ill. 424, 112 N. E. 970. See also *Johnson v. People* (1885) 113 Ill. 99, 5 Am. Crim. Rep. 350.

"Larceny and embezzlement belong to the same family of crimes, the distinguishing feature being that to constitute larceny there must have been a trespass or wrong to the possession, but where one gains possession of the property so as to constitute only a bare charge, or custody, or procures it by subterfuge, it does not divest the possession of the true owner; he is still in the constructive possession, and the offense of appropriating the property is larceny." *Boswell v. State* (1911) 1 Ala. App. 178, 56 So. 21. See to the same effect, *Ludlum v. State* (1915) 13 Ala. App. 278, 69 So. 255.

"To start with, it should be borne in mind that the basic difference between the crime of larceny and that of embezzlement is that the former is predicated upon the wrongful taking of property with intent upon its conversion, and the latter upon a wrongful conversion of property rightfully in possession. The former may take place among strangers, while the latter can only be consummated in cases where, by virtue of a special confidential relation, the defendant has been

intrusted with access and possession." *Axtell v. State* (1909) 173 Ind. 711, 91 N. E. 354.

So, it has been said that the crime of embezzlement "differs in its essential ingredients from the crime of larceny, in this: that in larceny the gravamen of the offense is the unlawful and felonious taking of personal property with the intent to convert and steal the same, while in embezzlement the taking is lawful, because of the trust reposed in the agent, servant, or trustee receiving it, and the gravamen of the offense consists in the conversion of the property so received, with a felonious and fraudulent intent of converting the same to the use of the agent, servant, or trustee." *State v. Culver* (1904) 5 Neb. (Unof.) 238, 97 N. W. 1016.

"In larceny there is the ingredient of an unlawful taking from the possession of the owner with the intent to deprive him of his property, and to wrongfully appropriate the same to the use of the party so taking. The custody or actual possession, in larceny, is acquired by the party unlawfully, in the act of feloniously taking the owner's property without his consent. But in embezzlement there is no wrongful or unlawful acquisition of the custody or possession of the property embezzled; on the contrary, the party embezzling must be lawfully in possession by virtue of some employment, trust, or agency, under and with the consent of the owner, and while so in possession, holding the property in trust or for the benefit of the owner, he wrongfully converts the same to his own use." *United States v. Harper* (1887) 33 Fed. 474. See also *Chaplin v. Lee* (1885) 18 Neb. 443, 25 N. W. 609.

The courts have frequently said that the only difference between larceny and embezzlement is that in the former there must be a trespass, while in the latter that is not necessary; that embezzlement is, to all intent and purpose, larceny without the ingredient of a trespass.

Colorado.—*Moody v. People* (1918) 65 Colo. 339, 176 Pac. 476.

Connecticut. — *State v. Hanley*

(1898) 70 Conn. 270, 39 Atl. 148; *State v. Lanyon* (1910) 83 Conn. 449, 76 Atl. 1095.

Indiana.—*Vinnedge v. State* (1906) 167 Ind. 415, 79 N. E. 353.

Kentucky.—*Com. v. Clifford* (1894) 96 Ky. 4, 27 S. W. 811.

Missouri. — *State v. Casey* (1907) 207 Mo. 1, 123 Am. St. Rep. 367, 105 S. W. 645, 13 Ann. Cas. 878.

North Dakota. — *State v. Collins* (1895) 4 N. D. 433, 61 N. W. 467.

North Carolina.—*State v. McDonald* (1903) 133 N. C. 683, 45 S. E. 582.

Oregon.—*State v. Browning* (1905) 47 Or. 470, 82 Pac. 955.

Wyoming.—*McCann v. United States* (1879) 2 Wyo. 274.

There must be possession in the defendant at the time of conversion to constitute embezzlement. If the actual or constructive possession is in the owner, the conversion is larceny. *Com. v. Doherty* (1879) 127 Mass. 20.

The distinguishing feature of embezzlement is that the technical taking or asportation essential to larceny is not required, a breach of trust taking its place. *Com. v. Hays* (1859) 14 Gray (Mass.) 62, 74 Am. Dec. 662.

"The crime of embezzlement embraces all of the elements of larceny, except the actual taking of the property or money embezzled." *State v. Baldwin* (1886) 70 Iowa, 180, 30 N. W. 476.

So, in *State v. Cothorn* (1908) 138 Iowa, 236, 115 N. W. 890, wherein it was shown that the defendant, an officer of a labor organization, in conjunction with others, converted funds of the union in his hands, it was said: "We think the facts do not make out a case of larceny. To constitute larceny there must be a trespass in the taking. This is fundamental in the law on the subject. True, it is not necessary that the taking be by force or stealth. If possession is obtained by fraud with intent to convert the property to the use of the taker, and it is so converted, larceny may be charged. But here the taking was in all respects rightful. It was rightful, even though the taker intended to make a wrongful disposition of the money, once it was in his possession.

The wrongful disposition, if criminal in character, would be embezzlement."

In *People v. Burr* (1871) 41 How. Pr. (N. Y.) 294, approved in *People v. Perini* (1892) 94 Cal. 575, 29 Pac. 1028, the court said: "To constitute larceny, it is necessary that the property should be taken from the possession of the owner, or person in possession thereof, with a felonious intent, and it may be committed by any person; whereas embezzlement, under our statutes, can only be committed by a clerk or servant of a private person, or of a copartnership, or an officer, agent, clerk, or servant of an incorporated company, or by a carrier; it cannot be committed with respect to property in the possession of the owner, employer, or master, but only of such property as shall have come into the possession of the class of persons described, by virtue of their employment or office. The law contemplates a lawful possession in the servant, acquired from some person other than the master, but by virtue of his employment and his appropriation while in transitu before it reaches the hands of such master or employer, or is applied to the purpose directed by him. When the property or money received is delivered to the owner by the servant, or applied as directed by him, it ceases to be the subject of embezzlement, and if taken thereafter feloniously, it is larceny, not embezzlement."

It has been said that, if a fraudulent intent exists at the time of receiving property, its subsequent conversion is larceny, and not embezzlement. *Knight v. State* (1907) 152 Ala. 56, 44 So. 585. See to the same effect: *Levy v. State* (1885) 79 Ala. 259; *Eggleston v. State* (1900) 129 Ala. 80, 87 Am. St. Rep. 17, 30 So. 582; *Hunt v. State* (1904) 72 Ark. 241, 65 L.R.A. 71, 105 Am. St. Rep. 34, 79 S. W. 769, 2 Ann. Cas. 33; *People v. Salorse* (1882) 62 Cal. 139; *People v. Howard* (1916) 31 Cal. App. 358, 160 Pac. 697; *Johnson v. People* (1885) 113 Ill. 99, 5 Am. Crim. Rep. 350; *State v. Harmon* (1891) 106 Mo. 635, 18 S. W. 128.

Under statutes defining larceny as "the taking of personal property accomplished by fraud or stealth, and,

with intent to deprive another thereof," and embezzlement as "the fraudulent appropriation of property by a person to whom it has been intrusted," it has been said with reference to the distinction between the two crimes: "In larceny the criminal intent must exist at the time of taking the property, and it must be taken, when taken, with intent to appropriate it to the taker's own use, and to deprive another thereof. It may be taken by stealth with such intent, or it may be taken with the owner's knowledge through fraudulent practice by which the owner was induced to give up possession without parting with the title or right to the property, and if the taker receives it under such circumstances, intending to convert it to his own use and thereby deprive the owner thereof, the crime is larceny. If, on the other hand, the property is received by the taker as a bailment, or the right of possession is intrusted to him by the owner with intent to confer upon the taker the present use and possession of the property, to be afterwards redelivered to the owner, and the taker receives it intending a compliance with the terms upon which he receives it, and after he has received it with such intent he converts it to his own use, intending to deprive the owner thereof, the crime is embezzlement." *Flohr v. Territory* (1904) 14 Okla. 492, 78 Pac. 565. See to the same effect, *Bivens v. State* (1912) 6 Okla. Crim. Rep. 521, 120 Pac. 1033; *Ennis v. State* (1917) 13 Okla. Crim. Rep. 675, L.R.A.1918A, 312, 167 Pac. 229.

"As between a larceny of this character [by trick] and an embezzlement, the chief distinction lies in the presence of the fraudulent and felonious intent with which the possession of personal property is procured by the accused in the case of the larceny, and the absence of this in embezzlement." *People v. Grider* (1910) 13 Cal. App. 703, 110 Pac. 586.

So, in *People v. De Coursey* (1882) 61 Cal. 134, it was said: "In the case of grand larceny, the taking must be with a felonious intent, but in the other — embezzlement — the original

taking is lawful, and the crime consists in the fraudulent appropriation of property by a person to whom it has been intrusted. In the latter crime, the possession in the first instance is lawful, and evidence sufficient to make out a case of embezzlement would be wholly sufficient to sustain the charge of grand larceny."

On this principle the conversion by a bailee of a horse which he hired without fraudulent intent then entertained, is embezzlement, and not larceny. *People v. Salorse* (1882) 62 Cal. 139; *People v. Bojorquez* (1917) 35 Cal. App. 350, 169 Pac. 922; *State v. Stone* (1878) 68 Mo. 101, 3 Am. Crim. Rep. 277. "If the defendant at the time he hired the horse intended to steal it, he was properly indicted for grand larceny, and the evidence was therefore admissible, without averring the alleged bailment in the indictment. *People v. Jersey* (1861) 18 Cal. 337. If, however, the intent to steal did not exist at the time of taking the possession of the property by the bailee, but was conceived afterwards, then the indictment should have been laid under § 71, and should have averred the facts necessary to show that the defendant was the bailee of the property." *People v. Smith* (1863) 23 Cal. 280.

In *People v. Crane* (1917) 34 Cal. App. 599, 168 Pac. 377, it was held that the intent to convert money received for investment was not formed until after the receipt thereof, so that the offense was embezzlement, and not larceny.

On the other hand, in *Golden v. State* (1886) 22 Tex. App. 1, 2 S. W. 531, wherein it was contended that the conviction should have been for theft instead of for embezzlement, it was said: "Defendant induced Mrs. Weedon to turn over the money to him, ostensibly and with the understanding that he was to deposit the same for her in bank for safe-keeping. She intrusted it to him for that and no other purpose. At the very time he obtained it, it is true that to all intents and purposes he was a thief, intending to steal it, but, in so far as she was concerned, she was only creating him her agent to take the money for

deposit for her to the bank. The trust imposed in him by her was that he would, as her agent, take the money to the bank, and it was intrusted to him solely for that purpose. Instead of complying with the purposes of the trust and his agency, he misapplied, misappropriated, embezzled, and converted to his own use the money so confided to him. The evidence makes a most clear and indubitable case of embezzlement." So, in *Wall v. State* (1911) 2 Ala. App. 157, 56 So. 57, it was said: "These charges seem to have been asked upon the theory that an agent cannot be guilty of embezzlement of his principal's property if he has the secret uncommunicated intent to convert it before he receives it, or before it comes into his custody or keeping. Such is not the law. While it is true that, if one receives money with the fraudulent intent at the time of converting it to his own use, he may be, and probably is, guilty of larceny, it is also the law that, if before or at the time of receiving the money the intent had been secretly formed to convert it by the party receiving it, he may nevertheless be guilty of embezzlement, if he afterwards unlawfully converts it to his own use." See to the same effect, *Miller v. United States* (1913) 41 App. D. C. 52; *State v. Taberner* (1883) 14 R. I. 272, 51 Am. Rep. 382.

III. Possession gained by virtue of trust or otherwise.

Some of the courts, in distinguishing between larceny and embezzlement, have emphasized the characteristic feature of the latter crime, viz., the nature of the possession held by the accused of the money or goods converted by him. Thus, in *Kibs v. People* (1876) 81 Ill. 599, 2 Am. Crim. Rep. 114, "the defendant's fiduciary character" was said to be "the distinguishing feature between embezzlement and larceny."

"An employee of a postoffice engaged in the distribution of the mails solely, who feloniously steals money out of a drawer in which are kept the money order funds, in charge of another clerk, is guilty of larceny, but not of

embezzlement; for, although he was an employee of the postoffice, the money stolen did not come to his possession by virtue of his employment, nor with the consent of the owner, without which there can be no embezzlement." *United States v. Allen* (1906) 150 Fed. 152.

Applying the rule just stated, it was held in *People v. Belden* (1869) 37 Cal. 51, that a stable hand had no such possession of a horse under his care as to make his conversion thereof embezzlement rather than larceny. See to the same effect, *Colip v. State* (1899) 153 Ind. 584, 74 Am. St. Rep. 322, 55 N. E. 739, holding that the taking of wheat from a bin by a farm hand was larceny, and not embezzlement. Likewise, in *Watkins v. State* (1919) — Tex. Crim. Rep. —, 207 S. W. 926, the conversion of cotton by a weigher was held to be theft, and not embezzlement. The same distinction was drawn in *People v. Bojorquez* (1917) 35 Cal. App. 350, 169 Pac. 922, holding that a person who converted a horse hired by him was guilty of embezzlement, and not larceny.

"The principle is well settled that to constitute a larceny there must be a felonious taking of the property. When property which is lawfully in the custody of an employee or bailee is criminally appropriated to the use of such employee or bailee, the offense may be embezzlement, but it cannot be larceny." *State v. Wingo* (1883) 89 Ind. 204, holding that the conversion of a team by a teamster was embezzlement, and not larceny. Compare *White v. State* (1919) 24 Ga. App. 336, 100 S. E. 756.

"The essential gist of the crime of embezzlement is in the breach of trust reposed in the agent, employee, or bailee, by his principal, employer, or bailor, and therefore the charge of embezzlement always presupposes the lawful acquisition by the agent, employee, or bailee of the possession of the property which has been misappropriated or wrongfully converted to the use of such agent, employee, or bailee. The essential distinction, then, between the crime of embezzlement and that of grand larceny is that,

in embezzlement, the original taking of the property is lawful, while in grand larceny the original taking involves a trespass, or is accompanied by a felonious intent to deprive the owner of the property so taken. In other words, 'in the case of grand larceny the taking must be with a felonious intent, but in embezzlement the original taking is lawful, and the crime consists in the fraudulent appropriation of property by a person to whom it has been intrusted.'" *People v. Kirk* (1916) 32 Cal. App. 518, 163 Pac. 696, holding that a conviction of larceny based on the conversion of a hired automobile was erroneous.

"The distinction between § 2006, defining larceny, and § 2022 [defining embezzlement], is clear. The larceny provision relates to cases where the property feloniously taken is at the time in the actual possession of the owner, or has been wrongfully obtained from him by fraud, while § 2022 relates to cases where the property at the time of the conversion is rightfully in the control or possession of the wrongdoer, by virtue of his employment." *Wynegar v. State* (1901) 157 Ind. 577, 62 N. E. 38, wherein it was held that conversion by one to whom money was intrusted for gratuitous safe-keeping was embezzlement.

"A distinction exists where a servant has merely the custody, and where he has the possession of the goods. In the former case, the felonious appropriation of the goods is larceny; in the latter, it is not larceny, but embezzlement. The custody alluded to is such as that of a butler or house servant of household goods, a hired hand of the plow and horses of the farmer for whom he is laboring, etc., and the possession mentioned is an actual or constructive possession of the master or employer at the time the goods are taken." *Warmoth v. Com.* (1883) 81 Ky. 133.

So, where the possession is obtained by a trick or fraud in the guise of a bailment, a conversion is larceny, and not embezzlement. *Lanier v. State* (1915) 17 Ga. App. 261, 86 S. E. 417.

Though property has been placed in

the hands of a bailee, if the bailment is thereafter terminated, leaving him the mere custody of the property, a subsequent conversion by him is larceny, and not embezzlement. *Johnson v. People* (1885) 113 Ill. 99, 5 Am. Crim. Rep. 350. On this principle, a breaking of bulk or other severance by a carrier of part of a shipment has been held so far to terminate the bailment that the conversion of the part so severed or taken from bulk was larceny, and not embezzlement. *Nichols v. People* (1858) 17 N. Y. 114. See also *State v. Fairclough* (1860) 29 Conn. 47, 76 Am. Dec. 590. So, where an employee having the custody of property during the day enters the premises of his employer at night, and takes it away with felonious intent, his offense is larceny rather than embezzlement. *Com. v. Davis* (1870) 104 Mass. 548; *Com. v. Barry* (1874) 116 Mass. 1.

In the District of Columbia, it is held that it is larceny and not embezzlement for an employee to convert property intrusted to him with limited authority for a specific purpose. This rule has been applied to a salesman converting goods in his possession for exhibition to prospective customers (*Talbert v. United States* (1914) 42 App. D. C. 1), to a driver for a transfer company converting goods which he was hauling (*Weisberg v. United States* (1919) 258 Fed. 284), and to a hotel clerk intrusted with the valuables of a guest at the hotel [see the reported case (*CHANOCK v. UNITED STATES*, ante, 799)].

In Massachusetts, the court in *Com. v. O'Malley* (1867) 97 Mass. 584, stated and applied the same rule as follows: "To constitute the crime of embezzlement, the property which the defendant is accused of fraudulently and feloniously converting to his own use must be shown to have been intrusted to him, so that it was in his possession, and not in the possession of the owner. But the facts reported in the bill of exceptions do not show that the possession of the owner of the money was ever divested. She allowed the defendant to take it for the purpose of counting it in her presence and

taking from it a dollar, which she consented to lend him. The money is alleged to have consisted of two \$10 bills, three \$5 bills, a \$2 bill, and a \$1 bill, amounting in all to \$38. The \$1 he had a right to retain, but the rest of the money he was only authorized to count in her presence and hand back to her. He had it in his hands, but not in his possession, any more than he would have had possession of a chair on which she might have invited him to sit." See to the same effect, *Com. v. Berry* (1868) 99 Mass. 428, 96 Am. Dec. 767. And see a District of Columbia case (*Woodward v. United States* (1912) 38 App. D. C. 323), wherein conversion of money intrusted to an agent for expenditure in the principal's business was held to be embezzlement, and not larceny.

So, in Georgia, it was held in *Basley v. State* (1912) 10 Ga. App. 470, 73 S. E. 624, that conversion by a servant of a bill given him for the purpose of getting it changed is "larceny after trust," and not simple larceny. See to the same effect, *Mobley v. State* (1902) 114 Ga. 544, 40 S. E. 728, 14 Am. Crim. Rep. 441.

In California, it has been held that a different rule obtains. *Re Grin* (1901) 112 Fed. 790, affirmed in (1902) 187 U. S. 181, 47 L. ed. 130, 23 Sup. Ct. Rep. 98, 12 Am. Crim. Rep. 366. In that case it was said: "It is contended that the petitioner is guilty, if at all, of the crime of larceny, and not of embezzlement, and, as the laws of this state will not permit a trial of the offense of larceny upon the charge of embezzlement, upon the showing made the prisoner cannot be held for embezzlement, and should therefore be discharged. This contention is based upon the alleged fact that the money was delivered to the petitioner by his superior, to take from the bank to the railway company, and, while in the custody of the petitioner, was really in the lawful possession of the employer; that the appropriation thereof by the said Grin was therefore a taking from the possession of his employer, and was larceny. That was the early rule, when the statutory crime of embezzlement was created to

provide for the punishment of those fraudulently converting money or property to their own use, which had been intrusted to them. As the element of trespass was wanting, the common-law crime of larceny would not cover the offense, and the offender escaped punishment. The creation of the distinct offense of embezzlement supplied a remedy for this defect in the law, but technical difficulties still frequently arose, owing to the strict construction of the common law of the relationship of master and servant, employer and employee, holding the servant or employee to be merely the extended hand of the master or employer, the possession of the master or employer thereby continuing, even when the custody or control was in the servant or employee, until the interposition of some third party. The line was thus, of necessity, drawn between the cases where property was intrusted to the servant by the master (where the servant was held to have merely the custody, but not possession), and where it was intrusted to the servant by a third party, for or on behalf of the master. In the latter case the possession was held to be in the servant, and a conversion of the property by the servant was embezzlement. To overcome the difficulties still existing, and to meet the necessities of larger commercial relations with the corresponding increase of responsibility upon employees, many states have introduced into their statutes governing embezzlement words indicating that conversion of property merely 'in the care or custody' of the employee shall constitute embezzlement, thus taking the crime more definitely and decidedly from the domain of larceny." Compare *People v. Abbott* (1878) 61 Cal. 284; *People v. Kawanankoa* (1919) 37 Cal. App. 438, 174 Pac. 686.

So, in *State v. Coster* (1913) 170 Mo. App. 539, 156 S. W. 778, 157 S. W. 85, conversion by the driver of a delivery wagon was held to be embezzlement, and not larceny.

In *Neal v. State* (1908) 55 Fla. 140, 19 L.R.A. (N.S.) 371, 46 So. 845, it ap-

peared that a package of money was accidentally put into a laundry bag, and was found and converted by the laundress. The court sustained a con-

viction of embezzlement, as against a contention that the prosecution should have been for larceny.

W. A. S.

LEWIS SKINNER, Appt.,

v.

WILL W. STONE.

Arkansas Supreme Court — June 7, 1920.

(— Ark. —, 222 S. W. 360.)

Specific performance — effect of offer to pay by taking care of drafts.

1. A suggestion in the acceptance of an offer to sell real estate that the purchaser will take care of draft attached to deed sent to a specified bank does not make that method of payment a condition which will avoid the contract if not accepted, but the purchaser must be given the opportunity to pay in money if the seller requires it.

[See note on this question beginning on page 811.]

— sufficiency of description of land
— all owned in specified county.

2. An accepted offer to sell all the land owned by grantor in a certain county, consisting of 120 acres, which offer was made in response to an inquiry describing a portion of the land, is sufficient where the land referred to is certain.

[See 25 R. C. L. 649 et seq.; 27 R. C. L. 317.]

Vendor and purchaser — implication as to kind of deed.

3. In the absence of description of the conveyance intended in a contract to sell real estate, the law implies a

deed in fee simple, with covenants of general warranty.

[See 27 R. C. L. 826, 481.]

— offer subject to easement.

4. An offer to purchase real estate, with knowledge of the existence of a right of way across it, is presumed to be subject to such easement.

[See 27 R. C. L. 729.]

— suggested conditions as to closing
— effect.

5. A grantor making no objection to the suggestion of the grantee as to the method of closing the deal cannot object to performance on the ground that unsatisfactory conditions have been imposed upon him.

APPEAL by defendant from a decree of the Chancery Court for Clark County (Shaver, Ch.) in favor of plaintiff in an action brought to enforce specific performance of an alleged contract for the sale of certain land. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. J. E. Callaway, for appellant:

It is an essential element of a contract for the sale of land that the kind and character of deed should be stated or understood. It should also be definitely stated just what is to be conveyed.

Fordyce Lumber Co. v. Wallace, 85 Ark. 4, 107 S. W. 160; *Tippins v. Phillips*, 123 Ga. 415, 51 S. E. 410; 36 Cyc. 589; *Pom. Spec. Perf.* ¶ 159; 2 Parsons, *Contr.* 3d ed. 510; *Knight v.*

Cooley, 34 Iowa, 218; *Blackstock v. Williams*, 7 Terr. L. Rep. 362; *Lincoln v. Erie Preserving Co.* 132 Mass. 129; *Moulton v. Kershaw*, 59 Wis. 316, 48 Am. Rep. 516, 18 N. W. 172.

Messrs. John H. Crawford and Dwight H. Crawford, for appellee:

There was a valid and binding contract entered into between the parties.

Hastings Industrial Co. v. Copeland, 114 Ark. 415, 169 S. W. 1185; *Kempner v. Cohn*, 47 Ark. 519, 58 Am. Rep.

775, 1 S. W. 869; Potter v. Phoenix Ins. Co. 63 Fed. 382; Taylor v. Union Saw-mill Co. 105 Ark. 518, 152 S. W. 150.

The contract is in writing.

El Dorado Ice & Planing Mill Co. v. Kinard, 96 Ark. 184, 131 S. W. 460; S. H. Kress Co. v. Moscovitz, 105 Ark. 638, 152 S. W. 298; Fordyce Lumber Co. v. Wallace, 85 Ark. 1, 107 S. W. 160; Hirschman v. Forehand, 114 Ark. 436, 170 S. W. 98; Ashcraft v. Tucker, 136 Ark. 451, 206 S. W. 896; Bates v. Harris, 144 Ky. 399, 36 L.R.A. (N.S.) 154, 138 S. W. 276; Lente v. Clarke, 22 Fla. 515, 1 So. 149; Francis v. Barry, 69 Mich. 311, 37 N. W. 353; Hodges v. Kowing, 58 Conn. 12, 7 L.R.A. 87, 18 Atl. 979; Wilcox v. Sonka, 137 Mo. App. 54, 119 S. W. 445; Moayon v. Moayon, 114 Ky. 855, 60 L.R.A. 415, 102 Am. St. Rep. 303, 72 S. W. 33; Hurley v. Brown, 98 Mass. 545, 96 Am. Dec. 671.

Plaintiff has always been ready, willing, and able to perform his contract.

Read's Drug Store v. Hessig-Ellis Drug Co. 93 Ark. 497, 125 S. W. 434; Union Cent. L. Ins. Co. v. Caldwell, 68 Ark. 505, 58 S. W. 355.

Smith, J., delivered the opinion of the court:

This is a suit to enforce the specific performance of a contract for the sale of certain lands in Clark county owned by appellant, Lewis Skinner. The suit is based upon the following correspondence:

Gurdon, Ark., June 3, 1919.

Mr. Lewis Skinner,
Perryville, Ind.

Dear Sir:—

I am in the land business here, and will buy either your timber on the east half of the northeast quarter of section 21, township 9 south, range 20 west, Clark county, Arkansas, or I will buy land and timber if you will make me a fair price on it. What do you want for it?

Very truly yours,
Will W. Stone.

Perryville, Ind., June 28, 1919.

Mr. Will W. Stone,
Gurdon, Ark.

Dear Sir:—

Your letter received asking for prices on land owned by me in Clark county, Arkansas. I will sell

the land and timber, 120 acres, for \$2,500 cash.

Yours truly,
Lewis Skinner.

Gurdon, Ark. July 5, 1919.

Lewis Skinner,
R. F. D. No. 1,
Perryville, Ind.

Dear Mr. Skinner:—

Your price for your 120 acres of land near Smithton, Clark county, Arkansas, is rather high, but I am accepting your offer, to take \$2,500 cash for this land, and am inclosing your deed Arkansas form for you to make deed to Will W. Stone and have acknowledged before a notary public, attach draft to deed and send to the Merchants' & Farmers' Bank, Gurdon, Arkansas, and I will take care of same.

Very truly yours,
Will W. Stone.

It will be observed that the first letter was a proposal to buy the timber on the east half, northeast quarter, section 21, township 9 south, range 20 west, or to buy both the land and the timber, and in response appellant proposed to sell 120 acres of land and timber for \$2,500 cash. The testimony taken at the trial showed that appellant owned, in addition to the 80 acres above described, a 40-acre tract, making 120 acres, and that he owned no other land in that county, and that the two tracts constituted the land referred to by appellant in his letter as the "land owned by me in Clark county, Arkansas."

It also appears from the testimony that appellant made no response to the letter of July 5th, but, instead, came down to Clark county, and went over his land and made inquiry about its then market value without letting appellee know of his presence in the neighborhood. Finally, when pressed to close the deal in accordance with the correspondence set out above, appellant declined to do so upon the ground that the minds of the parties had not met upon certain essential details. First, as to the kind of deed which

should be made, whether quitclaim or warranty. Second, that appellant had previously granted a right of way over a portion of the land to a sawmill company for a railroad, and the parties had not reached an agreement in regard to this easement. It is also urged that appellant knew nothing about the responsibility or solvency of the Merchants' & Farmers' Bank, of Gurdon, Arkansas, and could not, therefore, be compelled to accept this bank as his agent in closing the transaction, and that no tender of the purchase money had been made, and that appellee's offer to "take care" of a draft to be attached to the deed could not be treated as a tender. It is also said that the letters set out above do not meet the requirements of the Statute of Frauds, in that the property to be conveyed is not sufficiently described.

Answering this last insistence first, it may be said that appellant's letter, fairly construed, proposed to sell all the land owned by him in that county, and the testimony shows that to have been 120 acres. Appel-

Specific performance—sufficiency of description of land—all owned in specified county.

lee's first letter describes particularly and exactly 80 acres of the land, and the testimony makes the remain-

ing 40 acres equally as certain. *Miller v. Dargan*, 136 Ark. 237, 206 S. W. 319; *Fordyce Lumber Co. v. Wallace*, 85 Ark. 1, 107 S. W. 160; *Hirschman v. Forehand*, 114 Ark. 436, 170 S. W. 98.

Upon the question of the kind of deed contemplated by the parties, this court has held that "where a party agrees to convey land, and there is nothing said as to the nature and extent of the title to be conveyed, nor anything connected with the transaction, going to indicate the particular species of conveyances

Vendor and purchaser—implication as to kind of deed.

intended; the law implies a deed in fee simple, and with covenants of gener-

al warranty." *Holland v. Rogers*, 33

Ark. 255; *Witter v. Biscoe*, 13 Ark. 422.

Upon the question of the prior encumbrance it may be said that, in decreeing the specific performance of the contract, the court expressly excepted the right of way previously conveyed the lumber company for its railroad. Moreover, the testimony shows that appellee knew of this easement, and it will therefore be presumed that he proposed to purchase subject to it.

Appellee did not ^{—offer subject to easement.} prepare the deed,

but sent to appellant a blank to be used, and appellant had both the right and the opportunity to prepare and return to appellee a deed specifically exempting this easement, if he thought it essential so to do.

It is true, of course, that appellant could not have been required to close the deal through the Merchants' & Farmers' Bank at Gurdon, he not having agreed to do so. But appellee did not impose this as a condition. The letter of July 5th must be treated as a suggestion whereby the deal could be closed without delay; and, as the appellant did not ask that the deal be ^{—suggested conditions as to closing—effect.} closed in some other manner, he is in no position to say that appellee imposed a condition which was not satisfactory.

So, too, in regard to the tender. Appellant did not exact cash, but the reference to cash must be treated as referring to the time of payment rather than to the manner of payment, as in ordinary transactions a check or draft is regarded as the equivalent of money. Appellant would have been within his legal rights in demanding money, but common fairness demanded that, after his offer had been accepted, he give appellee a chance to pay in money if that condition was to be imposed. We think a binding contract was made when appellee, by his letter of July 5th, accepted appellant's proposition, contained in the

letter of June 28th, and that the statement about sending the draft to the Merchants' & Farmers' Bank was not an additional and unagreed-upon condition, but was a mere suggestion to expedite the con-

Specific performance—effect of offer to pay by taking care of drafts.

summation of a contract which the letter itself closed by accepting unconditionally appellant's offer to sell.

We conclude, therefore, that the court correctly decreed the specific performance of the contract, and that decree is affirmed.

ANNOTATION.

Right of purchaser to opportunity to pay in cash where tender has been made in other medium.

The question whether custom or previous dealings may impose an obligation upon a party to a contract to accept something else in lieu of cash is treated in a note to *Stein v. Schapiro*, 8 A.L.R. 1268. In the *Stein Case*, the court, while holding that previous dealings, or a well-established usage or custom of trade, could not inject into a sales contract an obligation on the part of the seller to deliver the goods sold, upon being tendered something else in lieu of cash, such as a draft drawn by the buyer's agent upon the buyer, stated that it might well be that a course of dealing or custom might avail to avoid a default or forfeiture; that is, when the seller refused the draft, the previous dealings of the parties, or custom to settle with drafts, might have given the buyer a reasonable time to produce and tender the purchase price in money. The present annotation deals with the question thus suggested, except that it is not limited to the effect of custom or usage. It is apparent that while the seller might not be obliged to deliver the property on tender of something else in lieu of cash, he might be obliged to permit the buyer a reasonable time in which to obtain the money, where the tender is made in some other medium, as a check or draft. There are several cases to this effect, in addition to *SKINNER v. STONE* (reported herewith), ante, 808, which support the doctrine that the buyer should be allowed a reasonable time to procure the money, and that the seller cannot repudiate the contract without giving such opportunity, where he refuses to accept a tender in some other medium.

Thus, in *Hughes v. Knott* (1905) 138 N. C. 105, 50 S. E. 586, 3 Ann. Cas. 903, an action for the possession of tobacco, the subject-matter of a contract of sale by the defendants to the plaintiff, where the latter testified that he was ready, willing, and able to pay for the tobacco on the date for performance of the contract, that he had checks on a bank and a large amount of collateral with him on that date, so that the checks could have been promptly cashed, that he went to the defendants' warehouse on that date and found it closed,—the court stated that if the plaintiff went to the defendants' warehouse during business hours for the purpose of paying for the tobacco, with available funds for that purpose, either in money or checks which could have been promptly converted into money, and the defendants were not at their places of business, the plaintiff would be relieved of the duty of converting such checks into currency on that day, and carrying the same about on his person until he could find the defendants; that if the plaintiff's view of the transaction was correct, he should have been allowed a reasonable time, after the refusal of the defendants to deliver the tobacco, to convert his funds into currency; and that if his funds were available for that purpose, the jury would be justified in finding that he was ready, able, and willing, within the terms of the contract.

And it was held in *Hughes v. Knott* (N. C.) supra, that evidence of a general custom in the tobacco trade to accept checks in payment of tobacco sold was admissible.

That readiness on the part of the

buyer to perform the contract may be shown by evidence that, on the date for performance, he was ready and able to pay the purchase price by check, which was the customary mode of payment in that class of transactions, is held in *Blalock v. Clark* (1904) 137 N. C. 140, 49 S. E. 88, an action by the buyer of cotton against the seller for breach of contract, in which, the contract not specifying the mode of payment, it was held competent for the buyer to show a general commercial custom and usage among cotton dealers as to the method of paying for cotton in large lots, and that evidence was admissible of a well-established custom to pay therefor by check. It was held that the defendant could not object to an instruction that before the plaintiff would be entitled to recover, he must satisfy the jury that, at the time he demanded the cotton, he had then and there the money ready to pay for it, or was able, ready, and willing to pay for it "according to the custom of the community in buying and paying for cotton in large lots . . . by giving valid checks for the same, or by shipping with bill of lading attached to sight drafts."

So, in *Bass v. White* (1875) 65 N. Y. 565, it was held that the court would take notice of the custom of business men in New York city to make payment by checks, and that a purchaser in that city, whose check, offered in payment of coal, was refused by the seller, was entitled to a reasonable time, after such refusal, to obtain the money. In this case the buyer, on tender of the coal, at first refused payment unless a deduction was made of an account which he had against the seller. The latter refusing this request, the buyer finally offered to give his check for the amount of the purchase price, but this offer was not made until after banking hours on Saturday, and the seller refused to accept the check. On the following Monday morning, the buyer tendered the money in payment, which, it was held, should have been accepted. It was said that the buyer was entitled to a reasonable time, after refusal of

the check, to procure the money, and that until the morning of the next business day was not unreasonable, especially as the seller did not inform him that he must procure the money at once, or forfeit his contract. This case is approved but distinguished in *Meeker v. Johnson* (1893) 5 Wash. 718, 32 Pac. 772, 34 Pac. 148, where there was no offer to pay in any other medium than cash, but a delay merely on the part of the purchaser's agent, in order to obtain money from another city.

Where statements made by one who had contracted to sell land warranted the belief on the part of the purchaser that specie would not be demanded in payment, it was held that the latter was justified in not tendering specie on the day for performance of the contract; and that a demand for it on that day, and a refusal to give reasonable time for procuring the specie, which the purchaser offered to procure on the following day, was arbitrary and unjust, and would not defeat the purchaser's right to specific performance of the contract, especially after he had been in possession and made improvements on the property. *Pickle v. Auble* (1843) 4 N. J. Eq. 315.

And although holding that a seller of sheep was not obliged to accept the purchaser's check in final payment, even though he had accepted a check for the first payment, the court, in *Servel v. Jamieson* (1919) 167 C. C. A. 212, 255 Fed. 592, held that a directed verdict for the defendant in an action by the buyer against the seller for damages for breach of contract was erroneous, where there was evidence tending to show that the buyer might have obtained the currency for the purchase price, on the day for performance, had not the seller avoided him and delayed their meeting until after 4 o'clock in the afternoon, when the banks were closed, and then refused to accept the purchaser's check.

Where the holder of an option to purchase land accepted the same before the offer expired, it was held in *Barrett v. McAllister* (1890) 33 W. Va. 738, 11 S. E. 220, that the vendor could not forfeit the vendee's rights by in-

sisting on a tender in money, instead of a check, where he had good reason to believe that the check would be honored when presented for payment, and the money could have been obtained on it before the vendor could have prepared and delivered a deed.

There may be circumstances, however, where the seller is not obliged to allow the buyer time to obtain money for payment if the tender is by check, or in some other medium than money. Thus, in the case of a public auction, where one of the conditions of the sale was that the purchaser, the highest bidder, should, immediately after the sale, pay to the auctioneer a deposit of 10 per cent of the purchase money, and the highest bidder, to whom the property was knocked down, was known by the vendor to be a pauper, it was held that, although he informed the vendor that he was buying not on his own account, but for his wife, and it was proved at the trial that she intended and was able to make good his check, the vendor was not obliged to take the pauper's check for the amount of the deposit, or to wait until the next day for the money, but could immediately resell the property, upon a failure to make any other form of deposit. *Johnston v. Boyes* [1899] 2 Ch. (Eng.) 73, 68 L. J. Ch. N. S. 425, 47 Week. Rep. 517, 80 L. T. N. S. 488.

And where the agent of the purchaser, having a blank check of his principal with which to pay for the property purchased, failed to reach the place of delivery in time to comply with the contract, the court, in *Smyth v. Sutton* (1874) 24 Gratt. (Va.) 191, stated (obiter) that the seller was not bound to receive a check, and that, even if he had seen the agent of the buyer, he had a right to refuse the check and sell the property as his own. There were special circumstances, however, in this case, arising during the Civil War, which it seems might be regarded as barring any right which the purchaser might otherwise have had to a reasonable opportunity to obtain the money on failure of the seller to accept his check.

The note does not cover the question

merely of the sufficiency of a tender by check or in some other medium than money, that question frequently arising under circumstances which do not present the question of the purchaser's right to a reasonable time to obtain the money after rejection of his offer of payment in some other medium. Several cases illustrative of this distinction may be cited. In *Watkins v. Youll* (1903) 70 Neb. 81, 96 N. W. 1042, an action by the vendee for specific performance of a contract to convey land, the objection on the part of the vendor that the bank in which he had placed a deed for the land in escrow offered him only a check signed by the vendee, instead of the money, was said not to merit consideration, where, on refusal of the check, the cashier of the bank offered to cash it and give the vendor the money. And *Clarke v. King* (1826) 2 Car. & P. (Eng.) 286, is illustrative of a class of cases which involve merely the sufficiency of the tender; it being held that the seller of a public house was not obliged to accept the purchaser's check, even though there was evidence that such transactions were usually handled in this manner. See also *Walter v. Reed* (1892) 34 Neb. 544, 52 N. W. 682, and *Behrends v. Beyschlag* (1897) 50 Neb. 304, 69 N. W. 835, among other cases to the effect that, in the absence of special agreement, the seller ordinarily has a right to insist upon cash on the delivery of the property, and cannot be required to take a check or other commercial paper which may require his indorsement and render him subsequently liable thereon.

The scope of the note, of course, precludes consideration of such questions as that raised in *Johnson-Locke Mercantile Co. v. Howard* (1901) 6 Cal. Unrep. 748, 65 Pac. 953, holding that if the seller does not, on tender of a check in payment, make objection to the form of the tender, but refuses delivery on other grounds, he waives any objection which he might be entitled to raise as to the character of the tender on the ground that it was by check instead of in money.

R. E. H.

GEORGE H. TUTTLE
v.
ISABELLE WINCHELL, Appt.

Nebraska Supreme Court—June 19, 1920.

(— Neb. —, 178 N. W. 755.)

Adoption — faults — breach of contract.

1. Where an infant child is taken by those who, in pursuance of a parol contract, agree to adopt, rear, educate, and make it an heir as if it were their own, and the child remains in their family on that footing until he attains his majority, when he leaves with their approval and consent, in an action to enforce the child's right to a share in the estate of the adoptive parents, who died intestate, faults of character or behavior on the part of the child during his minority are not proof of failure to perform his filial duty sufficient to invalidate the contract, unless it is shown that the adoptive parents rescinded the contract and terminated the relation because of such conduct.

[See note on this question beginning on page 819.]

Specific performance — parol agreement to adopt.

2. A parol agreement of adoption, whereby a parent surrenders a child to others upon their promise to adopt, rear, and educate it as their own, and to give it the same right of inheritance as a natural child, but which is not consummated by a statutory adoption, will, if otherwise fully performed, be enforced in case the adoptive parents die intestate, by decreeing to the plaintiff the same share in their property to which he would have been en-

titled if the agreement to adopt had been fulfilled.

[See 25 R. C. L. 312, 313; see note in 2 A.L.R. 1197.]

Adoption — consideration for contract.

3. The parent's sacrifice in giving up the child to those who promise to adopt it, and the subsequent society, companionship, and filial obedience of the child, constitute the consideration for a parol contract of adoption.

[See 1 R. C. L. 617.]

Headnotes by DORSEY, C.

(Letton, J., dissents.)

APPEAL by defendant from a decree of the District Court for Hamilton County (Corcoran, J.) in favor of plaintiff in an action brought to compel specific performance of an alleged agreement by defendant's parents to adopt plaintiff and make him their heir. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Messrs. Hainer, Craft, & Edgerton, for appellant:

The contract to adopt and its terms are not established by the evidence.

Overlander v. Ware, 102 Neb. 216, 166 N. W. 611; Hamlin v. Stevens, 177 N. Y. 39, 69 N. E. 118; Holmes v. Connable, 111 Iowa, 298, 82 N. W. 780; Hanly v. Hanly, 105 App. Div. 335, 93

N. Y. Supp. 864; Russell v. Sharp, 192 Mo. 270, 111 Am. St. Rep. 496, 91 S. W. 134; Wilson v. Heath, 23 Misc. 714, 53 N. Y. Supp. 168; Peterson v. Bauer, 76 Neb. 658, 107 N. W. 993, 111 N. W. 361; Lay v. Lay, 75 Ark. 526, 87 S. W. 1026.

The contract is not enforceable because there has not been such per-

formance as will take it out of the Statute of Frauds.

Overlander v. Ware, supra; *Lacey v. Zeigler*, 98 Neb. 381, 152 N. W. 792; *Peterson v. Bauer*, 83 Neb. 415, 119 N. W. 764; *Dankroeger v. James*, 95 Neb. 788, 146 N. W. 936.

It would be unjust and inequitable to enforce such a contract.

Owens v. McNally, 113 Cal. 444, 38 L.R.A. 869, 45 Pac. 710; *Kofka v. Rosicky*, 41 Neb. 328, 25 L.R.A. 207, 43 Am. St. Rep. 685, 59 N. W. 788; *Best v. Gralapp*, 69 Neb. 814, 96 N. W. 641, 99 N. W. 837, 5 Ann. Cas. 491; *Teske v. Dittberner*, 70 Neb. 551, 113 Am. St. Rep. 802, 98 N. W. 57; *Bennett v. Burkhalter*, 257 Ill. 572, 44 L.R.A. (N.S.) 733, 101 N. E. 189.

Messrs. Fawcett, Mockett, & Walford and M. F. Stanley, for appellee:

The contract in question was enforceable.

Kofka v. Rosicky, 41 Neb. 328, 25 L.R.A. 207, 43 Am. St. Rep. 685, 59 N. W. 788; *Peterson v. Bauer*, 83 Neb. 405, 119 N. W. 764; *O'Connor v. Waters*, 88 Neb. 224, 129 N. W. 261; *Hespin v. Wendeln*, 85 Neb. 172, 122 N. W. 852; *Dankroeger v. James*, 95 Neb. 784, 146 N. W. 936; *McNea v. Moran*, 101 Neb. 476, 163 N. W. 766; *Moline v. Carlson*, 92 Neb. 419, 188 N. W. 721; *Harrison v. Harrison*, 80 Neb. 103, 113 N. W. 1042; *Hannemann v. Ott*, 98 Neb. 492, 153 N. W. 506; *Parks v. Burney*, 103 Neb. 572, 173 N. W. 478.

Dorsey, C., filed the following opinion:

The plaintiff brought this suit, and obtained a decree therein in the court below, for the specific performance of an alleged parol agreement by Earl Tuttle and Catherine Tuttle, his wife, to adopt the plaintiff and to make him their heir. The only other interested party is Isabelle Winchell, the daughter of Mr. Tuttle, in whom the interests of all the heirs at law are merged, and who prosecutes this appeal. The effect of the decree is to vest her with the title to the undivided half of the property and the plaintiff with the remaining half; whereas, if the plaintiff should not prevail, she would be entitled to all of it. Mr. Tuttle died in 1914, and his wife in 1917, both intestate.

The appellant, Isabelle Winchell, admits that the Tuttle took the plaintiff and reared him, but denies that they entered into any contract to adopt him or make him an heir. She also alleges that his behavior toward Mr. and Mrs. Tuttle was not such as was due from a son to his parents, and that he is thereby precluded from recovery.

In 1881, the plaintiff's mother, Ellen Purdy, widow of David Purdy, his father, was living in Hamilton county, Nebraska, at the home of an aunt, and had the little boy, then between two and three years old, with her. It appears that she was working out, and, as her aunt was old and infirm, there was no one to give the child proper care during her absence. Earl Tuttle and his wife were well-to-do people, owning and residing upon a quarter section of land in the neighborhood.

The circumstances surrounding the taking of the boy by the Tuttle are related by the plaintiff's mother in her deposition taken in California in January, 1919. Her name then was Ellen Criddle, she having married again shortly after the Tuttle took the boy. She testified that, having heard she was trying to get someone to look after the boy, they called upon her, stating that they wanted him; that they would take him and educate and provide for him as their own; that they would have the papers made out and adopt him, and that he should live with them the same as the daughter, and be an equal heir with her; that she did not want to give up the boy, but thought it was better for him to have a home, and that she accordingly assented to the proposition of the Tuttle. About a week later, while she was away working, they came, she said, and took the boy away. She lived in the neighborhood until the boy was grown, but never after that asserted any right or control over him. The Tuttle, she said, never complained to her about the boy, or asked that he be taken back.

It appeared, without substantial dispute, that the boy remained a

member of the Tuttle family until he had grown to manhood; that he was known in the neighborhood and at school as George H. Tuttle; that he addressed Mr. and Mrs. Tuttle as his parents, and that they treated him in the same way and on the same footing as the daughter, Isabelle. In 1885, the daughter, then twenty-four years of age, married I. H. Winchell and left the Tuttle home. Thereafter the plaintiff was the only child in the household. After he became twenty-one the plaintiff left the Tuttle home, with the approval and consent of Mr. and Mrs. Tuttle, so far the record shows.

As tending to discredit the testimony of Ellen Criddle relative to the contract, three women who lived in the neighborhood at the time testified for the defendant to statements made by the plaintiff's mother to the effect that the Tuttles had not adopted the boy, but intended only to take care of him. Letitia Wright testified that Mrs. Purdy told her that she had not made out adoption papers, because she might want the boy herself after she married Criddle. Alice Chaney testified that Mrs. Purdy told her the Tuttles were not going to adopt him, because it would not look well to change his name. The trial court likewise admitted, over the plaintiff's objections, the testimony of three witnesses that Mrs. Tuttle had told them that she and her husband had not adopted George, and did not intend to, but had only taken him to raise. Charles Fry also testified, over objection, that Mrs. Tuttle told him the boy had never been legally adopted; "that they thought they would when they first got him, but that they didn't do it."

It is upon the testimony of Ellen Criddle that the establishment of the alleged contract of adoption principally depends. The defendant assails the credibility of her story upon the ground that she detailed language used by Mr. and Mrs. Tuttle with too much precision, in view of the fact that thirty-eight years had elapsed since their conversation, and

that the language which she says they used was so nearly like that required to make a case for the plaintiff as to indicate a desire to manufacture testimony to help the plaintiff. It is said, moreover, that her story is improbable, for the reason that a mother situated as she was, encumbered with a child that she was without means of properly caring for, who had been trying to get someone to take it, was not likely to have insisted upon an agreement to adopt, but would have been glad to shift her responsibility to any suitable person, who would agree merely to assume the custody, nurture, and education of the child.

A careful reading of this testimony, with the foregoing criticism in view, leads us to the conclusion, however, that Mrs. Criddle related the facts as she remembered them, and that she did not embellish her story in order to assist the plaintiff. However difficult or impossible it might be, after such a lapse of time, to recall ordinary and unimportant matters, it is by no means so remarkable as to arouse suspicion that a mother should retain an accurate recollection of the import and details of a conversation dealing with her permanent separation from an infant child, nor does it seem improbable that the plaintiff's mother should have felt some concern for plaintiff's future interests, in arranging to surrender him to the care of strangers. Although such an arrangement may have suited her, it is not to be assumed that she would relinquish her child without assurances as to its future status and welfare. It was to go at a tender age into another family, to grow up in a different environment, and the tie that bound it to its only living parent was to be permanently severed.

The fact that a definite and final separation was contemplated as a consideration of the agreement is borne out by the fact that the mother never afterwards reclaimed or sought to interfere with the child, although she married again and con-

tinued for twenty years to live in the same neighborhood. During that time she visited the plaintiff at the Tuttle home only at infrequent intervals, and the relation of parent and child was never resumed between them. Considering also the attitude, circumstances, and conduct of Mr. and Mrs. Tuttle in the matter, we find nothing to indicate that they would have been reluctant to adopt the boy and to give it the rights and status of a child of their own. Mr. Tuttle's daughter, Isabelle, was twenty years of age, and likely before long to leave them, as she did when she married in 1885. It was quite natural that they should feel the need and desire for another child in the family, and it is not unreasonable to suppose that, after finding a child that suited them, which they were willing to take into the family and to keep in that intimate relationship from early infancy, they intended, in taking it, to make the child, by adoption, in every sense of the word their own.

There is no improbability, therefore, in the testimony of Mrs. Criddle that, when they came to see the boy and expressed their satisfaction with him, they suggested, as an inducement to her to surrender him, that they would adopt him and give him the same rights as if he were their own. Nor is the fact that they neglected to institute formal adoption proceedings evidence that the promise was not made. Except for their neglect in that particular, they fulfilled the substantial part of their agreement. The plaintiff was reared and educated as their child, and bore their name. He was treated in no different way than children are ordinarily treated by their parents. He lived with the Tuttles until he came of age, and then went his way, as children are wont to do, with their apparent consent and approval.

We are mindful of the rule that parol contracts of this character must be established by clear, convincing, and satisfactory evidence. *Peterson v. Bauer*, 83 Neb. 405, 119 N. W. 764. Giving due weight to
11 A.L.R.—52.

the evidence and arguments presented by the defendant, we are, nevertheless, convinced that there was a contract on the part of Mr. and Mrs. Tuttle to adopt the plaintiff, and to give him the same rights as if he had been their own child.

It is the defendant's contention, however, that there was not such performance of the alleged contract as to entitle the plaintiff, in equity, to specific performance. In that connection, counsel cite *Overlander v. Ware*, 102 Neb. 216, 166 N. W. 611, that "the work constituting the performance required under the Statute of Frauds must be such as is referable solely to the contract sought to be enforced, and not such as might reasonably be referable to some other and different contract or relation. Nothing will be considered as part performance which does not put the party into a situation which is a fraud upon him unless the agreement be fully performed."

The fact that the mother surrendered the boy, and gave over her authority over him to the Tuttles, without executing a formal written relinquishment under the Adoption Statute, cannot, it is urged, be taken as performance on her part of a supposed agreement to adopt, since her act is to be accounted for upon the theory that she was anxious to get rid of the boy, even without an agreement to adopt, in order to be free to marry again. It is likewise argued that the evidence shows the boy was insolent, mischievous, and unwilling to work; that he made little return for what the Tuttles did for him; and that his conduct was not such as to constitute performance of the contract on his part within the meaning of the rule.

In determining whether there was adequate performance of the contract on the part of plaintiff and his mother, it is important to note the distinction, in the nature and terms of the contract involved, between *Overlander v. Ware*, supra, and cases of that nature, and the case in hand. The contract established in the instant case was that Mr. and

Mrs. Tuttle would adopt the boy, and that he should live with them the same as the daughter and be an equal heir with her. This was not an express contract to convey, by will, to the plaintiff all or any specific part of the property of Mr. and Mrs. Tuttle. It did not in terms restrict their right to dispose of their property before or after their death. It only gave the plaintiff the right to inherit what remained undisposed of on equal terms with the daughter. The question of the rights of the plaintiff as against one to whom the Tuttles might have conveyed their property by will is not here involved, for they never made a will.

In *Overlander v. Ware*, supra, on the contrary, the claim sought to be enforced was to the entire estate of the decedent, not under a contract to adopt the claimant or to make him an heir, but under an alleged contract to convey all the decedent's property, in consideration of the claimant living with the decedent and caring for him as a son until his death. The consideration for the promise to convey in such cases is based upon the foundation idea of services to be rendered, while, in the case of contracts of adoption, the consideration is the society, companionship, and filial obedience of the child, together with the parent's sacrifice in giving up the child to another. *Healy v. Healy*, 55 App. Div. 315, 66 N. Y. Supp. 927; *Winne v. Winne*, 166 N. Y. 263, 82 Am. St. Rep. 647, 59 N. E. 832.

The mother's performance of the contract in this case was complete upon surrender of the child. In taking into their keeping and agreeing to rear a child of tender years, Mr. and Mrs. Tuttle could not know what disposition and character the boy might develop. They could not reasonably expect the child to be wholly free from faults or defects of character. There is some testimony indicating that in his boyhood the plaintiff was of a mischievous disposition, that he would tease and an-

noy Mrs. Tuttle, and that he was disobedient and averse to work. Nothing so serious occurred, however, as to cause a breach of his relations with the family, and he continued a member of it until he became of age. The record contained letters indicating that, in their latter years, Mr. and Mrs. Tuttle had not withdrawn their affection and confidence from the plaintiff. There was nothing to indicate that the plaintiff's conduct had induced them to break their connection with him. In the absence of any proof of an intention on their part to

rescind the contract
—faults—breach
of contract.

because of his conduct, it will be presumed that he yielded them the companionship and obedience demanded by the contract. *Burns v. Smith*, 21 Mont. 251, 69 Am. St. Rep. 653, 53 Pac. 742.

If the promise to adopt the plaintiff had been consummated by formal adoption under the statute, it would have carried with it a child's right of inheritance in the property of Mr. and Mrs. Tuttle. They made no will, and their property was left to descend by operation of law. Equity considers that done which should have been done, and, since the plaintiff's right to the share to which he would have been entitled if legally adopted can be recognized without violating any expressed intention of the deceased to the contrary, the decree awarding him that share was just and equitable. *Pemberton v. Heirs of Pemberton*, 76 Neb. 669, 107 N. W. 996.

Specific performance—parental agreement to adopt.

We accordingly recommend that the decree of the court below be affirmed.

Per Curiam:

For the reasons stated in the foregoing opinion, the judgment of the District Court is affirmed, and this opinion is adopted by and made the opinion of the court.

Letton, J., dissents.

ANNOTATION.

Misconduct of child as defense to action or suit to enforce agreement to adopt, or to provide for, child taken into family.

Generally, as to right of beneficiary to enforce contract between third persons to provide for him by will, see annotation to *Seaver v. Ransom*, 2 A.L.R. 1187.

Observing the general rule that a child taken into a family has neither an adequate remedy at law for the nonperformance of an agreement to leave property to it, nor an absolute right to demand specific performance, but that the decreeing of specific performance lies in the discretion of the court on the facts of each particular case, and will be granted if to do so would not be unfair, inequitable, or unjust, the following authorities which have passed upon the effect of misconduct upon the part of the child are to the effect that the particular misconduct under consideration was insufficient to warrant a denial of enforcement of the agreement: *Burns v. Smith* (1898) 21 Mont. 251; 69 Am. St. Rep. 653, 53 Pac. 742; *TUTTLE v. WINCHELL* (reported herewith) ante, 814; *Winne v. Winne* (1901) 166 N. Y. 263, 82 Am. St. Rep. 647, 59 N. E. 832.

Thus, in the reported case (*TUTTLE v. WINCHELL*, ante, 814), it was held that the fact that a boy taken into a family under an agreement to make him an heir was of a mischievous disposition, teased and annoyed the promisor, and was disobedient and averse to work, was insufficient to warrant a denial of specific performance; at least, where nothing so serious occurred as to cause a breach in the boy's relations with the family, where he remained until of age, when he left with the promisor's approval and consent, and there was nothing showing an intention on the latter's part to rescind the contract because of the boy's conduct. And in *Burns v. Smith* (Mont.) supra, it appeared that the plaintiff, who had gone to live with promisor under a contract to receive a child's share of his estate, on one

or more occasions had left the promisor's home, and that she did not get along harmoniously with promisor's wife, but that he had no intention of rescinding the contract because of the alleged abandonment or failure to yield the obedience demanded by the contract, and the court held that whatever breach there was on the child's part was not sufficient to warrant a denial of specific performance as contended for by the promisor's heirs.

On the other hand, where, because of misconduct on the part of the child, good conscience and natural justice do not require an enforcement of the contract, specific performance should not be awarded. For instance in *Winne v. Winne* (N. Y.) supra, it was said that if the child, instead of following the promisor's admonitions and becoming an upright and respected man, had become dissolute or otherwise led an unworthy life, and thus entailed upon the promisor sorrow and disgrace, the court might well refuse relief by way of specific performance. And in *Ball v. Brooks* (1918) 173 N. Y. Supp. 746, applying the rule that specific performance of an agreement of adoption, and to give all of one's property upon death to another, will not be decreed when the agreement has not been substantially performed by the complaining party, or sufficient reason has not been shown for its non-performance, it was held that a child who, after having lived with the promisor for ten years, left with an intention of abandoning performance of any agreement that he may have had, and for twenty-five years thereafter appears never to have spoken to the promisor, and for seven years thereafter visited him only occasionally, had not conducted himself as was reasonably to be expected of an adopted son, and that such conduct did not constitute such a performance as would be sufficient to warrant a decree granting specific performance.

In *Re Thiel* (1884) 14 W. N. C. (Pa.)

422, a suit was brought to rescind a statutory adoption on the ground that "the child had refused to be subject to the duties of a child, that he left the college where he had been matriculated, and left petitioner's home and removed to another state, where he engaged in a marriage contract against the kind but earnest protest of the

petitioner, and has become a prodigal and undutiful son," but it was held that rescission could not be decreed, the court saying that the statute contained no provision for the rescission of the contract of adoption, and that until the child becomes of age neither he nor anyone for him can waive his rights.
G. J. C.

RE ESTATE OF BREWSTER FERREL, Deceased.

STATE OF WASHINGTON et al., Appts.

Washington Supreme Court (Dept. No. 1)—August 18, 1920.

(— Wash. —, 192 Pac. 10.)

Tax — inheritance — amount of exemption.

1. Only one exemption of \$10,000, and not as many as there are heirs and legatees, is granted by a Succession Tax Law which provides that "\$10,000 of the value of any estate shall be exempt" from the tax.

[See note on this question beginning on page 825.]

Executor and administrator — power to make family allowance.

2. Failure of the will to authorize a family allowance pending settlement

of the estate does not deprive the executor of authority to make such allowance.

APPEAL by the state and tax commissioner from a judgment of the Superior Court for Walla Walla County (Mills, J.) in favor of the executors of the estate of Brewster Ferrel, deceased, upon submission of the question of computation of the inheritance tax on said estate. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. J. M. Thatcher, in propria persona, and George G. Hannan, for appellants:

The will in question nowhere authorizes the executors to make any family allowance or pay any sums of money whatever to the widow or any other relatives as a family allowance.

Bayer v. Bayer, 83 Wash. 431, 145 Pac. 433.

The \$10,000 exemption authorized by statute should be allowed only to all legacies of a class collectively.

State v. Clark, 80 Wash. 439, 71 Pac. 20; *McGhee v. State*, 105 Iowa, 9, 74 N. W. 695; *Herriott v. Bacon*, 110 Iowa, 342, 81 N. W. 701; *Howell's Estate*, 147 Pa. 164, 23 Atl. 403; *Dixon v. Ricketts*, 26 Utah, 215, 72 Pac. 947; *State ex rel. Gilmore v. District Ct.* 45 Mont. 335, 122 Pac. 922, Ann. Cas. 1914A, 469.

Messrs. Gese & Crowe, for respondent:

The allowance of \$1,000 to the widow for her support during administration, while the funds and revenues were tied up in the hands of the executors, was a meager allowance when all of the circumstances of the estate are considered, and the amount paid, not exceeding \$1,000, was a just and proper deduction from the estate.

Re Murphy, 30 Wash. 9, 70 Pac. 109.

The exemption allowed from the portion of the estate passing to or for the use of the father, mother, husband, wife, lineal descendant, adopted child, or lineal descendant of adopted child, is an exemption from the estate passing to each of such beneficiaries as an entity.

Re Corbin, 107 Wash. 424, 7 A.L.R.

(— Wash. —, 198 Pac. 10.)

685, 181 Pac. 910; *Re Howe*, 112 N. Y. 100, 2 L.R.A. 825, 19 N. E. 513; *Re Cager*, 111 N. Y. 344, 18 N. E. 866; *Knowlton v. Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; *People v. Koenig*, 37 Colo. 283, 85 Pac. 1129, 11 Ann. Cas. 140; *Booth v. Com.* (Rodman v. Com.) 130 Ky. 88, 33 L.R.A. (N.S.) 592, 113 S. W. 61; *State v. Clark*, 30 Wash. 439, 71 Pac. 20.

Holcomb, Ch. J., delivered the opinion of the court:

On or about September 27, 1918, Brewster Ferrel died in Walla Walla, leaving an estate valued at over \$279,000. By nonintervention will the deceased gave the estate to his widow and seven children, and appointed his four sons executors. The will was admitted to probate, the executors qualified, and the estate was duly administered. A controversy arose between the executors and the state tax commissioner as to the method of computing the inheritance tax upon the estate. Being unable to agree thereon, they entered into a stipulation as to the facts, and submitted to the trial court the question of the amount of inheritance tax due the state. After hearing the case the trial court made findings, to which certain exceptions were allowed the state, and thereafter entered judgment in favor of the executors. The state, by the tax commissioner, has appealed.

A number of assignments of error are made upon certain findings of the court and the rendering of its decree, but in their last analysis these assignments present here for determination but two questions, viz.: Whether, in the computation of the inheritance tax, \$1,000 may be deducted from the estate as a family allowance, during administration under a nonintervention will, without order of the court, but later found to be reasonable and valid; and whether, in the computation of the inheritance tax, the entire estate left by the deceased is entitled to a single exemption of \$10,000, or whether the amount passing to each legatee as a separate entity is entitled to the exemption of \$10,000.

Taking up the first question, we find, by referring to chapter 146, p. 593, Laws of 1917 (Amendment of Inheritance Tax Act), that § 1 thereof provides:

"That § 9182 of Remington and Ballinger's Code be amended to read as follows:

"Section 9182. All property within the jurisdiction of this state, . . . which shall pass by will . . . shall, for the use of the state, be subject to a tax as provided for in § 9183 [which provides for the levying of the inheritance tax], after the payment of all debts . . . and family allowance not to exceed \$1,000. . . ."

Appellant calls attention to §§ 92 and 93 of the Probate Code (Laws 1917, chap. 156, p. 642), the two sections named appearing under the heading, "Settlement of Estates without Administration," on pages 666 and 667, and says that, under these two sections the executors obtain their authority, not from the court or the general laws in regard to ordinary wills, but from the will itself. Appellant then argues that the will nowhere authorizes the executors to make any family allowance; that to make such allowance is a violation of the terms of the will, the only document through which the executors receive their authority; and that they should be bound in all their actions by its provisions.

Section 92 of the Probate Code provides for the settlement of estates without intervention by the court, when so directed in the will, and also provides for the making of the court's order of distribution, and for the procedure in the event of refusal or disqualification of an executor, or of any mismanagement of the estate by an executor; such provisions not being material here. Section 93 gives to executors acting under nonintervention wills a very wide scope of authority. Under this section it would seem that the executors in the instant case had power to do several things, in connection with the handling of the real

and personal property, which they did not even attempt to do, and compared to which the mere paying out to the widow, for her support pending settlement of the considerable estate, something in excess of \$1,000 in the form of a family allowance, seems rather insignificant. The law authorizes the allowance for the welfare of the family, and it is as much

as a part of the rights of the family during administration as if the testator had himself made the provision therefor.

We conclude that an allowance of \$1,000 was a proper deduction from the estate.

The second question is whether, in computing the inheritance tax, the amount of the exemption shall be deducted but once, that is, from the net estate here subject to the inheritance tax, or whether \$10,000 of the share of each beneficiary is exempt from taxation.

Chapter 43, page 196, Laws of 1917, under the heading, Taxation of Inheritances, provides:

"Section 1. That § 9183 of Remington & Ballinger's Code be amended to read as follows:

"Section 9183. The inheritance tax shall be imposed on all estates subject to the operation of this act at the following rate:

"If passing to or for the use of a . . . wife . . . [or] lineal descendant, . . . the tax shall be one per centum of any value not exceeding fifty thousand dollars: . . . Provided, however, that in the above cases, ten thousand dollars of the net value of any estate shall be exempt from such duty or tax."

Here \$45,058 passed to the widow and \$12,548.41 passed to each child.

The particular question involved in this case does not appear to have been heretofore presented to this court. The original Inheritance Tax Law (Laws 1901, chap. 55, § 2, p. 67; Rem. & Bal. Code, § 9183), provided for a graduated inheritance tax levy, and in regard to direct heirs enacted as follows: "The inheritance tax

shall be and is to be levied on all estates subject to the operation of this chapter [act] on all sums above the first ten thousand dollars, where the same shall pass to or for the use of the father, mother, husband, wife, lineal descendant, adopted child, or the lineal descendant of an adopted child, one (1) per centum. . . ."

This section was amended by the legislature of 1917 by chapter 43, page 196, Laws of 1917, § 1 of which has been hereinbefore quoted. The 1901 Statute, providing for an inheritance tax on all estates in excess of \$10,000 passing to direct heirs, is merely changed by the Act of 1917, so that the exemption of \$10,000 occurs in the proviso to the amendment exempting that sum from the net value of any estate from such duty or tax.

We have uniformly held that the inheritance tax provided for in this state is a succession tax on distributive shares upon devolution of an estate, holding in several cases to the effect that an inheritance tax is not one on property, but one on the succession of property. The right to take property by devise or descent is a creature of the law, and not an inherent right or privilege, and therefore the authority which confers it may enforce conditions upon it. *State v. Clark*, 30 Wash. 439, 71 Pac. 20; *Re Clark*, 37 Wash. 671, 80 Pac. 267; *Re White*, 42 Wash. 360, 84 Pac. 831; *Re Stixrud*, 58 Wash. 339, 33 L.R.A. (N.S.) 632, 109 Pac. 343, Ann. Cas. 1912A, 850.

We also held, in *Re Corbin*, 107 Wash. 424, 7 A.L.R. 685, 181 Pac. 910, and in *Re Smith*, 107 Wash. 698, 183 Pac. 517, that each legacy should be considered as a separate entity, and taxed as such at the statutory rate. But none of those cases involved the question of whether the exemption of \$10,000 allowed by the statute is one exemption of \$10,000 or as many exemptions of \$10,000 as there are heirs or devisees coming within that class where the exemption is granted.

Respondents cite a number of cases from New York, Kentucky,

Colorado, and the United States Supreme Court, which are claimed to sustain their contention to the effect that the exemption, should be deducted from each distributive share of each of the devisees or heirs, where in excess of \$10,000.

The Supreme Court of the United States, in *Knowlton v. Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747, passed upon Act of Congress June 13, 1898 (30 Stat. at L. 464, 465, chap. 448), §§ 29, 30; the language of the provision of § 29 beginning as follows: "That any person or persons having in charge or trust, as administrators, executors, or trustees, any legacies or distributive shares arising from personal property, where the whole amount of such personal property as aforesaid shall exceed the sum of ten thousand dollars in actual value, passing, after the passage of this act, from any person possessed of such property, either by will or by the intestate laws of any state or territory. . . ."

The Supreme Court held, Justices Harlan and McKenna dissenting therefrom, that in view of the above-quoted language, providing that "any person or persons having in charge or trust, as administrators," etc., "any legacies or distributive shares arising from personal property, where the whole amount of such personal property as aforesaid shall exceed the sum of ten thousand dollars in actual value, passing, . . . either by will or by the intestate laws of any state or territory," by the use of the words, "having in charge or trust, . . . any legacies or distributive shares arising from personal property, where the whole amount of such personal property as aforesaid shall exceed the sum of ten thousand dollars . . . passing," etc., emphasizing the relation of the words, "such personal property as aforesaid," to the clause, "any legacies or distributive shares," manifested the intention of Congress to tax only the legacies in excess of \$10,000 arising from such personal property. That decision and that

construction of the Federal statute, therefore, do not seem to be in point upon our statute, nor are we bound by that decision in construing the terms and intent of our state legislation.

In New York the language of Act June 10, 1885, chap. 483, was that "after the passage of this act, all property which shall pass by will," etc., other than to certain excepted persons, "shall be and is subject to a tax of five dollars on every hundred dollars of the clear market value of such property: . . . Provided, that an estate which may be valued at a less sum than five hundred dollars shall not be subject to said duty or tax."

In passing upon this act, the New York court of appeals stated that "estate," as used in this proviso, refers to the estate or share of each beneficiary acquired through the will or the Statute of Distribution, which is to be valued, and the duty estimated, according to its value. *Re Howe*, 112 N. Y. 100, 2 L.R.A. 825, 19 N. E. 513; *Re Cager*, 111 N. Y. 343, 18 N. E. 866. Nor does the language of that act appear to be sufficiently identical with the language of our act.

The Kentucky statute (Laws 1906, chap. 22, art. 19, § 1) provided that "all property which shall pass, by will or by the intestate laws of this state, . . . or any interest therein, or income therefrom, which shall be transferred by deed, grant, sale or gift, made in contemplation of the death of the grantor or bargainor, or intended to take effect in possession or enjoyment after such death, to any person or persons, . . . shall be, and is, subject to a tax of five dollars on every hundred dollars of the fair cash value of such property, and at a proportionate rate for any less amount: . . . Provided, that the first five hundred dollars of every estate shall not be subject to such duty or tax."

In passing upon this act, the Kentucky court of appeals said: "The tax is upon the individual, and can

be imposed only when the particular interest in the decedent's estate passing to him exceeds \$500." *Booth v. Com.* (Rodman v. Com.) 130 Ky. 88, 33 L.R.A.(N.S.) 592, 113 S. W. 61.

The language of the Kentucky act is very nearly identical with the New York act, regarding the taxing of the legacy, bequest, or distributive share after the first \$500.

In *State v. Clark*, 30 Wash. 439, 71 Pac. 20, supra, we held that the exemption in the Inheritance Tax Law of 1901, supra, from the provisions of the act of sums below \$10,000, when the estate passed to direct heirs and kindred, was not invalid as violating the constitutional requirements of equality in taxation, for the reason that it did not extend the same exemption to devisees to collateral heirs or strangers to the blood, because the \$10,000 was to be deducted from the portion of the estate devised to the first class mentioned, and not extended to collateral heirs or strangers to the blood. It appeared to be there impliedly held or assumed that the \$10,000 exemption was an exemption to the class from the whole estate, and not an exemption to each of the heirs or devisees.

California appears to have a statute specifically providing that the exemption shall be deducted from the shares of the persons classified granted exemptions, thereby granting the exemption to each of such persons so classified. *Cal. Stat.* 1905, p. 343; *Cal. Stat.* 1911, p. 715.

Iowa appears to apply the exemption under a statute providing that the tax is payable on the value of the estate, above \$1,000, remaining after the payment of all debts from all the bequests or devisees as a whole, and not from each legacy. *McGhee v. State*, 105 Iowa, 9, 74 N. W. 695; *Harriott v. Bacon*, 110 Iowa, 342, 81 N. W. 701.

The same also appears to be the rule in Pennsylvania. *Howell's Estate*, 147 Pa. 164, 23 Atl. 403.

Utah follows the Pennsylvania rule, and, in announcing it, cites the

above-named Pennsylvania case in *Dixon v. Ricketts*, 26 Utah, 215, 72 Pac. 947.

Montana also gives it the same construction. *State ex rel. Gilmore v. District Ct.* 45 Mont. 335, 122 Pac. 922, Ann. Cas. 1914A, 469.

In view of the language of our Statute of 1917, amending the Act of 1901, we are of the opinion that the proviso was inserted in the form it was, as a proviso, in the Act of 1917, on account of its having been omitted from the enacting clause in amending the former act. The proviso seems to be clear in its intention: "Provided, however, That in the above cases, ten thousand dollars of the net value of any estate [not of any such share, as was the case in the United States Supreme Court case, supra] shall be exempt from such duty or tax."

It is the rule that the provision of a law granting exemption is to be strictly construed against a claimant. The beneficiary must be clearly within the statutory language. *Dos Passos, Inheritance Tax Law*, 2d ed. 74, and cases cited.

When we construe this language strictly, notwithstanding the fact that it is a change in language from the original act granting the exemption of \$10,000, we are of the opinion that the statute manifestly meant that only one exemption of \$10,000 should be allowed, and not as many exemptions as there were heirs or legatees, if there were more than one.

Tax-inheritance-amount of exemption.

In consequence of these observations, the decree of the trial court should be modified, so that the exemption of \$10,000 shall be deducted from the net value of the community half interest to be distributed, viz., \$132,896.87, leaving the sum of \$122,896.87 subject to the tax thereon at 1 per cent, amounting to \$1,228.96.

Reversed and remanded, with instructions to enter decree in conformity herewith.

Parker, Main, Mitchell, and Mackintosh, JJ., concur.

ANNOTATION.

Whole estate or individual shares as basis of computation of inheritance tax.

The earlier cases on this question are discussed in the note in 7 A.L.R., at page 688. As appears from that note, although the question under annotation is governed to some extent by the form of statute, the differences in statutes do not account altogether for the differences in judicial opinion. There are two theories as to whether an exemption in an inheritance tax statute is governed by the amount of the legacy or distributive share, or by the amount of the estate. The divergence of opinion which marks the earlier decisions appears in the decisions rendered since the date of the earlier note.

Rule that legacy or distributive share is determinative as to exemptions.

(Supplementing annotation in 7 A.L.R., at page 689.)

In Virginia, the rule has been followed that the exemption is governed by the amount of the legacy or distributive share. *Com. v. Carter* (1920) — Va. —, 102 S. E. 58; *Withers v. Jones* (1920) — Va. —, 102 S. E. 68; *Com. v. Patterson* (1920) — Va. —, 102 S. E. 569. See statute, *infra*.

The statute under which *Re Washbourne* (1918) 180 N. Y. Supp. 507, affirmed in (1920) 190 App. Div. 940, 180 N. Y. Supp. 508, and *Re Downey* (1918) 182 N. Y. Supp. 223, were decided, expressly made the exemption apply to the interest transferred to certain beneficiaries. Under the plain provisions of this statute, the beneficiaries being held to be within the class mentioned, the shares passing to them were held to be exempted where they were less than the amount fixed.

Rule that amount of the entire estate is determinative as to exemptions.

(Supplementing annotation in 7 A.L.R., at page 691.)

In the reported case (*RE FERREL*, ante, 820), the court construes the statute of Washington as providing for only one exemption, not as many exemptions as there were heirs or legatees if there were more than one.

Rule as to graduated rate.

(Supplementing annotation in 7 A.L.R., at page 695.)

As appears from the earlier note, the only cases that had decided the question at the date of that note, as it related to the graduated rates, held that such rate was measured separately by the amount of each legacy, and not by the sum of the whole estate. This theory is followed by the court of Virginia in *Com. v. Carter* (1920) — Va. —, 102 S. E. 58, thus aligning this state with the decision of the United States Supreme Court, the supreme court of Washington, and that of South Dakota. This question was not expressly considered in *Posey v. Com.* (1918) 123 Va. 551, 96 S. E. 771, although in that case the amount of the estate was made the basis of the computation of the tax. In so far as that decision lends any support to the theory that the estate is the basis, it is overruled by *Com. v. Carter*.

The Virginia statute provides that "where any estate . . . shall pass under a will or under the laws regulating descents and distributions . . . the estate so passing shall be subject to a tax of one per centum on every hundred dollars' value thereof: Provided, that estates passing to or for the use of [certain classes of beneficiaries] shall be subject to a tax of one per centum on every hundred dollars' value thereof in excess of \$15,000. . . . The foregoing rates are for convenience termed the primary rates. When the amount of the market value of such property or interest exceeds \$15,000, the rate of tax upon such excess shall be as follows:" [Here follow the graduated rates.]

It was urged in *Com. v. Carter* (Va.) supra, that the higher rate should be imposed unless the entire property of the decedent went to the direct or preferred beneficiaries; that if any part of it went to the other class, then the higher rate should be imposed upon the entire estate, including that portion received by the preferred

class, as well as that received by the other class. This contention was negatived by the court. The court says: "The word 'estate,' as used in the first sentence, refers not to the entire estate of the decedent, but to the specific estate or property which

passes to the several beneficiaries, and the words 'property or interest' and 'estate' are used interchangeably to convey the same meaning, and refer to such proportion of the estate of the decedent as passes to the particular beneficiary." W. A. E.

RE PROBATE OF THE WILL OF J. CLARK TINSLEY, Deceased.

Iowa Supreme Court — September 22, 1919.

(— Iowa, —, 174 N. W. 4.)

Will — authority in case of accident.

1. The fact that one executed an instrument in the form of a will when about to start on a journey, and provided that "in case of any serious accident" certain things should be done, does not show that the instrument was to take effect only in case of accident, and not in case of death by natural means.

[See note on this question beginning on page 846.]

— probate — inoperative instruments.

2. That an instrument in the form of a will is not operative as a will does not prevent its admission to probate.

— instruments testamentary in character.

3. An instrument executed as a will, directing one to "take entire charge of my estate for disposal as he sees fit" in case of serious accident, is testamentary in character.

Power — right to dispose of estate.

4. An instrument executed as a will, giving one power to take entire charge of the maker's estate in case of serious accident, for disposal as he sees fit,

does not create a mere naked power of sale.

Will — directing to take charge of estate — bequest.

5. A bequest, and not a trust, results from a direction that, in case of serious accident, a named person should take entire charge of the maker's estate, for disposal as he sees fit.

— evidence of circumstances to control meaning.

6. Proof of extrinsic circumstances attending the execution of a will cannot be permitted to show that testator intended anything other or different from that which is to be found in or implied from the instrument itself.

APPEAL by contestants from a judgment of the District Court for Polk County (Wilson, J.), overruling their objections to the probate of the will of J. Clark Tinsley, deceased. *Affirmed.*

Statement by Weaver, J.:

A written instrument having been filed for probate as the last will and testament of J. Clark Tinsley, deceased, certain persons, claiming to be the heirs at law of said Tinsley, appeared and objected thereto for reasons stated in the opinion. On trial to the court the objections were overruled, and the instrument was adjudged to have been duly proved

and established. The contestants appeal.

Messrs. W. W. Willcoxon and Frank H. Dewey for appellants.

Messrs. Carr, Carr, & Cox, for appellee:

The document is testamentary in character. It meets statutory requirements as to execution, was executed with animus testandi, and disposes of an estate.

(— Iowa, —, 174 N. W. 4.)

Bond v. Seawell, Burr. 1775, 97 Eng. Reprint, 1092; *Re Hulse*, 52 Iowa, 662, 3 N. W. 734; *Nixon v. Snellbaker*, 155 Iowa, 393, 136 N. W. 223; *Re Bybee*, 179 Iowa, 1089, 160 N. W. 901; *Blacksher Co. v. Northrup*, 176 Ala. 190, 42 L.R.A.(N.S.) 454, 57 So. 743; *Herold v. State*, 21 Neb. 50, 31 N. W. 258; *Koerner v. Wilkinson*, 96 Mo. App. 510, 70 S. W. 509; *United States v. Hacker*, 73 Fed. 292; *Howard Bros. v. Caperon*, 3 Tex. App. Civ. Cas. (Willson) 382; *Benz v. Fabian*, 54 N. J. Eq. 615, 35 Atl. 760; *Cheney v. Plumb*, 79 Wis. 602, 48 N. W. 668; *Fairman v. Beal*, 14 Ill. 244; *Dalrymple v. Leach*, 192 Ill. 51, 61 N. E. 443; *King v. Ackerman*, 2 Black, 408, 17 L. ed. 292; *Forsythe v. Forsythe*, 108 Pa. 129; *Beard v. Knox*, 5 Cal. 252, 63 Am. Dec. 125; *Connely v. Putnam*, 51 Tex. Civ. App. 233, 111 S. W. 164; *Pearre v. Hawkins*, 62 Tex. 434; *Hammond v. Croxton*, — Ind. App. —, 61 N. E. 598; *Benninghoff v. Evangelical Asso. Church*, 28 Ind. App. 374, 61 N. E. 952; *Mulvane v. Rude*, 146 Ind. 476, 45 N. E. 659; *Rona v. Meier*, 47 Iowa, 607, 29 Am. Rep. 493; *Re Burbank*, 69 Iowa, 378, 28 N. W. 648; *Law v. Douglass*, 107 Iowa, 609, 78 N. W. 212; *Luckey v. McCray*, 125 Iowa, 691, 101 N. W. 516; *Meyer v. Weiler*, 121 Iowa, 51, 95 N. W. 254; *Re Weien*, 139 Iowa, 658, 18 L.R.A.(N.S.) 463, 116 N. W. 791; *Schricker v. Schricker*, 151 Iowa, 310, 131 N. W. 42; *Re Hubbell*, 135 Iowa, 644, 13 L.R.A.(N.S.) 496, 113 N. W. 512, 14 Ann. Cas. 640; *Canaday v. Baysinger*, 170 Iowa, 414, 152 N. W. 562.

The will is not conditional or contingent.

Forquer's Estate, 216 Pa. 331, 66 Atl. 93, 8 Ann. Cas. 1146; *Thorne's Goods*, 4 Swabey & T. 36, 34 L. J. Prob. N. S. 131, 11 Jur. N. S. 569, 12 L. T. N. S. 639; *Dobson's Goods*, L. R. 1 Prob. & Div. 88, 35 L. J. Prob. N. S. 54, 13 L. T. N. S. 758, 14 Week. Rep. 408; *Stuart's Goods*, Ir. L. R. 21 Eq. 105; *Tarver v. Tarver*, 9 Pet. 174, 9 L. ed. 91; *Bateman v. Pennington*, 3 Moore, P. C. C. 223, 13 Eng. Reprint, 95; *Cody v. Conly*, 27 Gratt. 313; *Eaton v. Brown*, 193 U. S. 411, 48 L. ed. 730, 24 Sup. Ct. Rep. 487; *Damon v. Damon*, 8 Allen, 192; *French v. French*, 14 W. Va. 458.

Weaver, J., delivered the opinion of the court:

The paper filed and admitted to probate as the will of the deceased is

exceedingly brief, and in the words following:

Des Moines, Ia., Sept. 2–15.

In case of any serious accident, after my just debts are paid, I direct that my aunt Miss Mary E. Clark, take entire charge of my estate for disposal as she sees fit.

J. Clark Tinsley.

Witnesses:

W. H. Barnard, Des Moines, Iowa.

J. H. Fowler, Des Moines, Iowa.

The deceased appears to have left neither wife nor lineal descendants, and the contestants are surviving collateral heirs of various degrees of relationship.

The objections filed to the admission of the will are as follows:

First. The instrument purporting to be the last will and testament of J. Clark Tinsley is not testamentary in character. It leaves nothing to be done after the death of the testator.

Second. Said instrument makes no provision for, or mention of, a disposition of property after, or in the event of, death of the purported testator.

Third. The instrument is directory only as to the management of the business of the decedent during his lifetime, and then only in case of any serious accident whereby he is incapacitated. Said instrument on its face purports to appoint an agent or attorney in fact, and is not testamentary in character.

Fourth. The said decedent met with no serious accident during his lifetime and died a natural death. Said instrument cannot operate as a testamentary disposition of his estate and made in contemplation of death.

Fifth. Said instrument, which is alleged to be a will, rests upon a contingency or the happening of an event, and refers to some future contingent event, which did not take place, and said instrument is therefore ineffective as a will.

Sixth. Said instrument does not make any devise or distribution of property, nor did it vest the same in

any person; it leaves the disposal of property to another person. The decedent did not by said instrument, and could not, delegate to an agent the power to make a will for him.

Seventh. Said instrument does not vest a title in anyone, and no beneficiary is named or indicated therein, and the same is therefore void.

Eighth. If the said instrument created Miss Mary E. Clark a trustee for the purpose of attending to any business and making a disposal of the property of J. Clark Tinsley, she having departed this life prior to the time of his death, the trust fails and the instrument is void.

Ninth. If the said instrument created a life estate only in Miss Mary E. Clark, she having departed this life prior to the decedent, said devise has failed, and the property is subject to distribution among the heirs at law of said decedent.

By a later amendment to these objections it was further alleged, in substance, that, even if construed to be a will, its utmost effect was to provide a power to be exercised by the said Mary E. Clark, or a life estate in her with power attached, and that, the said devisee having died in the lifetime of the testator, said provision never became effective.

The evidence produced on the trial tends fairly to show that Tinsley was a resident of Des Moines, where he was engaged in business. At the date of the instrument in controversy, he was contemplating a more or less extended visit to California. With the paper prepared by himself in its present form ready for execution, he called at the office of the Security Loan & Investment Company, with which he was accustomed to do business, and requested the president and vice president of that institution to witness its execution as his will. They complied with his request, and attached their names to it as witnesses. Just what disposition Tinsley made of the paper at that time is not expressly shown, but we think it is inferable that he delivered it to

the beneficiary named therein, by whom it was retained until her death, in the year 1917, when it passed into the hands of the sole beneficiary of her will, Miss Olive M. Clark, who presented it for probate.

For a reversal of the order admitting the will to probate appellants contend:

I. That, as a matter of proper practice, probate should be denied to an offered writing when, from the contents of the instrument, considered in the light of the facts shown on the hearing, it is inoperative as a will. Discussing this proposition, counsel admit, for the purposes of this branch of the discussion, "that the instrument offered was in form a will, and under some of the decisions in this state was therefore properly a matter for probate, leaving any question of construction to be settled afterward under proper proceedings." This concession is necessitated by the repeated holdings of this court that the probate of a will decides no question but that which relates to its execution and publication. *Lorieux v. Keller*, 5 Iowa, 196, 68 Am. Dec. 696; *Fallon v. Chidester*, 46 Iowa, 588, 26 Am. Rep. 164; *Niemand v. Seemann*, 136 Iowa, 716, 114 N. W. 48; *Murphy v. Black*, 41 Iowa, 488.

Will—probate
—inoperative
instruments.

No question is raised against the sufficiency of the evidence of due execution and publication of this instrument, and with the concession of counsel above cited, together with their further statement that the trial court "did not attempt to pass on anything except the sole question whether the instrument was sufficient in form to be admitted to probate as a will" (a sufficiency which, as we have seen, is conceded), there seems to be nothing left on which to base the first assignment of error. Even if it should be held (a proposition we are not here called upon to decide) that, under some circumstances, the court might, in its discretion, have entered upon an inquiry whether there was anything upon which the alleged will could

operate if probated, there is certainly no rule or precedent in this jurisdiction for holding it reversible error for the court, in considering an application for admission of a will, to limit its attention to the fundamental inquiry whether the paper offered is "in form a will," and whether there is proof of its due execution and publication.

II. Of other objections made to the will, the following may be considered together: They are: (1) That the paper is not testamentary in character; (2) that it constitutes simply an attempt to create a trust, but fails to designate any beneficiary; and (3) that it does no more than provide a naked power to sell.

That the instrument may properly be treated as testamentary in character is conceded by counsel in the first division of their argument, and, while it is perhaps their privilege to assert inconsistent grounds of contest, they can hardly hope to convince the court that they are right upon both propositions. Any writing by which a person undertakes to

make disposition of his property or estate, to take effect after his death, is testamentary in character, and, if duly signed, witnessed, and published, is entitled to admission to probate. It makes little difference whether the language employed be that of a lawyer skilled in all technicalities of the law of wills, or is prepared by the most ignorant and unpractised scrivener, if, when candidly read and fairly construed, it reveals the purpose of the testator to make a disposition of his estate or some part of it which shall become effective and irrevocable at his death. It is not necessary that there shall be express technical words of devise or bequest, or an express declaration that its provisions shall take effect only at his death, if, when read as a whole, in the light of the circumstances under which the instrument was made, such is the reasonable meaning to be extracted from its terms. A very large proportion of wills presented to the

courts for probate is of very informal character, and not a few have been prepared by the testators themselves. If held to any rigid test of form, very many of them would be held hopelessly bad; but the courts everywhere very properly feel bound to look to the substance; and, if the intent of testators be ascertainable, give their wills effect accordingly. *Flynn v. Holman*, 119 Iowa, 738, 94 N. W. 447.

There is no fair method of reading into the will in this case a purpose to give Mary E. Clark a mere naked power to sell the property for the benefit of the deceased, or of his estate, or of any other person or persons, Power—right to dispose of estate. named or unnamed.

She is given possession or charge of his entire estate for her disposal as she may see fit. There is no direction, intimation, or suggestion that she is to account therefor to any other person, or that any other person shall have any right or interest in the property or in the proceeds of its sale. The case of *Filkins v. Severn*, 127 Iowa, 738, 104 N. W. 346, cited and relied upon by the appellants is not in point in fact or principle. In that case the testator in express terms made another his trustee to keep, care for, and dispose of certain property for the benefit of the testator's estate, but failed to name any person or persons as beneficiaries of the trust so created, and the conclusion was inevitable that the trust was incomplete. As we have already noted, there is nothing of this character in the will now before us.

If the sole evidence of a transaction between A and B is that A delivers to B a sum of money or other item of personalty, saying to him, "Here, take this and manage and dispose of it as you please," no lawyer will contend that this alone establishes the creation of a trust. On the contrary, he would say that this fact, without other evidence to modify its effect, establishes a valid gift, for which the receiver is under no obligation, at law or in equity, to

account to the giver or to his representatives. If such would be the ruling as to an alleged gift inter vivos, why should

**Will—directing
to take charge
of estate—
bequest.**

we hold that a testamentary gift, in substantially the

same words, is ineffective?

In *Rona v. Meier*, 47 Iowa, 607, 29 Am. Rep. 493, this court said: "It is fully settled . . . that, if the first taker has the power by the terms of the will to dispose of the property, he must be considered the absolute owner."

The same rule was reaffirmed in *Law v. Douglass*, 107 Iowa, 607, 78 N. W. 212, and on frequent occasions since that time. Unrestricted power of disposal is an attribute of absolute ownership. Quite in point, also, is *Cheney v. Plumb*, 79 Wis. 602, 48 N. W. 668, where the instrument was in form as follows: "When I have done with my property, I want John R. Cheney and his wife to pay all my debts and collect my dues and dispose of my things as they think best, only I want Sarah A. Williams to have my silver spoons . . . [and after several legacies] and the remainder to keep and dispose of as they think best."

This was held sufficient to vest the property absolutely in the persons named. See also *Benz v. Fabian*, 54 N. J. Eq. 615, 35 Atl. 760. And the trial court was justified in holding the instrument testamentary in form, and not a mere trust or power, expiring with the death of Mary E. Clark, there is no room to doubt.

III. The remaining objection, and the one on which counsel seem to rely with some confidence, is that, in any event, if the instrument, when made, may be considered a will, yet it was one of those peculiar or exceptional wills that are intended to become effectual only during a limited period or in a certain event. This position is taken on the strength of the introductory phrase of the instrument: "In case of any serious accident," etc. From this expression, and from the fact appearing in evidence that the deceased was about to

leave upon a trip to California, the court is asked to say that his intention in making the instrument was that it should become effective only in the event of his death while upon the contemplated trip,—an event which concededly did not happen. In other words, counsel would have us construe the writing as if it read: "I am about to make a trip to California, and if, by reason of any accident, I do not live to return to my home, then, in that event, I dispose of my estate as follows," etc. But to do this the court must make a will for the testator, expressing an intent which is not to be found in the writing which he executed. Proof of extrinsic circumstances may sometimes be admitted to clear up any ambiguity in the will, or to identify the subject-matter of a devise or bequest, or the person of a beneficiary; but it cannot be permitted to show that the testator intended anything other or different than that which is

—evidence of
circumstances
to control
meaning.

to be found in, or implied from, the instrument itself. If the will be unconditional upon its face, it cannot be adjudged to be conditional or contingent upon the strength of parol testimony.

It may well be that the contemplation of a long journey, and its possible dangers and exposures, suggested to the mind of the deceased the wisdom of providing for the succession to his estate in the event of his death, and that, acting upon this thought, he prepared the paper in question. This would indicate no more than that the circumstances mentioned were the occasion for his act, and not at all that his death while on that trip was a contingency without which the will would not become operative.

In *Forquer's Estate*, 216 Pa. 336, 66 Atl. 93, 8 Ann. Cas. 1146, is found a case in principle much like the one at bar. The court there goes into an extensive citation and review of the authorities, and from these deduces the rule that "when the event which constitutes the contingency ex-

pressed in the instrument can be reasonably construed to have been the occasion for making the will at a particular time, rather than as the reason for making it in a particular way, it should be so construed; and, further, that, unless it clearly appear from the instrument itself that it was not to operate in a certain event, it will be entitled to probate."

In that case to which this rule was applied, the will expressly stated that he was about starting on a trip to Montana, and, knowing the uncertainty and risk of the journey, he therefore executed the will which later became the subject of litigation.

In the case before us the fact that the deceased was about starting on a journey is not mentioned in the instrument, and the fact comes into the record only by the testimony of witnesses examined in the proceedings for its probate.

We are satisfied that upon no sound rule of law can the will in this case be refused probate because of any condition or contingency attached thereto.

It is suggested, finally, though not pressed in argument, that the expression, "In case of any serious accident," found in this instrument, is to be construed literally, and does not indicate that the provisions therein were made in contemplation of death. We cannot think there is merit in this objection.

The deceased was still a young man, and it would not be strange or unnatural if, in the hopefulness and confidence of the average man in youth or early prime, the idea of death was associated in his mind most prominently with the possibility of accident, thus leading him to use the expression which he employed in the writing. Many persons shrink from the bald mention of their own possible demise, and, when the disagreeable subject must be spoken of, make use of some figure of speech or euphemistic phrase which suggests the idea in less repulsive form. In ordinary parlance it is by no means unusual for a person in

stating his wishes or giving directions concerning what shall be done in the event of his death, to preface his statement with the expression, "If anything happens to me," and in such case no one misunderstands or doubts the meaning of the phrase. Words of this general character have often been considered by the courts, and held sufficient to indicate a testamentary intent. For example: "According to my present intention, should anything happen to me before I reach my friends in St. Louis, I wish to make a correct disposal," etc. *Ex parte Lindsay*, 2 Bradf. 204. "In case of any fatal accident to me, being about to travel by railway, I hereby leave," etc. *Dobson's Goods*, L. R. 1 Prob. & Div. 88. "I intend starting to-morrow morning to Bozeman, Montana. . . . Knowing the uncertainty and risk of the journey, . . . I hereby," etc. *Forquer's Estate*, supra. "I request that in the event of my death while serving in this horrible climate, or anything happening to me," etc. *Thorne's Goods*, 4 Swab. & T. 36. "Being about to travel a considerable distance, and knowing the uncertainty of life, think it advisable to make some disposition of my estate," etc. *Tarver v. Tarver*, 9 Pet. 174, 9 L. ed. 91. "As I am about to leave home for Bangor, should any accident take me out of the world," etc. In *Stuart's Goods*, Ir. L. R. 21 Eq. 105. "I am going on a journey, and may not ever return. And if I do not, this is my last request," etc. *Eaton v. Brown*, 193 U. S. 411, 48 L. ed. 730, 24 Sup. Ct. Rep. 487. "If any accident should happen to me that I die from home," etc. *Likefield v. Likefield*, 82 Ky. 589, 56 Am. Rep. 908. "If it should please Almighty God to call me suddenly from this mortal life and during my absence from home," etc. *Tylden's Goods*, 18 Jur. 136. See also *Bradford v. Bradford*, 4 Ky. L. Rep. 947.

In each of these illustrative cases it was held not only that the instrument expressed a testamentary intent, but in each and all it was also held that the reference made by the testator to the cause which pro-

—authority in
case of accident.

moted or induced the making of the will did not make the bequest or devise either conditional or contingent upon any event except the testator's death.

We are satisfied that the record discloses no reversible error, and the judgment of the District Court is affirmed.

Ladd, Ch. J., and Gaynor and Stevens, JJ., concur.

NOTE.

The question as to when a will is to be deemed contingent is the subject of the annotation following *WALKER v. HIBBARD*, post, 846. Specifically, as to the effect of reference in a will to a contemplated journey, and to perils or accidents incident thereto, see subdivision III. a, of that annotation.

CHARLES A. J. WALKER, Admr., etc., of Mary S. Long, Deceased, et al.,
Appts.,
v.

JULIA HIBBARD et al.

Kentucky Court of Appeals—November 7, 1919.

(185 Ky. 795, 215 S. W. 800.)

Will — contingent — what constitutes.

1. A will is contingent which is so phrased as clearly to show that it was intended to take effect only upon the happening of a particular event, set forth in the paper as the reason for writing it.

[See note on this question beginning on page 846.]

— rule of construction.

2. If there is reasonable doubt as to whether a will is intended to be contingent or permanent, the doubt will be resolved in favor of the permanency.

— contingent on death in operation.

3. A will in form of a letter is contingent which, after reciting that testator is about to go to a hospital for an operation, requests the addressee to see that, if anything happens to the

writer, everything he owns shall go to a named person, so that recovery from the operation will nullify the will.

— revocation — parol revival.

4. The passing of the emergency upon which a contingent will is based revokes the will, and it cannot be revived by testator's parol statement that he desires it to control the disposition of his property.

APPEAL by proponents from a judgment of the Common Pleas Division of the Circuit Court for Kenyon County, refusing probate of a letter purporting to be the last will and testament of Mary S. Long, deceased, in a proceeding to contest the validity of such paper. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. George H. Kattenhorn and Charles A. J. Walker, for appellants:

The will of Mary S. Long was her last will and testament, and not contingent or conditional.

Eaton v. Brown, 193 U. S. 411, 48 L. ed. 730, 24 Sup. Ct. Rep. 487; *Likelihood v. Likelihood*, 82 Ky. 589, 56 Am. Rep. 908; *Massie v. Griffin*, 2 Met. (Ky.) 364; *Maxwell v. Maxwell*, 3 Met. (Ky.)

101; *Dougherty v. Dougherty*, 4 Met. (Ky.) 25; *Bradford v. Bradford*, 4 Ky. L. Rep. 947; *Alexander, Wills*, 1915, § 105; *Schouler, Wills*, 1915, §§ 285, 287; *Jarman, Wills*, 1910, § 40; *Page, Wills*, 1901, §§ 62, 63; *Tarver v. Tarver*, 9 Pet. 174, 9 L. ed. 91; *Forquer's Estate*, 216 Pa. 331, 66 Atl. 92, 8 Ann. Cas. 1146; *Damon v. Damon*, 8 Allen, 192; *Thompson v. Connor*, 3 Bradf. 366; *Murphey*

(185 Ky. 795, 215 S. W. 800.)

v. Brown, 159 Ind. 106, 62 N. E. 275; Kelleher v. Kernan, 60 Md. 440; Redhead v. Redhead, 83 Miss. 141, 35 So. 761; French v. French, 14 W. Va. 458; Skipwith v. Cabell, 19 Gratt. 758; Mayd's Goods, L. R. 6 Prob. Div. 17, 50 L. J. Prob. N. S. 7, 29 Week. Rep. 214, 45 J. P. 8; Ex parte Lindsay, 2 Bradf. 204; Dobson's Goods, L. R. 1 Prob. & Div. 88, 35 L. J. Prob. N. S. 54, 13 L. T. N. S. 758, 14 Week. Rep. 408; Martin's Goods, L. R. 1 Prob. & Div. 380, 36 L. J. Prob. N. S. 116, 17 L. T. N. S. 32; Halford v. Halford, L. R. [1897] P. 36, 75 L. T. N. S. 520, 66 L. J. Prob. N. S. 29; Thorne's Goods, 4 Swabey & T. 36, 34 L. J. Prob. N. S. 131, 11 Jur. N. S. 569, 12 L. T. N. S. 639; Stuart's Goods, Ir. L. R. 21 Eq. 105; Spratt's Goods, L. R. [1897] P. 28, 66 L. J. Prob. N. S. 25, 75 L. T. N. S. 518, 45 Week. Rep. 159; Cody v. Conly, 27 Gratt. 313; Burton v. Collingwood, 4 Hagg. Eccl. Rep. 176, 162 Eng. Reprint, 1411; Buffington v. Thomas, 84 Miss. 157, 105 Am. St. Rep. 423, 36 So. 1039.

The construction is in favor of the instrument.

Alexander, Wills, § 105, p. 123; Dykeman v. Jenkins, 179 Ind. 549, 101 N. E. 1013, Ann. Cas. 1915D, 1011.

Messrs. S. D. Rouse, R. C. Simmons, and C. W. Baker, for appellees:

The will was a conditional paper which was never delivered to the person for whom it was intended, and the condition presenting the cause for it to be written not having resulted, the paper, as a testamentary document, became void.

Massie v. Griffin, 2 Met. (Ky.) 364; Maxwell v. Maxwell, 3 Met. (Ky.) 101; Dougherty v. Dougherty, 4 Met. (Ky.) 25; Likefield v. Likefield, 82 Ky. 589, 56 Am. Rep. 908; Bradford v. Bradford, 4 Ky. L. Rep. 947; Underhill, Wills, § 8; Alexander, Wills, 1917 ed. 117; Schouler, Wills, § 287; Parsons v. Lanoe, 1 Ambl. 557, 1 Ves. Sr. 190, 27 Eng. Reprint, 358, 974, 1 Wils. 243, 95 Eng. Reprint, 597; Sinclair v. Hone, 6 Ves. Jr. 608, 31 Eng. Reprint, 1219; Porter's Goods, L. R. 2 Prob. & Div. 22, 39 L. J. Prob. N. S. 12, 21 L. T. N. S. 680, 18 Week. Rep. 231; Robinson's Goods, L. R. 2 Prob. & Div. 171, 40 L. J. Prob. N. S. 16, 23 L. T. N. S. 397, 19 Week. Rep. 135; Lindsay v. Lindsay, L. R. 2 Prob. & Div. 459, 42 L. J. Prob. N. S. 32, 27 L. T. N. S. 322; Winn's Goods, 2 Swabey & T. 147, 7 Jur. N. S. 764, 4 L. T. N. S. 655, 9 Week. Rep. 852; Todd's Will, 2 Watts & S.

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145; Wagner v. M'Donald, 2 Harr. & J. 346; Robnett v. Ashlock, 49 Mo. 171; White's Estate, Myrick, Prob. Ct. Rep. 157; Davis v. Davis, 107 Miss. 245, 65 So. 241; Dougherty v. Holscheider, 40 Tex. Civ. App. 31, 88 S. W. 1113.

There was want of mental capacity on the part of testatrix, and undue influence, exercised by the beneficiary.

Porschet v. Porschet, 82 Ky. 93, 56 Am. Rep. 880; McClure v. McClure, 86 Tenn. 173, 6 S. W. 44; Arnault v. Arnault, 52 N. J. Eq. 801, 31 Atl. 606; Snyder v. Erwin, 229 Pa. 644, 140 Am. St. Rep. 737, 79 Atl. 124; Dean v. Negley, 41 Pa. 312, 80 Am. Dec. 620; Page, Wills, § 411.

Messrs. Thorne Baker and Martin J. Brown also for appellees.

Carroll, Ch. J., delivered the opinion of the court:

The following paper was probated in the Kenton county court as the last will of Mame S. Long, who died in December, 1917, but on appeal to the circuit court, the law and facts being submitted by consent of parties to the judge, the decision of the county court was set aside, and the paper rejected as a will:

June 8th, 1917.

Dear Aunt Mintie:—On Sunday evening I go to St. Elizabeth's Hospital to have a slight operation. I do not anticipate any trouble, but one never knows. If anything should happen to me, I want you please to do this for me. See that everything I have in the world goes to George B. Gomersall. He is dearer to me than anything in this world, and he deserves it. You may think this is too much, but I don't believe you will, and it is my wish. If there is anything around the house you want, of course it is yours. The sideboard belongs to Sam Long. You have been far better to me than I deserve, and I love you better than you will ever know.

With very much love,
Mame S. Long.

Mame S. Long, the writer of this letter, was a childless widow, having been divorced from her husband, Sam Long, in 1904. At the time of her death in December, 1917, she

was about forty-six years old, and George B. Gomersall, the beneficiary in the paper, was an unmarried man about thirty-three years of age. Shortly after the death of Mrs. Long this paper was offered for probate by Gomersall in the Kenton county court, and its probate contested by the uncles, aunts, nieces, and nephews of Mrs. Long, who were her nearest of kin, and the persons to whom her estate, which amounted in value to about \$60,000, would have passed under the Statute of Descent and Distribution if she had died intestate.

The validity of the paper was contested upon the grounds that Mrs. Long was wanting in testamentary capacity; that its execution was procured by the undue influence of Gomersall; that the paper was a contingent will, and void as a final testamentary disposition because the contingency upon which it was to become effective never happened.

It is upon this last-named ground that the paper was rejected and its probate refused by the circuit judge who heard and disposed of the case.

It is conceded that Mrs. Long completely recovered from the operation to which she was about to submit when the paper was written, and died some six months later from a cause entirely independent of, and having no connection with, the operation itself, or the ailment to relieve which it was performed. And there being no dispute about this, we will pass without comment the issues as to testamentary capacity and undue influence, although there was evidence to support both, and rest our decision on the determination of the question whether the paper in controversy is what is known in the law as a contingent will, because, if it comes fairly within that class of testamentary paper described as a contingent will, it never became effective as her last will.

But before coming to the discussion of this controlling feature of the case it will be appropriate to briefly set forth such facts and circumstances appearing in the record

as serve to illustrate the surroundings of Mrs. Long, at the time and before she wrote the letter, and throw light on her intention in doing so, as well as her relations with Gomersall, the proposed beneficiary of her bounty, so that a better understanding may be had of the situation of the parties, and the effect, if any, that should be given to her acts and declarations at the time the letter was delivered by her to Gomersall.

Mrs. Long, some ten years before her death, acquired the habit of drinking to excess intoxicating liquors, and from that time until her death in December, 1917, she was frequently under the influence of liquor, and was often found in a condition of helpless intoxication. And there is abundant evidence by a number of physicians who treated her for this habit at different times from 1908 until her death, as well as by other friends and acquaintances, that when laboring under the effects of intoxicating liquor, as she frequently was, she was utterly incapable of transacting any business affairs, and her conduct was totally destitute of the delicacy and refinement that characterized it when she was free from the influence of strong drink.

She had many relatives, among them a Mrs. Mary Shinkle, her aunt, and who was the "Aunt Mintie" to whom the letter was addressed, who lived in or near Covington; but the relations between Mrs. Long and her kindred had become somewhat estranged on account of her dissipated habits, that subjected them to much embarrassment and distress, although they continued, as best they could under the circumstances, to exercise a kindly and watchful care over her, and especially did her aunt, Mrs. Mary Shinkle, to whom it appears Mrs. Long was deeply attached, continually do everything in her power to correct the unfortunate habit of her niece, and save her from the painful notoriety that her conduct produced.

It also appears that Mrs. Long met Gomersall for the first time in

September, 1916, at the house of a mutual friend in the city of New York, whom they were both visiting, but was only in his company on this occasion for a very short while. Soon after this she returned to her home in Covington, and about a month afterwards Gomersall, whose residence was in Cincinnati, Ohio, called her over the telephone to inquire after her health, being influenced, as he says, to make this inquiry, by the fact that during their brief meeting in New York Mrs. Long was suddenly taken so ill as to make it necessary that she should be removed from the hotel dining room where the Phelps's, Gomersall, and Mrs. Long had gone to take dinner, to the home of the Phelps's or her hotel. Soon following this inquiry, as a result of the conversation over the telephone, he visited her at her apartments in Covington, and thereafter, and until just before her death, met her probably two or three times a week, frequently taking her to theaters, dinners, picture shows, races, and other places of entertainment.

During this time Gomersall saw or had many opportunities of seeing her under the influence of strong drink, and on several occasions drank with her intoxicating liquor, thus becoming thoroughly apprised of her unfortunate habit. It further appears that in April, 1917, they entered into an engagement to marry, upon the condition, imposed by Gomersall, that Mrs. Long should be able to abstain from the use of intoxicating liquors for a period of as much as six months. It is also made clear by numerous letters written by her to Gomersall that Mrs. Long became desperately infatuated with him, and was willing to marry him at any time, but this event was postponed from time to time, presumably on account of her inability to refrain from the use of intoxicating liquor for the period required by Gomersall as the condition precedent to their marriage.

On June 10th Mrs. Long was taken to the hospital, where the

operation referred to in the letter was performed, and she left the hospital on June 21st, fully recovered from the operation and its effects.

It further appears that the paper in question, written by her on June 8th, was retained by her at her apartment in Covington, and delivered by her to Gomersall on June 24th, just a few days after her return from the hospital.

When this paper was delivered to him no persons were present except Mrs. Long and Gomersall; and, as he was the only witness who could or did testify as to what occurred on that occasion, we will look to his evidence for an account of what was said and done:

Q. What, if any, statement, did she make at the time of the delivery of that paper to you?

A. She gave me this paper to read; I read it, and handed it back to her. She said, "This is my will; you keep it," which I did. . . .

Q. Look at the entire paper, including the signature; will ask you in whose handwriting the entire paper, including the signature, is?

A. In the handwriting of Mrs. Mary S. Long.

Q. In whose handwriting is the envelop?

A. Mrs. Mary S. Long. . . .

Q. Mr. Gomersall, where were you when Mrs. Long gave you that paper?

A. I was leaving her home.

Q. How happened Mrs. Long to give you that paper?

A. We were discussing her return from the hospital; I had remarked how happy I was to have her back again. She commented on that, said, "To show you what I have done for you, I want you to read this." She left and went in the other room, and came back with that paper.

Q. How long before this was it that she went to the hospital?

A. On June 10th; returned about June 21st.

Q. Gave you this paper about June 24th?

A. Yes, sir.

Q. She returned cured, did she?

A. Yes, sir.

Q. Was that letter in the envelop when she brought it from her bedroom?

A. She opened the envelop and took out the letter and handed it to me to read.

Q. You mean she broke the seal of the envelop?

A. She did; yes, sir.

Q. Now, I would like you to give her exact words when she gave you that paper?

A. After our conversation closed about her coming from the hospital, she says, "I will show you what I did for you." She went to the other room, and came back and handed me the letter opened. I read it. I then handed it back to her. I told her I was much beside myself when I read of that. I said that was very sweet and lovely. I handed it back to her. She says: "No; that's my will; I want you to keep it; it may prove valuable to you later on."

Q. Now, Mr. Gomersall, did you ever deliver that letter to Mrs. Shinkle?

A. I did not.

Q. What did you do with it?

A. Took it home, and placed it among my effects.

Q. Did you ever tell Mrs. Shinkle that you had the letter?

A. I never had met Mrs. Shinkle; never knew her.

Coming now to the law of the case, we find that many opinions on the subject of contingent wills have been written, but we will only refer to what we conceive to be the leading cases on both sides of the question.

Taking up first the cases relied on by counsel for Gomersall, the earliest Kentucky case is *Massie v. Griffin*, 2 Met. 364. In that case, Massie, a resident of Anderson county, Kentucky, made a visit to the state of Missouri in August, 1850, and while there he wrote and delivered to one Allen the following paper: "It is my wish that all the notes and accounts found among my papers (vs.) my brothers, should be destroyed or

handed over to them. Should I never return. I also desire that each of them should have \$200 in addition, and the remainder of my property divided equally between the heirs of Thomas and John M. Massie, at their respective ages of eighteen—should it be deemed judicious to do so." The remainder of the paper is the expression of two wishes: First, that a Mr. Bright should have every indulgence on the amount due for a farm; second, that Mr. J. B. Allen and Dr. Wm. H. Lee would attend to his affairs. After this he returned to his Kentucky residence, and in 1853 went to Missouri again for a short visit, and again returned to Kentucky, going back to Missouri in 1855, and died in Kentucky as he was returning home from this trip. After his death this paper, which was found among his papers, was offered for probate in the Anderson county court, and its probate resisted upon the ground that it was a contingent will, executed for a temporary purpose, and was to become a permanent disposition of his estate only on the contingency that Massie never returned to his home in Kentucky after the paper was written. It will be observed that the words "should I never return," which are the only expressions tending to establish the contingent character of the paper, are to be found about the middle of it, and following the disposition the testator wished should be made of certain notes and accounts he held against his brothers; that in a subsequent paragraph of the will he disposed of other parts of his estate, and the court ruled it was not a contingent will because the only words it contained indicating its contingent nature were not applicable to the whole writing, but only to a part of it.

That it was held not to be contingent for this reason only is made plain by what is said in the case of *Maxwell v. Maxwell*, 3 Met. (Ky.) 101. The Maxwell opinion was written by the same judge who wrote the Massie opinion, and shortly afterwards, and both cases were con-

sidered by a court composed of the same members. In the Maxwell Case the court, in speaking of the Massie Case, said: "The writing in this case is unlike that which was established as the will of Massie, in the case of Massie v. Griffin, decided at the summer term, 1859, of this court. . . . In that case it was decided that the condition was limited to a single provision of the will, and was not applicable to the entire writing, and it was not, therefore, a contingent will. But here that portion of the writing, claimed to be a testamentary instrument, is made in such terms as to render it totally dependent on a contingency, whether it shall ever become a will. The contingency applies to the entire disposition. The two cases are, therefore, not analogous."

It is therefore apparent that the Massie Case is not entitled to any weight in the disposition of the case we have, as here the contingency applies to the entire letter and everything that was said in it.

Another case relied on is Likefield v. Likefield, 82 Ky. 589, 56 Am. Rep. 908. In that case, Likefield, in January, 1859, wrote the following paper:

If any accident should happen to me that I die from home, my wife, Julia A. Likefield, shall have everything I possess, the house and lots and the money that is due to me, and for her to hold it as her own.

Wm. A. Likefield.

He died at his home in March, 1881, leaving surviving his wife. The probate of this paper, which was found in his possession after his death, was contested upon the ground that it was a contingent will, intended only to be effective in the event the testator should die away from home. But the court, in holding it not to be a contingent instrument, said: "The rule is that courts will not incline to regard a will as conditional if it can be reasonably held that the maker was simply expressing his inducement to make it, however inaccurate the language

may be for that purpose, if strictly construed; and, unless the words clearly show that it was intended to be temporary or contingent, it will be upheld. In this instance, if the testator, by the words he used, referred to the possibility of his accidentally dying from home as a reason for making the will, then it must be maintained; but if he intended by them to show that he was then making only a temporary or conditional disposition of his property, it must fail, because the event named never happened."

In pointing out the distinction between this case and other cases referred to in the opinion holding that wills written to meet a particular condition were contingent wills, the court said:

"It will be noticed in all the above cases, and in others not now at hand where the will has been held to be conditional, that a specific contingency is named, and is either confined to a time certain or a particular event.

"In this respect they are clearly distinguishable from the case now presented. The will in this instance fixes no limit or time, as during a particular journey, or for a particular length of time. No specific time or particular event is named. It refers to no particular expected calamity, and the words are general in their character; and this fact leads to the conclusion that the testator, who was evidently not an educated man or an adept in writing such instruments, did not intend the disposition of his estate to depend upon whether he died at or away from his home. . . .

"It is shown in this case that the testator carefully preserved the paper in contest; that he examined it the year prior to his death; and, while these facts cannot constitute a statutory republication of it, yet they illustrate the intention of the maker of the instrument, as they tend to show that he believed he had disposed of his property by it; and, while the word 'if' is an apt one to express a condition, yet the language

used is so general in its character that it shows the testator intended it as words of inducement to the making of the will only, and not that the disposition of his property should depend merely upon the place of his death."

It will be noticed that the court was careful to say that no particular event was named as the reason for writing the will; that it referred to no specific expected calamity; and that, in distinguishing it from other cases holding wills to be contingent, the court said that in those cases a specific contingency was named, and the will confined to a time certain or a particular event. That case is therefore clearly distinguishable from this one, and the opinion also makes it plain that it was not the purpose of the court to depart from the rule that a will would be held contingent when it appeared to have been written only to meet a particular event.

Bradford v. Bradford, 4 Ky. L. Rep. 947, is another case in which a will sought by the contestants to be given a contingent effect was held not to be a contingent will. In that case the will read: "Being in the full possession of all my mental faculties, but in feeble health, and about to start upon a long journey, and subject to the common casualties of others, I deem it prudent to provide for the disposition of my property in case I should not return."

Then follows the unconditional disposition of his property. And the court said:

"It is contended that the words, 'in case I should not return,' rendered the instrument contingent, and, as he took the journey and returned without casualty, it is void and inoperative as a testamentary paper. Those words do not constitute a condition upon which the will is dependent.

"In connection with the other words quoted, they simply set forth the circumstances which induced him to make his will before his departure, for fear he might never return. The supposed condition is alone con-

nected with the motive and reasons for the prudence he deemed it his duty to exercise, and it is evident he did not intend to say, 'In the event I do not return, then I make the following disposition of my property, or wish it disposed of in a particular mode,' but that he had doubts of his return, which arose from his physical condition, the long journey he was about to take, and the casualties which so often occur to travelers, and for these reasons he absolutely disposed of the whole of his estate without any conditions whatever."

In that case it will be observed that no particular event or specific contingency was assigned as a reason for making the will. The reasons why it was written are general in their nature, and such as are often found in statements at the beginning of wills, setting forth why the testator deemed it prudent to make a disposition of his estate. Lacking as this will was in the distinguishing features generally regarded as essential to constitute a contingent will, it is not authority against the construction we will give to the will now before us.

Forquer's Estate, 216 Pa. 331, 66 Atl. 92, 8 Ann. Cas. 1146, is another case in which a will was held not to be contingent. The will there in question was written by Forquer, in November, 1882, at his home in Butler, Pennsylvania. It read: "I intend starting to-morrow morning to Bozeman, Montana, to see my brother Joseph. Knowing the uncertainty and risk of the journey, know all persons that I do hereby will and bequeath all my personal property to my wife, Martha M. Forquer. And I do hereby devise my real estate to said Martha M. Forquer. . . . And should anything befall me while away, or that I should die, then in that event all my estate, money, notes, property of every nature and description, both real and personal, are hereby assigned, conveyed, and set over to my wife for her sole benefit."

It further appears from the opinion that Forquer, after writing the

will, delivered it to his wife, who retained it until his death. After his death the paper was offered for probate, and its probate contested on the ground that it was a contingent will, intended only to be operative if Forquer died away from home on the trip he was about to take. In holding that the will was not contingent the court said: "In the case before us the language expressive of the contingency is, 'and should anything befall me while away, or that I should die,' etc. The expression, 'should anything befall me while away,' standing alone, is clearly contingent. It evidently refers to the possible death of the testator while away, as no other event could befall him which would give effect to the disposition of his estate which he was then making. The testator would have expressed the same thought had he said, 'and should death overtake me while away.' It clearly refers to his possible death while on his journey. We may well suppose that the testator, by the disjunctive expression which follows, 'or that I should die,' meant to add something to what he had already said. He had already provided for the contingency of death while on the journey. We may assume that he meant to add something by the use of the language which followed, and, if so, that he meant to make provision against the event of his death whenever it might occur. By the use of the disjunctive 'or,' the provision which follows excludes the thought that immediately preceded, and has, we think, the same force and meaning as if it stood alone. To give it the meaning contended for by the appellants, we would have to interpolate the qualifying expression, 'while away,' used in the preceding clause. But what warrant have we for doing this in order to give to the instrument a contingent character, which, if it exist, must clearly arise out of the writing as it stands? In other words, we conclude: (1) That it does not clearly appear from the will itself that its operation was intended

to be contingent; and (2) that it can, by reasonable interpretation of its language, be construed to be absolute rather than contingent, and in either event, under the authorities, it is entitled to probate."

This case merely follows the general rule that where the reasons assigned for writing the will are general in their nature, and it does not clearly appear that it was intended to be operative only during a certain period or until a particular emergency had passed, it will be a permanent and not a contingent will. In this controlling feature it is easily distinguishable from the paper before us in this case.

Another case strongly relied on by the propounders is *Eaton v. Brown*, 193 U. S. 411, 48 L. ed. 730, 24 Sup. Ct. Rep. 487. In that case, the will which was held not to be contingent, read:

I am going on a Journey and may not ever return. And if I do not, this is my last request. The Mortgage on the King House, wick is in the possession of Mr. H. H. Brown to go to the Methodist Church at Bloomingburgh. All the rest of my properday both real and personal to My adopted Son L. B. Eaton of the Life Saving Service, Treasury Department, Washington, D. C. All I have is my one hard earnings and I propose to leave it to whome I please.
Caroline Holley.

The writer returned safely from her journey and died about six months afterwards. In the course of the opinion the court, after saying, "Courts do not incline to regard a will as conditional where it can be reasonably held that the testator was merely expressing his inducement to make it, however inaccurate his use of language might be, if strictly construed," proceeded to analyze the will and the circumstances surrounding the testator at the time it was written, and then said: "If her failure to return from the journey had been the condition of her bounty, an hypothesis which is to the last degree improbable in the ab-

sence of explanation, it is not to be believed that when she came to explain her will she would not have explained it with reference to the extraordinary contingency upon which she made it depend, instead of going on to give a reason which, on the face of it, has reference to an unconditional gift."

This case is but one among many illustrating the narrow line that separates contingent and permanent wills, thus often making it difficult for courts to determine in which class the paper before them should fall, and emphasizes what the court said in this case that "each case must stand so much on its own circumstances and words." It is perhaps the strongest case relied on by counsel for Gomersall, but it may, we think, be distinguished from the one before us upon the ground that in this letter Mrs. Long expressed, as plainly as language could make it, that she was only writing the letter to meet a single emergency immediately at hand, while in the Eaton Case it appears from the will that it was written in anticipation of a journey she was about to take to a distant state, and to provide against death that might happen from any cause while on that journey. In other words, it was written to provide against the general probability of death, and not to provide against a single specific and near-at-hand event that might result in death; and we cannot give it the controlling effect claimed for it by counsel.

Other cases relied on by counsel for Gomersall are: *Kelleher v. Kernan*, 60 Md. 440; *Skipwith v. Cabell*, 19 Gratt. 758; *Redhead v. Redhead*, 83 Miss. 141, 35 So. 761; *French v. French*, 14 W. Va. 458; *Cody v. Conly*, 27 Gratt. 313. But as the ones we have quoted from fully illustrate the trend of the cases supporting the view insisted on by counsel, we need not extend this opinion with excerpts from these.

On the other side of this question the leading Kentucky case is *Maxwell v. Maxwell*, 3 Met. (Ky.) 101. In that case Maxwell, a resident of

Kentucky, was on his way home from a trip to the South, when the steamboat on which he was a passenger was lost in the Mississippi river. Maxwell, having escaped this danger, made his way to Memphis, Tennessee, and while there wrote his wife in January, 1857, this letter: "The ice is still running very bad in the river. I can't say when I will be able to get off from here, but I hope soon, as the weather seems to be moderating. The river is very low, navigation is very dangerous—so much so, I feel that I should protect you in any emergency. I would not have had you with me for the world. If I never get back home, I leave you everything I have in the world. The property I got by my first wife, I wish you to return everything to her father."

The letter in due course of mail was received by his wife, and shortly afterwards Maxwell returned to his home in Kentucky, and lived there until his death in 1858. After his death the letter was offered by his widow for probate, and contested upon the ground that it was a contingent will, intended only to be effective if Maxwell never reached home. The court in the course of the opinion, holding that the paper was a contingent will, said:

"Obviously the first duty of the court is to ascertain the real nature of the writing which is offered as the will. Is it an absolute and unconditional disposition of the estate of the writer, or is it what is commonly denominated a contingent will; or, to speak with more exact propriety, is it such a writing as may or may not eventually take place as a will, dependent upon the happening or not happening of a certain event?"

"The question is, Did Maxwell, when he wrote the letter to his wife, intend to, and did he actually, make and publish that as his will at all events, or did he make the fact of its becoming his will depend upon the event of his getting back home?"

"The question recurs. What is the true nature, and what the proper

construction, of the paper now before the court? The words of testamentary disposition are, 'If I never get back home, I leave you everything I have in the world.' Considering the words alone, it seems to us that they are words of as positive and express condition as can be. It is not perceived how a condition could be more plainly expressed.

. . . He had just barely escaped with his life from a condition of intense suffering and imminent peril, as we learn from the account which forms the staple of his letter to his wife. A large part of his journey was still before him. He expected soon to be again upon the Mississippi river, although he did not know when he would be able to leave Memphis. The ice was running badly. The river was very low, and navigation very dangerous—so much so that he felt he should protect his wife in any emergency. To what emergency or emergencies did he refer? What dangers were then in his contemplation? Undoubtedly the emergencies and dangers which he regarded as incident to the journey in which he was then engaged. He did not, at the moment, look beyond that. He did not then think of emergencies or dangers through which he might be called to pass after that journey should be complete. The word 'any'—the qualifying word of emergency—was not intended to include all the emergencies of life, but those emergencies only which might possibly arise before he should get back home. Evidently he thought if he returned to his home he could protect and provide for his wife as he should then think proper; but in the event that he should not get back, then he chose to protect her in the manner provided for in the letter.

"It seems to us that the conclusion is inevitable that Maxwell did not intend the writing before us to be his will, except in the event of his never getting back home. Whether it was eventually to take place as his will, or not, was made by him, in his own words, to depend upon the happening, or not happen-

ing, of that particular event. Here was a contingency—a condition. The only question remaining is, Did it happen? It did not. The result is that the paper never was the will of Maxwell."

Another case is *Dougherty v. Dougherty*, 4 Met. (Ky.) 25. In that case *Dougherty*, in 1857, wrote with his own hand the following will: "In the name of God, amen. I, James Dougherty, of the county of Franklin, and state of Kentucky, hath this day made this my last will and testament, as I intend starting in a few days to the state of Missouri, and should anything happen that I should not return alive, my wish is that all of my land and negroes, and all I leave behind me, after paying my just debts, be kept in the hands of the bishop of the diocese of Scott county, as trustee."

He made the contemplated trip to Missouri, returned home, and died in 1861. The court, in holding that it was a contingent will, said:

"In our judgment, the foregoing language used by the decedent in the outset of the paper, being unmodified and unrestricted by other words or expressions in the subsequent or remaining portions of the instrument, brings it directly within that class of instruments denominated 'contingent' wills, and intended to take effect upon the happening or not happening of a certain event.

"The words in relation to the trip to Missouri contain two ideas; the one a reason for making a will, and the other the conditions upon which the paper is to take effect as a will. The expression, 'as I intend starting in a few days to the state of Missouri,' refers to the contemplated trip as the reason for the making the will; and the remainder of the language, 'and should anything happen that I should not return alive, my wish is,' etc., makes, in unequivocal terms, a contingency or condition upon which the paper was to operate as his will."

In both of these cases the court held the papers offered to be con-

tingent wills, but in neither of them do the letters indicate so clearly as in the case we have the contingent nature of the instrument.

Other illustrative cases in which the papers offered were held to be contingent wills are: *Morrow's Appeal*, 116 Pa. 440, 2 Am. St. Rep. 616, 9 Atl. 660; *Dougherty v. Holscheider*, 40 Tex. Civ. App. 31, 88 S. W. 1113; *Magee v. McNeil*, 41 Miss. 17, 90 Am. Dec. 354; *Hamilton's Estate*, 74 Pa. 69.

In addition to the cases referred to in the opinion, we have examined many others, and find that there is no lack of harmony in the cases as to what constitutes a contingent will, and that the different conclusions reached by courts in this class of cases are due to the dissimilar circumstances surrounding the testators at the time the instruments considered were written, and the various manners in which they are worded, rather than to any conflict of opinion as to the requisites of a contingent will.

It may also, as we think, be fairly gathered from all the authorities that, if the will is so phrased as to clearly show that it was intended to take effect only upon the happening of the particular event set forth in

the paper as the reason for writing it, or, putting it in other words, if it was written only to make provision against a death that might occur on account of or as a result of the specific thing assigned as a reason for writing the will, it will be a contingent will; but if the causes assigned for writing it are merely a general statement of the reasons or a narrative of conditions that induced the testator to make his will, it will not be a contingent will, although it may set forth probable or anticipated dangers or conditions that induced the testator to write it.

It will be seen from this description of the two classes of wills that the distinction between them is so narrow that it is often difficult to decide in which class the paper in ques-

tion should fall, and in some cases this has influenced courts to attach importance to the relation the beneficiary bore to the testator, and to lean towards that construction most favorable to the natural objects of his bounty.

It is also quite generally held that if there is reasonable doubt as to whether the will was intended to be ^{-rule of construction.} contingent or permanent, the doubt will be resolved in favor of its permanency, or, in other words, a paper will not be treated as a contingent disposition of the testator's estate, unless it clearly appears from the paper itself that it was so intended to be, and the intention of the testator is to be gathered from the paper itself; but it is always admissible, in arriving at his intention, for the court to have the aid, by extrinsic evidence, of the circumstances, situation, and surroundings of the testator at the time the paper was written.

Looking now again to the paper in the light of the authorities referred to and the principles announced, by which we are to be guided in ascertaining the class in which it should be put, we are convinced by the paper itself, without the aid of extrinsic evidence, that if a person not versed in the law of wills can write a contingent will, Mrs. Long intended, ^{-contingent on death in operation.} in writing this letter, that it should

have no effect if she survived the operation she was about to submit to, and was only written to provide against the fatality that might follow it.

We are influenced to reach this conclusion by the fact that this letter contains every requisite that would make it only a disposition of her estate contingent upon her death as a result of the operation she was about to undergo. It will be observed that in the first two sentences of the letter she refers to the anticipated operation, and then says, "If anything should happen to me," as the result of this operation, "see

that everything I have in the world goes to George B. Gomersall." It seems plain from this that the only thought she had in mind in writing this letter was to give her estate to Gomersall in the event, and only in the event, she died from the effects of the operation. She did not intend, when this paper was written, that it should be a permanent disposition of her property, or that it should be her last will, no matter when or where she died, or from what cause, but only that it should be her last will in the event she died in St. Elizabeth's Hospital as a result of the operation. Fear of the fatal result that might follow the operation was the moving cause, and the only cause, that influenced her to write it, and it was only this probable calamity that she wanted to provide her. It was a temporary disposition, intended to meet a present emergency, and when the emergency it was intended to provide against passed, the paper ceased to have any force or effect. This letter is not susceptible of any other construction.

If she had said in the letter, "I only intend this disposition of my estate to be effective in the event I do not survive the operation I am about to submit to," it would not manifest her purpose in writing it more clearly than the words she employed.

That she was deeply attached to Gomersall at the time this letter was written, the expressions of affection for him that it contains leaves no room for doubt; nor is it to be questioned that, if she died as the result of the operation, she intended that Gomersall should have her estate. But this expressed intention of the disposition which she desired to make of her estate in the presence of the impending operation cannot be extended by any reasonable construction into an expression of her intention that Gomersall should be the beneficiary in the event she survived this operation. There are no words in the letter from which it can be fairly inferred that it was intended to be more than a contingent will, to be-

come effective only upon the happening of the event to provide against which it was written. Nor is there anything in the paper to leave the impression that her reference to the operation was merely a statement of reasons or narrative of conditions, such as are commonly found in wills, as matter of inducement tending to show why they were written. On the contrary, the entire paper shows that Mrs. Long had in mind only one reason for writing the letter, and that was the fear that the operation might prove fatal.

There is, too, another feature of this letter that shows in a very conclusive way, as we think, that it was written only to meet and carry her desires beyond the emergency she was about to face, and that if she passed safely through the ordeal, the service the letter was intended to perform was finished.

It will be observed that this paper does not contain, as wills usually do, a direct devise or gift of property to Gomersall, but is a request or direction to her Aunt Mintie to see that Gomersall got all her property, in the event she died as the result of the operation. If she survived the operation it is clear that the request or direction to her Aunt Mintie could have no force or effect whatever, as it was only to be effective in the event she died under the operation.

The correctness of this being, as we think, beyond dispute, it would seem to necessarily follow that, when Mrs. Long recovered from the operation, the wish expressed that Gomersall should have her estate also became inoperative, because the direction to her aunt and the devise to Gomersall are so coupled together that when one failed or became inoperative, so did the other.

It would thus appear that the effectiveness of the direction to her aunt and the devise to Gomersall were each equally and alike dependent on the contingency that she should not survive the operation, and when she did, both became at once and by virtue of her survival inoperative and void.

The remaining question in the case is the competency and sufficiency of the acts and declarations of Mrs. Long, at the time she delivered the letter to Gomersall, to convert into a permanent will what was intended to be, and was when written, a contingent will.

Upon this feature of the case there is no disagreement in the authorities, and a few cases will be sufficient to illustrate the views of the courts that have considered it.

In the Maxwell Case before referred to, as in this, it was insisted that the declarations of Maxwell, after his return home, that the letter written to his wife was his will, were sufficient to make it his last will, although it was not so intended to be when written; but the court, in rejecting the admissibility of this evidence for the purpose intended, said: "It was stated by some of the witnesses that he said he still had that will, that it was his will, and he intended to keep it, and that his relations never should have any of his estate. It is not to be doubted that these conversations, or statements, referred to the letter of the 25th of January, 1857, written from Memphis to his wife, now propounded as his will. It is well established that the letter and signature are wholly in the handwriting of Maxwell. Now, are these parol declarations, proved as they are altogether by parol evidence, sufficient to make an instrument a last will and testament, which otherwise never was and never could have been a will?"

The court then referred to the statute providing how wills may be executed and revoked, which are the same as §§ 4828 and 4834 of the present Kentucky Statutes. Then, in answer to the argument that, as the will was wholly in the handwriting of the testator, the declarations that it was his will were sufficient to revive it without going through the form of rewriting it, said: "When the paper is produced, it is seen that it is never to be a will, except upon the happening of a contingency therein plainly expressed. The con-

tingency is the peculiar and distinguishing feature of the paper. It is in writing. And now the effort is to change or destroy that by the parol declarations of Maxwell, proved by parol evidence. To allow this would be strikingly within all the mischiefs which we know the statute was intended to guard against. We do not suppose it will be contended by anyone that Maxwell at any time, when speaking of this paper now said to be a will, intended to re-execute it, or believed that he was re-executing it. Certainly no act of his was done, or word said, with the intent or purpose, at the time, of re-executing the will. How, then, can it be said that he did re-execute it?"

To the same effect is the Dougherty Case above quoted.

In the Forquer Case, 216 Pa. 331, 66 Atl. 92, 8 Ann. Cas. 1146, Forquer, after his return from the trip in contemplation of which he wrote his will and gave it to his wife, on more than one occasion declared it to be his will, and committed it to the custody of his wife until such time as it would be necessary to probate it. The question was whether this extrinsic evidence was admissible to establish the paper as his last will, in opposition to the effort to show that it was merely a contingent will, and the court, in holding the evidence inadmissible, said: "But we have not been referred to any authority which holds that the character of a will, as being contingent or otherwise, may be determined, or any doubt thereof solved, by the introduction of extrinsic circumstances such as those referred to. The court in a proper case may be aided by evidence of the circumstances surrounding testator at the time of making his will, so as to put itself as nearly as possible in his place at the time the will was executed, but even this cannot be permitted to affect the construction when the language is clear and unambiguous. To be governed or even aided by the subsequent declarations of a testator, in determining his intentions as already written in his will, would be a precedent at-

tended with much danger, tending to inject into the will an intent possibly not written therein, and thus to depart from the strictness of the rule which requires wills to be in writing. The meaning of the language of the will might thus be made to depend, in some degree, not on the intention of the testator at the time the will was executed, but on what he afterward said about it, under circumstances in which no testamentary import should be predicated of his words. All the evidence therefore, in the case at bar, of the subsequent declarations of the testator to the effect that he had made a will and given his property to his wife, and which was received under objection, is excluded, and the objections thereto sustained."

The rule declared in these opinions and other like ones must be correct, or else there could not be such an instrument known to the law as a contingent will, as distinguished from a permanent or last will, because the sole and only reason for assigning a place in the law of wills to contingent wills is that they become worthless and ineffective for all testamentary purposes unless the contingency happened that they were intended to provide for.

When the emergency they were written to meet has been safely passed, this condition works of itself the revocation of a contingent will, as effectively as if the testator had destroyed it or written across its face with his own hand, "This will is hereby revoked," and signed the revocation himself.

It is true that the statute, in § 4833, provides that a will shall not be revoked unless "by a subsequent will or codicil, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is required to be executed, or by the testator, or some person in his presence, and by his direction, cutting, tearing, burning, obliterating, canceling, or destroying the same, or the signature thereto, with the intent to revoke." But

this statute was only intended to point out the manner in which a valid subsisting will might be revoked, and can have no application to a paper, like the one here in question, that ceased by its own terms to have any existence as a will immediately upon the recovery of the testator from the operation; although we do not mean to say that the statute would not apply to a contingent will before the happening of the contingency; that question is not here.

Our statute, in § 4828, also provides that "no will shall be valid unless it is in writing with the name of the testator subscribed thereto by himself, or by some other person in his presence and by his direction; and, moreover, if not wholly written by the testator, the subscription shall be made or the will acknowledged by him in the presence of at least two credible witnesses, who shall subscribe the will with their names in the presence of the testator."

And, in § 4834, that "no will or codicil or any part thereof, which shall be in any manner revoked, shall, after being revoked, be revived, otherwise than by re-execution thereof, or by a codicil executed in the manner hereinbefore required; and then only to the extent to which an intention to revive the same is shown thereby."

In *Stewart v. Mulholland*, 88 Ky. 38, 21 Am. St. Rep. 320, 10 S. W. 125, in construing these statutes, the court said "that a will once revoked can only be revived by a re-execution of the instrument in the manner pointed out by the statute. It is in fact the making of another will, and must be executed in the same manner in which the original will was required to be executed."

Whether the statute providing how a revoked will may be revived should have any application to a contingent will that had become revoked by its own terms it is not necessary to determine, because it is plain that, when from any cause a paper has ceased to have existence as a will, there must be a new will executed to

—revocation—
parol revival.

take its place, or the person will die intestate.

It therefore follows that, the paper here in question having been revoked for the reasons and at the time heretofore stated, the testamentary disposition therein named could not thereafter be revived except by the execution of a new will in the manner provided in § 4828 of the statute.

Not being intended to be, when written, the last will of the testator unless she died as a result of the

operation, she could not make it so by the mere act of delivering it to Gomersall, or by her declarations that it was her last will.

It follows from what we have said that the Circuit Court did not err in holding that the paper offered by Gomersall was not the last will of Mrs. Long.

Wherefore the judgment rejecting it is affirmed.

Petition for rehearing denied December 12, 1919.

ANNOTATION.

When will deemed contingent.

- I. Generally, 846.
- II. Reference to occasion or peril held to make will contingent:
 - a. Death on journey, 848.
 - b. Death on voyage, 850.
 - c. Death in military service, 851.
 - d. Death from sickness or operation, 851.
 - e. Death away from home, 852.
 - f. Death before particular time, 852.

I. Generally.

A contingent will is a will dependent on a specified contingent event, the happening of which is a condition precedent to the operation of the will. *Tarver v. Tarver* (1835) 9 Pet. (U. S.) 174, 9 L. ed. 91; *Damon v. Damon* (1864) 8 Allen (Mass.) 192. It may be stated generally that whether a will referring to the possibility of the death of the testator under certain circumstances is to be deemed contingent on his death under those circumstances depends on whether the peril in question is referred to as the occasion or inducement for making the will, or whether it is made a condition on the happening of which the will is to become operative. If the possibility of death in the manner referred to is the occasion for making the will, it is held that the will is not contingent.

United States. — *Tarver v. Tarver* (1835) 9 Pet. 174, 9 L. ed. 91; *Eaton v. Brown* (1904) 193 U. S. 411, 48 L. ed. 730, 24 Sup. Ct. Rep. 487, reversing (1902) 20 App. D. C. 453.

- III. Reference to occasion or peril held not to make will contingent:
 - a. Death on journey, 853.
 - b. Death on voyage, 856.
 - c. Death in military service, 857.
 - d. Death away from home, 857.
 - e. Sudden or unexpected death, 858.
 - f. Death before particular time, 858.

Indiana. — *Murphey v. Brown* (1901) 159 Ind. 106, 62 N. E. 275.

Iowa. — *RE TINSLEY* (reported here with) ante, 826.

Kentucky. — *Massie v. Griffin* (1859) 2 Met. 364; *Bradford v. Bradford* (1883) 4 Ky. L. Rep. 947; *Likefield v. Likefield* (1835) 32 Ky. 589, 56 Am. Rep. 908.

Maryland. — *Kelleher v. Kernan* (1883) 60 Md. 440.

Mississippi. — *Redhead v. Redhead* (1903) 83 Miss. 141, 35 So. 761.

New York. — *Ex parte Lindsay* (1852) 2 Bradf. 204; *Thompson v. Connor* (1855) 3 Bradf. 366.

Pennsylvania. — *Forquer's Estate* (1907) 216 Pa. 331, 66 Atl. 92, 8 Ann. Cas. 1146.

Virginia. — *Skipwith v. Cabell* (1870) 19 Gratt. 758; *Cody v. Conly* (1876) 27 Gratt. 313.

West Virginia. — *French v. French* (1877) 14 W. Va. 458.

England. — *Winter v. Pawle* (1918) 34 Times L. R. 437; *Vines v. Vines*, L. R. [1910] P. 147, 79 L. J. Prob. N. S. 25, 102 L. T. N. S. 141, 54 Sol. Jo.

272, 26 Times L. R. 257; Halford v. Halford, L. R. [1897] P. 36, 66 L. J. Prob. N. S. 29, 75 L. T. N. S. 520; Spratt's Goods, L. R. [1897] P. 28, 66 L. J. Prob. N. S. 25, 75 L. T. N. S. 518, 45 Week. Rep. 159; Mayd's Goods (1880) L. R. 6 Prob. Div. 17, 50 L. J. Prob. N. S. 7, 29 Week. Rep. 214, 45 J. P. 8; Martin's Goods (1867) L. R. 1 Prob. & Div. 380, 36 L. J. Prob. N. S. 116, 17 L. T. N. S. 32; Dobson's Goods (1866) L. R. 1 Prob. & Div. 88, 35 L. J. Prob. N. S. 54, 13 L. T. N. S. 759, 14 Week. Rep. 408; Thorne's Goods (1865) 4 Swabey & T. 36, 34 L. J. Prob. N. S. 131, 11 Jur. N. S. 569, 12 L. T. N. S. 639; Stuart's Goods (1888) Ir. L. R. 21 Eq. 105.

But if death under the circumstances referred to is a condition on the happening of which the will is to become operative, the will is contingent on that event, and is void unless the contingency is fulfilled.

California.—White's Estate (1878) Myrick, Prob. Ct. Rep. 157; Re Cook (1916) 173 Cal. 465, 160 Pac. 553.

Georgia.—Oetjen v. Diemmer (1902) 115 Ga. 1005, 42 S. E. 388.

Kentucky.—Maxwell v. Maxwell (1860) 3 Met. 101; Dougherty v. Dougherty (1862) 4 Met. 25; Lee v. Kirby (1920) 186 Ky. 603, 217 S. W. 895.

Maryland.—Wagner v. M'Donald (1806) 2 Harr. & J. 346.

Massachusetts.—Damon v. Damon (1864) 8 Allen, 192.

Mississippi.—Magee v. McNeil (1866) 41 Miss. 17, 90 Am. Dec. 354; Davis v. Davis (1914) 107 Miss. 245, 65 So. 241.

Missouri.—Robnett v. Ashlock (1872) 49 Mo. 171.

New Jersey.—Cowley v. Knapp (1880) 42 N. J. L. 297.

New York.—Re Bittner (1918) 104 Misc. 112, 171 N. Y. Supp. 366.

Ohio.—Underwood v. Rutan (1920) — Ohio St. —, 128 N. E. 78.

Pennsylvania.—Re Todd (1841) 2 Watts & S. 145; Hamilton's Estate (1873) 74 Pa. 69; Morrow's Appeal (1887) 116 Pa. 440, 2 Am. St. Rep. 616, 9 Atl. 660; Jeffries's Estate (1901) 18 Pa. Super. Ct. 439.

South Carolina.—Jacks v. Hender-

son (1797) 1 S. C. Eq. (1 Desauss.) 543.

Texas.—Vickery v. Hobbs (1858) 21 Tex. 570, 73 Am. Dec. 238; Phelps v. Ashton (1867) 30 Tex. 344; Dougherty v. Holscheider (1905) 40 Tex. Civ. App. 31, 38 S. W. 1113.

England.—Hugo's Goods (1877) L. R. 2 Prob. Div. 73, 46 L. J. Prob. N. S. 21, 36 L. T. N. S. 518, 25 Week. Rep. 396; Lindsay v. Lindsay (1872) L. R. 2 Prob. & Div. 459, 42 L. J. Prob. N. S. 32, 27 L. T. N. S. 322; Robinson's Goods (1870) L. R. 2 Prob. & Div. 171, 40 L. J. Prob. N. S. 16, 23 L. T. N. S. 397, 19 Week. Rep. 135; Porter's Goods (1869) L. R. 2 Prob. & Div. 22, 39 L. J. Prob. N. S. 12, 21 L. T. N. S. 680, 18 Week. Rep. 231; Smith's Goods (1869) L. R. 1 Prob. & Div. 717, 38 L. J. Prob. N. S. 85, 21 L. T. N. S. 340, 17 Week. Rep. 1110; Roberts v. Roberts (1862) 2 Swabey & T. 337, 31 L. J. Prob. N. S. 46, 8 Jur. N. S. 220, 5 L. T. N. S. 689; Winn's Goods (1861) 2 Swabey & T. 147, 7 Jur. N. S. 764, 4 L. T. N. S. 655, 9 Week. Rep. 852; Sinclair v. Hone (1802) 6 Ves. Jr. 607, 31 Eng. Reprint, 1219; Parsons v. Lanoe (1748) 2 Ambl. 557, 1 Ves. Sr. 189, 27 Eng. Reprint, 358, 974, 1 Wils. 243, 95 Eng. Reprint, 597; Newton's Goods (1873) 42 L. J. Prob. N. S. 58, 28 L. T. N. S. 677, 21 Week. Rep. 648.

"If the will is clearly expressed to take effect only on the happening or not happening of any event, *cadit questio* it is conditional. If the testator says, in effect, that he is led to make his will by reason of the uncertainty of life in general, or for some special reason, *cadit questio* it is not conditional. But if it be not clear whether the words used import a reason for making a will or impress a conditional character upon it, the whole language of the document, and also the surrounding circumstances, must be considered." Spratt's Goods, L. R. [1897] P. (Eng.) 28.

"If the language used by him [testator] can by any reasonable interpretation be construed to mean that he refers to the calamity, and the period of time during which it may happen, as the reason for making a will,

then the will is not conditional; but if he refers to the calamity or the possible occurrence of some event as a reason for a certain disposition of his property, and mixes up the disposition of the property with the event so that one is dependent on the other, then the court must hold the will to be conditional." *Porter's Goods* (1869) L. R. 2 Prob. & Div. (Eng.) 22.

II. Reference to occasion or peril held to make will contingent.

a. Death on journey.

The will involved in *Dougherty v. Dougherty* (1862) 4 Met. (Ky.) 25, read, in part, as follows: "I, James Dougherty, of the county of Franklin and state of Kentucky, hath this day made this my last will and testament, as I intend starting in a few days to the state of Missouri, and should anything happen that I should not return alive, my wish is that all of my land and negroes, and all I leave behind me, after paying my just debts, be kept in the hands of the bishop of the diocese of Scott county, as trustee," etc. The testator made the contemplated trip to Missouri, returned home, and died later. The court held that the will was contingent, saying: "The words in relation to the trip to Missouri contain two ideas: the one a reason for making a will, and the other the condition upon which the paper is to take effect as a will. The expression, 'as I intend starting in a few days to the state of Missouri,' refers to the contemplated trip as the reason for making the will; and the remainder of the language, 'and should anything happen that I should not return alive, my wish is,' etc., makes, in unequivocal terms, a contingency or condition upon which the paper was to operate as his will."

In *Robnett v. Ashlock* (1872) 49 Mo. 171, the testator prefaced his will by the following words: "I this day start to Kentucky; I may never get back, if it should be my misfortune, I give my property to my sisters' children," etc. The court held that the words referred to imported a condition on the fulfilment of which the will was to become operative, and that

when the testator returned alive from Kentucky the will was void and inoperative, saying: "The paper under consideration is awkwardly drawn, but its purport seems to be clear. Had the language been, 'I this day start for Kentucky; I may never come back; I therefore give,' etc., the language would only express the occasion of making the will, and the bequest would be absolute. Or if, after expressing the doubt about his return, he had said, 'Lest I should not return,' or words to that effect, 'I give,' etc., he might in that case be considered as merely expressing his sense of the propriety of making a will, without intending to make the disposition of his property contingent upon his not returning. I take the words after the first phrase to mean, 'If it should be my misfortune never to get back,' or, 'If I die during my absence I give,' etc. It is not easy to attach any other meaning to them, and with that meaning the bequest is made conditional upon his not returning, and could only become operative upon the contingency of his dying before his return."

It appeared in *Cowley v. Knapp* (1880) 42 N. J. L. 297, that a testatrix having made a will devising her entire estate to her husband, in contemplation of a European tour with him, made a later will devising her estate to her sister, "in case of anything happening us." Both the husband and wife died within three days' time, in Paris. The court held that the second will was contingent on the death of both on their travels, and that, as this event had taken place, the will became operative.

The will construed in *Phelps v. Ashton* (1867) 30 Tex. 344, commenced as follows: "Know all men by these presents that I, H. C. Ashton, Sr., being on the eve of leaving home for an indefinite time, and not knowing what Providence may ordain during my absence, do make and will this request in case of my death while absent." The court held that this was a contingent will, and hence inoperative where the testator died at home, or after his return from the proposed absence.

It was shown in *Wagner v. M'Donald* (1806) 2 Harr. & J. (Md.) 346, that a testatrix, intending to leave the state, prefaced her will as follows: "In the name of God, amen. If I should not come to you again, my son Michael Wagner shall pay," etc. She made the trip, returned safely, and died several days later at her home. The court held that the will was contingent.

In *Jeffries's Estate* (1901) 18 Pa. Super. Ct. 439, affirming (1900) 9 Pa. Dist. R. 709, 24 Pa. Co. Ct. 492, the will under consideration contained the following recital: "I, Mary A. Jeffries, of sound mind, am about going on a trip away from home with my nephew, George L. Stewart, do hereby direct that in case of the death of both of us that my estate shall be divided as follows." It concluded with the provision that such was to be her will "in case of the death, as aforesaid, of myself and George L. Stewart." The court held that the instrument was a contingent will, and, as both the testatrix and her nephew returned safely, did not become operative.

So, it appeared in *Morrow's Appeal* (1887) 116 Pa. 440, 2 Am. St. Rep. 616, 9 Atl. 660, that an illiterate farmer, in anticipation of a trip, disposed of his property by a will reading, in part, as follows: "I am going to town with my drill and i aint feeling good and in case if i shouldend get back do as i say on this paper tomy and robert is to pay their last payment," etc. The court held that the words used made the will contingent on his nonreturn, so that where he made the trip and returned safely, but died at home from illness contracted during the journey, it was inoperative and could not be admitted to probate.

It was shown in *Todd's Will* (1841) 2 Watts & S. (Pa.) 145, that the testator, in contemplation of a journey to another state to recuperate in health, made a will reading, in part, as follows: "My wish, desire, and intention now is that if I should not return (which I will, no preventing Providence) what I own shall be divided as follows." The testator returned in

bad health, but able to attend to business, and died about a month later. The court refused probate of the will, holding that it was contingent and not intended to operate in the event of the testator's death at home.

In *Hugo's Goods* (1877) L. R. 2 Prob. Div. (Eng.) 73, 46 L. J. Prob. N. S. 21, 36 L. T. N. S. 518, 25 Week. Rep. 396, it appeared that a man and his wife, contemplating a railroad trip, executed a joint will, disposing of their property "in case we should be called out of this world at one and the same time by one and the same accident." The court held that the will was contingent and did not operate to revoke a will previously made by the decedent, since the testator and his wife made the trip safely, and returned home without accident, where the testator later died.

The will construed in *Roberts v. Roberts* (1862) 2 Swabey & T. (Eng.) 337, 31 L. J. Prob. N. S. 46, 8 Jur. N. S. 220, 5 L. T. N. S. 689, commenced as follows: "I leave in possession two bank notes to my wife should anything happen to me on my passage to Wales or during my stay there I leave all my goods and chattels," etc. The will was held to be contingent, it appearing that the testator returned safely from the proposed trip.

In *Parsons v. Lanoe* (1748) 2 Amb. 557, 27 Eng. Reprint, 358, the will under consideration began thus: "In case I should die before I return from the journey I intend, God willing, shortly to undertake for Ireland, my will and desire is: That my house and lands at Farly hill, and all the furniture and appurtenants thereto belonging, be all sold." Each following clause contained a bequest which referred expressly to this sale and provided for a payment out of it. The testator was childless when the will was made, but returned from Ireland and had several children born to him afterward. The court held that the will was contingent, and was avoided by the testator's return, saying that while the contingency did not expressly make the whole will contingent, yet it made the devise as to the sale contingent, and hence all subsequent dis-

positions made to depend on the sale were connected with the condition.

b. Death on voyage.

It appeared in the case of *Re Bittner* (1918) 104 Misc. 112, 171 N. Y. Supp. 366, that a man, while in Holland with his son, made a will providing that "if any misfortune should happen to me and our boy Herman John on the way of going abroad the Atlantic ocean bound for New York, that if we both should lose our life in this critical time of European War," his wife should be his sole heir. The testator and his son arrived safely in New York, where he later died. The court, in holding the will to be contingent, said: "The will seems plainly to be conditional upon the death of both the decedent and his son. When the whole will is inspired by a possible danger from a definite source, and the gift is made in terms to depend upon a failure to escape such danger, it must be conditional. The cases are irreconcilable, but the best authority and the most abundant is in favor of contingency when the sole gift is made to take effect if the decedent shall die upon an intended voyage. . . . While it is true that the contemplated voyage in times of unusual peril may have been regarded by the testator as the occasion for making a will, it was also plainly shown in the instrument that the gift was to take effect only in the happening of a fatal event. The most persuasive feature of the paper is that the gift is dependent not only upon the death of the decedent during the proposed voyage, but upon the death also of his son."

The will involved in *Oetgen v. Diemer* (1902) 115 Ga. 1005, 42 S. E. 388, made a certain disposition of the testator's property "if my wife and myself should perish at sea in going to or returning from Germany," and another disposition of the property in case the wife survived the testator. Neither the testator nor the wife perishing at sea, the court held that the first-mentioned item was inoperative.

It was shown in the case of *White's Estate* (1878) Myrick, Prob. Ct. Rep.

(Cal.) 157, that one, in contemplation of a voyage to China and Japan, made a will stating, "In case of my death while performing the journey, I desire the following disposition of my estate to be made," etc. The testator returned from the voyage and subsequently died in California. The court held that the will was conditional, and refused probate thereof.

In *Damon v. Damon* (1864) 8 Allen (Mass.) 192, it appeared that a will made in contemplation of a voyage commenced as follows: "I, J. W. Damon of Charlestown, in the county of Middlesex, commonwealth of Massachusetts, being in sound mind and body, and being about to go to Cuba, and knowing the dangers of voyages, do hereby make this as my last will and testament, in manner and form following: First, If by casualty or otherwise I should lose my life during this voyage, I give and bequeath to my wife Ann," etc. In the second and third clauses, the testator devised certain property to his nephews. The testator made the voyage, returned safely, and later died at home. The court held that the will was contingent as to the first clause, but should be admitted to probate as to the remainder.

It appeared in *Jacks v. Henderson* (1797) 1 S. C. Eq. (1 Desauss.) 543, that a person, in contemplation of a voyage from Scotland to South Carolina, executed a paper partaking somewhat of the nature of a deed and also of a will, which disposed of certain property in case he should suffer accident or death on the trip. The court held that the provisions were contingent, and did not take effect, since it appeared that the testator arrived safely in South Carolina.

The mariner's will construed in *Lindsay v. Lindsay* (1872) L. R. 2 Prob. & Div. (Eng.) 459, 42 L. J. Prob. N. S. 32, 27 L. T. N. S. 822, bore the heading, "Instructions to be followed if I die at sea or abroad." The court held that the heading governed the contents, rendering the entire will contingent.

So, in the case of *Robinson's Goods* (1870) L. R. 2 Prob. & Div. (Eng.) 171, a will executed by a mariner

while on a voyage, commencing, "This is the last will and testament of me, . . . that in case anything should happen to me during the remainder of the voyage from hence to Sicily and back to London, that I give and bequeath to," etc., was held to be contingent on his death during the voyage.

The court in the case of *Winn's Goods* (1861) 2 Swabey & T. (Eng.) 147, construed a will beginning as follows: "Be it known that I, John Moss Winn, . . . being on the eve of embarking for San Francisco, South America, or Mexico, do hereby, in case of my decease during my absence being fully ascertained and proved, do and will," etc. The testator returned from this trip, but subsequently started on another voyage from which he never returned. The court held that the will was contingent on his death on his first proposed voyage.

c. Death in military service.

In *Magee v. McNeil* (1866) 41 Miss. 17, 90 Am. Dec. 354, it appeared that a soldier in the Confederate army wrote a letter to his wife, containing the following words: "But we do not know about these things, and it is well enough to arrange them beforehand, and if I never get back to you, I want all I have to be yours." The testator returned home safely from the war, but died a few weeks later at home. The court held that the letter should not be admitted to probate, as it amounted to a contingent will.

It appeared in the case of *Porter's Goods* (1869) L. R. 2 Prob. & Div. (Eng.) 22, that one about to leave England to join his regiment in China executed the following paper: "Should anything unfortunately happen to me while abroad, I wish everything that I may be in possession of at that time, or anything appertaining to me hereafter, whether in lands, goods, clothes, chattels, or money, to be equally divided," etc. The testator later returned to England from China. The court held that the will was contingent, depending on the testator's death in China.

d. Death from sickness or operation.

It appeared in *Re Cook* (1916) 173 Cal. 465, 160 Pac. 553, that a woman, before going to the hospital to undergo an operation, wrote and sent three letters, intending them to become effective as her will. In the letters the testatrix used the expressions, "If I should die from the operation," and "In case I do not live through the operation," and the instructions were to be carried out "only in case I do not live," and "I want you to see it done in case of my death only." The court held that the dispositions so made were conditioned on her death from the operation, or from the disease which the operation was intended to relieve, and not solely on death as the immediate effect of the operation.

So, in the reported case (*WALKER v. HIBBARD*, ante, 832), it is held that an instrument executed by a woman about to go to the hospital, providing "that everything I have in the world goes to G," was contingent, and hence was inoperative where the testatrix recovered and returned home.

Similarly, it was shown in *Davis v. Davis* (1914) 107 Miss. 245, 65 So. 241, that one lying in a hospital, about to undergo an operation, wrote a letter to his mother, saying in part: "Should I not get over this operation, I want you and papa to take charge of everything I've got, sell my pool room for about \$500 at least, and I have \$800." He recovered after the operation and returned to work on the railroad, where he was later killed. The court held the will to be contingent.

It appeared in *Dougherty v. Holschneider* (1905) 40 Tex. Civ. App. 31, 88 S. W. 1113, that a person wrote several letters to his friend, containing the following statements: "I am going to start to Monterey to-morrow, to have a surgical operation performed on me, and possibly I may never get back alive." "While I don't anticipate any danger, as the doctor has assured me that there is no danger, yet there might be." "In case anything should happen I want you to see to what I have left." The court held that the

disposition made by the letters was contingent.

e. Death away from home.

In *Maxwell v. Maxwell* (1860) 3 Met. (Ky.) 101, it appeared that one who had escaped from a steamboat wreck on the Mississippi river, on reaching land, immediately wrote a letter to his wife, detailing the hardships undergone and using, near the end, the following words: "The ice is still running very bad in the river. I can't say when I will be able to get off from here, but I hope soon, as the weather seems to be moderating. The river is very low, and navigation is very dangerous,—so much so I feel that I should protect you in any emergency. I would not have had you with me for the world. If I never get back home, I leave you everything I have in the world. The property I got by my first wife I wish you to return everything to her father." This letter was received by his wife, and the writer himself eventually arrived home, but was a short time later murdered by his slaves. The letter was offered by the wife for probate, but was refused, the court holding that it constituted a contingent will, saying: "It seems to us that the conclusion is inevitable that Maxwell did not intend the writing before us to be his will, except in the event of his never getting back home. Whether it was eventually to take place as his will, or not, was made by him, in his own words, to depend on the happening or not happening of that particular event. Here was a contingency—a condition. The only question remaining is, Did it happen? It did not. The result is that the paper never was the will of Maxwell." In commenting on *Massie v. Griffin* (1859) 2 Met. (Ky.) 364, the court said: "The writing in this case is unlike that which was established as the will of Massie, in the case of *Massie v. Griffin* (Ky.) *supra*, decided at the summer term, 1859, of this court. In that case it was decided that the condition was limited to a single provision of the will, and was not applicable to the entire writing, and it was not therefore a contingent will.

But here that portion of the writing claimed to be a testamentary instrument is made in such terms as to render it totally dependent on a contingency whether it shall ever become a will. The contingency applies to the entire disposition. The two cases are, therefore, not analogous."

It appeared in the case of *Newton's Goods* (1873) 42 L. J. Prob. N. S. (Eng.) 58, 28 L. T. N. S. 677, 21 Week. Rep. 648, that a person, while in India, executed a will containing these words: "I write this as my last will and testament, in case of a sudden or accidental death befalling me in India." The court held that the will was contingent on the testator's death in India.

f. Death before particular time.

In *Hamilton's Estate* (1873) 74 Pa. 69, it appeared that the testator made a will in 1871, another will in 1873, and later executed a codicil, providing in part as follows: "Now I, James Hamilton, the testator, declare said will of 20th November, 1871, marked 'A,' to be my last will and testament, should I die before the 1st day of March, 1873; otherwise, the will of 18th of January, 1873, shall be and is hereby declared to be my last will." The testator died on the 23d of January, 1873. The court held that the will of 1871 was his will, and that the will of 1873 was contingent.

It appeared in *Sinclair v. Hone* (1802) 6 Ves. Jr. 607, 31 Eng. Reprint, 1219, that a man residing with his wife in Dominica, in contemplation of a trip to England, executed a codicil reading as follows: "In case I die before I join my beloved wife, I leave to her all my property," etc. It appeared that the testator missed the boat, returned to his home, and lived with his wife until they both together left the island for England. Subsequently, the testator died in Corsica. The court held that the codicil was contingent and never took effect, since the testator rejoined his wife, the master of the rolls being of the opinion that the voyage to Corsica was not in the mind of the testator when the will was made.

III. Reference to occasion or peril held not to make will contingent.

a. Death on journey.

In *RE TINSLEY* (reported herewith) ante, 826, it appeared that one, in the expectation of making a trip, made a will commencing as follows: "In case of any serious accident, after my just debts are paid, I direct," etc. The court held that the words used expressed the occasion or inducement for his act, and did not express the condition on which his will was to become effective, saying: "It may well be that the contemplation of a long journey, and its possible dangers and exposures, suggested to the mind of the deceased the wisdom of providing for the succession to his estate in the event of his death, and that, acting upon this thought, he prepared the paper in question. This would indicate no more than that the circumstances mentioned were the occasion for his act, and not at all that his death while on that trip was a contingency without which the will would not become operative."

So, it was shown in *Eaton v. Brown* (1904) 193 U. S. 411, 48 L. ed. 730, 24 Sup. Ct. Rep. 487, reversing (1902) 20 App. D. C. 453, that a woman, in contemplation of a proposed journey, made a disposition of her estate by a will which commenced: "I am going on a journey and may not ever return. And if I do not, this is my last request." The testator returned safely from the journey referred to, and died later at home. The court held that this was not a contingent will.

Likewise, it was shown in *Tarver v. Tarver* (1835) 9 Pet. (U. S.) 174, 9 L. ed. 91, that a citizen of Georgia made a will in which he stated that "being about to take a long journey, and knowing the uncertainty of life, think it advisable to make some disposition of my estate." The testator made the contemplated trip and returned safely, but some time later died within the state of Alabama. It was held that the will was not conditional, and was not made to depend on the event of his return from the journey. The court said: "And it is contended that the condition upon which the in-

strument was to take effect as a will was his dying on the journey, and not returning home again. But such is a very strained construction of the instrument, and by no means warranted. It is no condition, but only assigning the reason why he made his will at that time. But the instrument's taking effect as a will is not made at all to depend upon the event of his return or not from his journey. There is no color, therefore, for annulling this will on the ground that it was conditional."

To the same effect is *Forquer's Estate* (1907) 216 Pa. 331, 66 Atl. 92, 8 Ann. Cas. 1146, wherein the will construed read, in part, as follows: "I intend starting to-morrow morning to Bozeman, Montana, to see my brother Joseph. Knowing the uncertainty and risk of the journey, know all persons that I do hereby will and bequeath all my personal property to my wife, Martha M. Forquer. . . . And should anything befall me while away, or that I should die, then in that event all my estate, money, notes, property of every nature and description, both real and personal, are hereby assigned, conveyed, and set over to my wife for her sole benefit." It appeared that the testator made the contemplated trip, returned in safety, and died later at home. The court held that the will was not contingent on the death of the testator away from home on the proposed trip, but continued operative after his return, saying: "In the case before us the language expressive of the contingency is, 'And should anything befall me while away, or that I should die,' etc. The expression, 'should anything befall me while away,' standing alone, is clearly contingent. It evidently refers to the possible death of the testator while away, as no other event could befall him which would give effect to the disposition of his estate which he was then making. The testator would have expressed the same thought had he said: 'And should death overtake me while away.' It clearly refers to his possible death while on his journey. We may well suppose that the testator, by the disjunctive expression which follows, 'or that I should die,' meant

to add something to what he had already said. He had already provided for the contingency of death while on the journey. We may assume that he meant to add something by the use of the language which followed, and, if so, that he meant to make provision against the event of his death, whenever it might occur. By the use of the disjunctive 'or,' the provision which follows excludes the thought that immediately preceded, and has, we think, the same force and meaning as if it stood alone. To give it the meaning contended for by the appellants, we would have to interpolate the qualifying expression 'while away,' used in the preceding clause. But what warrant have we for doing this in order to give to the instrument a contingent character, which, if it exist, must clearly arise out of the writing as it stands? In other words, we conclude (1) that it does not clearly appear from the will itself that its operation was intended to be contingent, and (2) that it can, by a reasonable interpretation of its language, be construed to be absolute rather than contingent, and in either event, under the authorities, it is entitled to probate."

The will involved in *Redhead v. Redhead* (1903) 83 Miss. 141, 35 So. 761, began as follows: "Realizing the uncertainty of life at all times, and the dangers incident to travel, I leave this as a memorandum of my wishes, should anything happen to me during my intended trip to Buffalo and other places." It appeared that the testator took the contemplated trip, made a safe return home, where he died without any other or further disposition of his property. The court held that the will was not contingent, saying that the uncertainty of life realized by the testator, and the circumstances mentioned at the outset of the will, were reasons and motives for making it.

It appeared in *Kelleher v. Kernan* (1883) 60 Md. 440, that a person, in the expectation of taking a trip, executed a paper commencing as follows: "In anticipation of my departure from the city of Baltimore, and to provide for possible contingencies,

I hereby give, bargain, and sell and transfer unto my daughter, Ann C. Kelleher, her personal representatives and assigns, all my machinery, horses, wagons, goods, chattels, and effects, which I now have or may hereafter acquire or possess, and all moneys, claims, and demands to which I am or may be hereafter entitled, reserving to myself the use of the same, and the right to dispose of the same otherwise, if I deem proper. Witness my hand and seal this 20th day of July, 1882." The testator made the trip, returned safely, and died later at home, leaving the paper uncanceled. The court held that the paper was not a contingent will, and should be admitted to probate.

In *French v. French* (1877) 14 W. Va. 459, it appeared that the testator, in contemplation of crossing a swollen stream, wrote out and handed to his wife, before starting, the following paper: "Let all men know hereby, if I get drowned this morning, March 7, 1872, that I bequeath all my property, personal and real, to my beloved wife, Florence." It appeared from the evidence that the testator crossed the stream in safety, returned home, and died later. The court held that the paper was a valid and operative will, and was not contingent on the testator's being drowned the day it was made. Haymond, J., said: "The testator was on that morning about to undertake a perilous and dangerous passage across a deep river, and death to him by drowning was then naturally most prominent in his mind, and thus he doubtless used the words 'get drowned,' by which he indirectly meant 'die,' or death in any form. . . . We may well and properly conclude, in this particular case with its peculiar characteristics, that said paper writing was not intended by the decedent to be provisional and contingent, but was intended by him to be absolute; that the language used by the decedent in the said paper writing can in this particular case, with its peculiar surroundings, be reasonably interpreted and construed to mean that he refers to the calamity and the time during which it may happen as the

reason for making said paper writing, and not as the condition upon which the disposition of the property is to become operative; and that the will should be interpreted as though it read: 'Lest I get drowned this morning, or lest I die this morning.'

It was shown in *Bradford v. Bradford* (1883) 4 Ky. L. Rep. 947, that a man, in expectation of a long journey, made a will containing a recital that "in case I should not return" a certain disposition of his property should be made. He took the journey and returned safely. The court held that the will was not void or inoperative as a testamentary paper, since the words did not constitute a condition on which the will was contingent, saying: "It is contended that the words, 'in case I should not return,' rendered the instrument contingent, and, as he took the journey and returned without casualty, it is void and inoperative as a testamentary paper. Those words do not constitute a condition upon which the will is dependent. In connection with the other words quoted, they simply set forth the circumstances which induced him to make his will before his departure, for fear he might never return."

So it appeared in *Massie v. Griffin* (1859) 2 Met. (Ky.) 364, that a resident of Kentucky made a visit to Missouri, and while there wrote and delivered the following paper: "It is my wish that all the notes and accounts found among my papers (vs.) my brothers, should be destroyed or handed over to them. Should I never return. I also desire that each of them should have \$200 in addition, and the remainder of my property divided equally between the heirs of Thomas and John M. Massie, at their respective ages of eighteen,—should it be deemed judicious to do so." After making this he returned to Kentucky; made a second trip to Missouri; then made a third trip, and died while on his way back to Kentucky. The paper, being found after his death, was offered for probate in Kentucky, but was resisted on the ground that it was a contingent will, to become permanent only on the contingency that he

never returned home after the paper was written. It was held that it was not a contingent will, since the words it contained indicating its contingent nature were applicable to a part only, and not to the whole of the will. The court said: "We confess that it is difficult to determine from the paper itself what is the true construction. The punctuation is very singular, and not according to any rule. There appears to be a period, or full stop, both before and after the words 'should I never return.' But it seems to the court that the most natural and easy reading of the paper is to confine those words to the disposition of the notes and accounts, making it one sentence from the commencement down to, and including, the conditional words: 'It is my wish that all of the notes and accounts found among my papers (vs.) my brothers should be destroyed or handed over to them, should I never return.' . . . If the testator intended to make the whole instrument contingent and conditional, he could very easily have inserted the condition in the remaining portion, thus: 'I also desire, in the event that I do not return.' That he did not thus insert it is very persuasive, at least, that he did not intend the entire paper to be conditional. If he had commenced the writing with the use of the words 'should I never return,' they would naturally have applied to every part of it; and it seems to us that he would have thus used them had it been his intention to make the entire paper contingent."

The will involved in *Ex parte Lindsay* (1852) 2 Bradf. (N. Y.) 204, commenced as follows: "According to my present intention, should anything happen to me before I reach my friends in St. Louis, I wish to make a correct disposal of" certain property. It appeared that the testator proceeded safely to St. Louis on the proposed journey, and afterwards returned to New York where he died. The court admitted the will to probate, saying that the words "according to my present intention" may have been designed to express the occasion for making the instrument, rather than the condition

on the happening of which the will was to become operative.

In the case of *Mayo's Goods* (1880) L. R. 6 Prob. Div. (Eng.) 17, it was shown that one in contemplation of a trip made a will commencing as follows: "In case of my death on the way, know all men this is a memorandum of my last will and testament." The testator made the trip, arriving safely at his destination, where he died. The court held that the will was not contingent on the testator's death on the journey. In distinguishing this case from *Porter's Case* (1869) L. R. 2 Prob. & Div. (Eng.) 22, 39 L. J. Prob. N. S. 12, 21 L. T. N. S. 680, the court said: "In this case there are no such words as those relied on by Lord Penzance, as leading to a different conclusion, namely, those in which the testator said, 'I wish everything that I may be in possession of at that time,' i. e., at the time of his death abroad, to be divided; I therefore admit the will to probate."

So, it was shown in *Dobson's Goods* (1866) L. R. 1 Prob. & Div. (Eng.) 88, 35 L. J. Prob. N. S. 54, 13 L. T. N. S. 758, 14 Week. Rep. 408, that a man made a will commencing as follows: "January 29th, 1863. Thursday morning. In case of any fatal accident happening to me, being about to travel by railway, I hereby leave all my property to," etc. It appeared that the testator made the trip and returned in safety. The court held that the will was not contingent on the testator's death on the contemplated journey.

In *Stuart's Goods* (1888) Ir. L. R. 21 Eq. 105, it was shown that a person, in contemplation of a trip, made a will providing as follows: "Should any accident take me out of the world, I will to E. McD. £200, and also furniture to the amount of £50 at her selection." The testator made the trip and returned home safely, remaining there until he died. The court held that the will was not contingent on any accident happening to him during the proposed journey.

b. Death on voyage.

In *Thompson v. Connor* (1855) 3

Bradf. (N. Y.) 366, it appeared that a will, after disposing of certain property, read as follows: "This gift and bequest being subject to the following condition, viz., that the said Margaret Baxter shall produce from the officers of the ship in which I shall sail on my next cruise, satisfactory evidence of my decease during the same." The court admitted the will to probate, though the testator did not die on the voyage, on the principle that the will was not dependent on the testator's death during the voyage, but referred to the collateral matter of proof of his death.

So, in *Halford v. Halford*, L. R. [1897] P. (Eng.) 36, it was shown that a man, residing in India, made a will disposing of his property to his wife and two others in trust to pay her the income of the residue of his estate during her widowhood, but in case of her remarriage she was to receive one third for life only. The will made no disposition of the residue after the wife's death without remarriage. The testator, on the eve of his departure for England, wrote a letter to his brother, saying: "If anything happens to us on the way, my will has been accidentally packed away in a tin box to which I cannot now get access, as I forget which box it has been put into. However, if we both come to grief, I appoint you my executor; if I only, then in conjunction with Nan,"—and also disposing of his estate after his wife's death in case she survived him. It appeared that both the testator and his wife arrived safely in England, where the testator later died. The court held that the letter was not conditional, but was a valid and operative codicil. Sir F. H. Jeune, speaking for the court, said: "I can see no reason for saying that it is conditional. There is no period defined in which alone the will is to be operative, or, if such is to be inferred, it can only be the voyage itself—that is, the period of danger. There is nothing in the disposition of the property which points to a limitation of the effect of the will; on the contrary, the letter, by prescribing what is to become of his property after

his wife's death if she does not marry again, makes so necessary and natural a provision that it can hardly be supposed it was intended to lapse so soon as the testator set foot in this country. I think, therefore, that the letter must be admitted to probate."

c. Death in military service.

In *Spratt's Goods*, L. R. [1897] P. (Eng.) 28, it was proved that a soldier, while in active service in the Maori War, wrote a letter to his sister, the material parts being as follows: "This is the most important part of my letter. If we remain here taking paks for some time to come, the chances are in favor of more of us being killed, and as I may not have another opportunity of saying what I wish to be done with any little money I may possess, in case of an accident, I wish to make everything I possess over to you. . . . Keep this until I ask you for it." The testator survived the war, but died later, never having revoked the testamentary disposition contained in the letter. The court held that the will was not dependent on his death while in active service, and was not, therefore, a conditional will.

In the case of *Thorne's Goods* (1865) 4 Swabey & T. (Eng.) 36, 34 L. J. Prob. N. S. 131, 11 Jur. N. S. 569, 12 L. T. N. S. 639, it was shown that the testator, a captain in the army stationed in Africa, wrote a will commencing: "In the event of my death whilst serving in a horrid climate, or any accident happening to me, I leave and bequeath," etc. The deceased survived the climate, but died later in London. It was held that the will was not conditional, and was not intended to operate only in case the testator died in Africa.

In *Winter v. Pawle* (1918) 34 Times L. R. (Eng.) 437, a will in the form of a letter was written by a soldier in the Dardanelles expedition, and provided as follows: "If I do buy it, you might see that the few quids I have at Holt's go to John Strange." The soldier survived the fighting there, but died later in India. The court held that the will was not contingent on his death during the Dardanelles

operations, but was a disposition of his property in any event.

d. Death away from home.

In *Likefield v. Likefield* (1885) 82 Ky. 589, 56 Am. Rep. 908, there was involved the following will: "If any accident should happen to me that I die from home, my wife, Julia An Likefield, shall have everything I possess, the house and lots and the money that is due to me, and for her to hold it as her own." The testator died at home. His wife offered the paper for probate, but the same was resisted on the ground that it was contingent, and intended to be effective only in the event that the testator should die away from home. The court held that the will was not contingent, saying: "The rule is that courts will not incline to regard a will as conditional, if it can be reasonably held that the maker was simply expressing his inducement to make it, however inaccurate the language may be for that purpose, if strictly construed; and unless the words clearly show that it was intended to be temporary or contingent, it will be upheld. In this instance, if the testator, by the words he used, referred to the possibility of his accidentally dying from home as a reason for making the will, then it must be maintained; but if he intended by them to show that he was then making only a temporary or conditional disposition of his property, it must fail, because the event named never happened." In distinguishing cases holding wills to be contingent, the court said: "In this respect they are clearly distinguishable from the case now presented. The will in this instance fixes no limit or time, as during a particular journey, or for a particular length of time. No specific time or particular event is named. It refers to no particular expected calamity, and the words are general in their character; and this fact leads to the conclusion that the testator, who was evidently not an educated man or an adept in writing such instruments, did not intend the disposition of his estate to depend upon whether he died at or away from his home."

The maker of the will involved in *Cody v. Conly* (1876) 27 Gratt. (Va.) 313, being in fear of being carried away by Federal troops, decided to leave the state, and in pursuance of this plan wrote the following letter to his wife, intending it as his last will: "I am going away; I may never return. I leave my property to Gaines and Dan; dispose of it as you think fit." It appeared, however, that the testator never abandoned his home, but resided there continually up until the time of his death. The contention was made that the paper was inoperative as a will, as it was based on a contingent event (his going away and not returning) which never occurred. The court, in holding that the will was not contingent, said: "There is not a word in the will . . . which is not perfectly consistent with the idea that the words, 'I am going away; I may never return,' were used only to indicate his reason for then making his will, and not to express or imply a condition on which it should have effect."

In *Vines v. Vines*, L. R. [1910] P. (Eng.) 147, the testator, while in India, executed and sent to his wife in England a will reading as follows: "If anything should happen to me while in India . . . all moneys, documents, property . . . to be disposed of to the best advantage after paying all my expenses; the remainder to be paid to my wife." Some years later the testator returned to England, where he died, and, the will being offered for probate, the same was resisted on the ground that it was nugatory because contingent on an event that never happened. The court held that the will was not contingent, saying: "The question always depends on the wording of the instrument, and reading the instrument before me I come to the conclusion that it is not conditional. It begins with the two words, 'My Will.' These words stand apart at the top of the document, and are apparently intended to control all that follows. What follows is, I think, to be read in two parts: First, that which directs what is to be done if he die in India; and,

secondly, that which directs what is to be done whether he die in India or not. I refer to the concluding words of the will, 'all property at the time of my death,' etc. I do not regard these words as a mere repetition of the earlier words in the will which are governed by the condition as to India, but as a general disposition of his property, free from any condition whatever."

e. Sudden or unexpected death.

In *Skipwith v. Cabell* (1870) 19 Gratt. (Va.) 758, it appeared that a woman, after disposing of her estate, made a codicil providing as follows: "In case of a sudden and unexpected death, I give the remainder of my property to be equally divided between my cousin, Dr. Carter of Philadelphia, and my cousin, Peyton Skipwith of New Orleans, one half of which each must hold in trust for the benefit of their children." The contention was made that the legacy depended on the testatrix's sudden and unexpected death, and that, since this did not occur, nothing passed by the bequest. The court held it was not a conditional legacy, saying: "In cases of this sort, the question to be determined is whether the contingency is referred to as the reason or occasion for making the disposition, or as the condition upon which the disposition is to become operative. . . . Upon the whole, it seems clear that such expressions as those used in this clause could not properly be construed as creating a condition unless accompanied by other language so clear as to admit of no other interpretation. They are not so accompanied in the present case, and, without putting the slightest strain upon the language, we can understand it as designed only to express the reason which led the testatrix to dispose of the residue at that time, and to avoid the risk of further delay."

f. Death before particular time.

It was shown in *Murphey v. Brown* (1901) 159 Ind. 106, 62 N. E. 275, that a man made a will disposing of his estate to his wife, and granting certain annuities for the wife and others

until the charter of a bank, of which he was a stockholder, expired. The will further provided that, should the testator have issue at the time the charter expired, the residue of the es-

tate should go to them; otherwise, to certain other persons. The court held that the will was not contingent on the death of the testator before the expiration of the charter. W. J. McC.

BITER-CONLEY MANUFACTURING COMPANY, Plff. in Err.,

v.

FRANK WRYN.

Oklahoma Supreme Court—July 23, 1913.

(— Okla. —, 174 Pac. 280.)

Master and servant — attorney's fee.

1. That part of § 3768 which provides that, "in addition to the actual damages that a workman may have sustained, he shall be entitled to recover such a reasonable attorney's fee as the jury may fix," is not violative of the 14th Amendment of the Constitution of the United States.

[See note on this question beginning on page 884.]

Appeal — failure to assign error.

2. Where plaintiff fails to assign as error the overruling of a motion for a new trial, this court will not review the sufficiency of the evidence to support the verdict.

Master and servant — soliciting change of employment.

3. Sections 3765 and 3768, Rev. Laws 1910, are not in contravention of § 59,

art. 5, of the Constitution of the state of Oklahoma.

Commerce — interference with — inducing workmen to come into state.

4. A statute making it unlawful to induce workmen to come into the state for employment, by false advertisements or misrepresentations as to conditions of work, is not invalid as interfering with interstate commerce.

Headnotes 1-3 by COLLIER, C.

ERROR to the District Court for Oklahoma County (Clark, J.) to review a judgment in favor of plaintiff in an action brought to recover damages, sustained by reason of defendant's failure to notify plaintiff of labor troubles and strikes at the place where he was to be employed, and an attorney's fee. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Messrs. Everest & Campbell and Sherman, Veasey, & O'Meara for plaintiff in error.

Messrs. Twyford & Smith and John R. Hadley, for defendant in error:

The legislature has a right to make a reasonable classification as to who shall be affected by an act, if there is a fair reason for such classification and it affects all in the particular class alike.

Barrett v. Indiana, 229 U. S. 26, 57 L. ed. 1050, 33 Sup. Ct. Rep. 692; Deibeikis v. Link-Belt Co. 261 Ill. 454, 104 N. E. 211, Ann. Cas. 1915A, 241, 5 N. C. C. A. 401; Com. v. Libbey, 216 Mass. 356, 49 L.R.A. (N.S.) 879, 103 N. E. 923, Ann. Cas. 1915B, 659.

The provision allowing attorney's

fee as a penalty is not unconstitutional.

Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609, 58 Kan. 447, 49 Pac. 602, 3 Am. Neg. Rep. 27; Missouri, K. & T. R. Co. v. Harris, 234 U. S. 412, 58 L. ed. 1377, L.R.A.1915E, 942, 34 Sup. Ct. Rep. 790; Southern R. Co. v. Reid, 222 U. S. 424, 56 L. ed. 257, 32 Sup. Ct. Rep. 140; Cleveland, C. C. & St. L. R. Co. v. Hamilton, 200 Ill. 633, 66 N. E. 389; Dow v. Beidelman, 49 Ark. 455, 5 S. W. 718; Burlington, C. R. & N. R. Co. v. Dey, 82 Iowa, 312, 12 L.R.A. 436, 3 Inters. Com. Rep. 584, 31 Am. St. Rep. 477, 48 N. W. 98; Iowa L. Ins. Co. v. Lewis, 187 U. S. 344, 47 L. ed. 209, 23 Sup. Ct. Rep. 126; Farmers' &

M. Ins. Co. v. Dobney, 189 U. S. 301, 47 L. ed. 821, 23 Sup. Ct. Rep. 565; *Insurance Co. of N. A. v. Bachler*, 44 Neb. 549, 62 N. W. 911; *Lancashire Ins. Co. v. Bush*, 60 Neb. 116, 82 N. W. 313; *Harp v. Fireman's Fund Ins. Co.* 130 Ga. 726, 61 S. E. 704, 14 Ann. Cas. 299; *Arkansas Ins. Co. v. McManus*, 86 Ark. 115, 110 S. W. 797.

Collier, C., filed the following opinion:

This is an action brought by the defendant in error against the plaintiff in error, to recover damages alleged to have been suffered by the plaintiff by reason that the defendant wrongfully and falsely failed to represent to him, at the time of his employment, that there were labor troubles, strikes, or lockouts at or around the place where the plaintiff was employed to work in Oklahoma, and \$150 attorney's fee.

Hereinafter the parties will be designated as they were in the trial court.

The evidence is voluminous, and we think that it is not necessary for a proper understanding of this case to set it out in detail; but it is sufficient to state that the unquestioned evidence is that the plaintiff was a resident of Kansas City, Missouri; was a structural iron worker by trade; that he was employed in Kansas City to come to this state and work for the defendant as a tank builder; that he was directed to go to Norfolk, Oklahoma; that on arriving near Norfolk he was informed that there was a strike, and later looked out and saw armed men at Norfolk, the field in which defendant was operating and where plaintiff was to work; that he did not stop at Norfolk; that he never went to the field in which defendant was operating; that he never worked for the defendant, but went to Cushing; that afterwards an agent of defendant offered to send plaintiff back to Kansas City, and said defendant's agent and said plaintiff could not agree as to the amount to be paid the plaintiff in settlement. There was also uncontradicted evidence in the case showing that, if the plain-

tiff was entitled to recover at all in this case, he was entitled to recover an amount certainly as great as the amount of the verdict rendered. The evidence was in conflict as to whether the party employing the plaintiff was, in so doing, the agent of the defendant, and whether or not the plaintiff at the time of his employment was informed by the agent of defendant that there were labor troubles in the vicinity to which he was to be sent.

It was stipulated that, if the plaintiff was entitled to any attorney's fees at all, the evidence would show that \$150 would be a reasonable attorney's fee. The jury returned a verdict in favor of the plaintiff for the sum of \$26, and answered interrogations as follows:

(1) Did the defendant, by its agents, represent to the plaintiff, before he left Kansas City, there were no strike or labor troubles in the oil fields in Oklahoma, where the plaintiff was to be carried for the purpose of working for the defendant?

Answer. No.

(2) Did the defendant, by its agent, inform the plaintiff, before he left Kansas City, there were strike or labor troubles in the oil fields in Oklahoma, where the plaintiff was to be carried for the purpose of working for the defendant?

Answer. No.

The defendant timely moved for a new trial, which was overruled and excepted to. Later the court entered a judgment against the defendant for the sum of \$26 and for the additional sum of \$150 attorney's fee. To the rendition of this judgment the defendant excepted, and perfected an appeal to this court.

The defendant assigns the following errors:

"First. There was no evidence upon which to base the finding of the jury.

"Second. There was no valid law authorizing the court to render judgment for \$150 attorney's fee in favor of the plaintiff.

"Third. The entire statute under

which this action was brought is unconstitutional.

"Fourth. The particular part of the statute which allows the recovery of attorney's fees is unconstitutional."

The overruling of the motion for a new trial not being assigned as error, errors occurring during the trial cannot be considered by this court. *Vandenburg v. Winne*, 55 Okla. 679, 155 Pac. 245; *Nichols v. Dexter*, 52 Okla. 152, 152 Pac.

Appeal—failure to assign error. 817; *Millus v. Lowrey Bros.* — Okla. —, L.R.A.1918B, 336, 164 Pac. 663; *Cleveland v. Lampkin*, — Okla. —, 165 Pac. 159.

It follows that the only question presented for review is as to the constitutionality of §§ 3765 and 3768, Revised Laws (1910), under the Constitution of this state; and is that part of said § 3768 which provides for including as costs an attorney's fee, in the event of the recovery of damages, in conflict with the 14th Amendment of the Constitution of the United States.

Sections 3765, 3766, and 3768 of the Revised Laws of Oklahoma (1910) were enacted at one and the same time (Sess. Laws 1907-08, p. 514), and should be construed together.

Section 3765 reads: "It shall be unlawful for any employer of labor doing business in the state, to induce, influence, persuade or engage workmen to change from one place to another in the state, or to bring workmen of any class or calling into the state to work in any of the departments of labor, through or by means of false or deceptive representations, false advertising or false pretenses concerning the kind and character of the work to be done, or amount and character of the compensation to be paid for such work, or the sanitary or other conditions of employment, or as to the existence or nonexistence of a strike or other trouble pending between employer and employees, at the time of or prior to such engagement. Failure to state in an advertisement, pro-

posal or contract for the employment of workmen that there is a strike, lockout or other labor trouble at the place of the proposed employment, when, in fact, such strike, lockout or other labor troubles then actually exist at such place, shall be deemed a false advertisement and misrepresentation for the purposes of this section."

Section 3766 reads: "Any employer of labor of any kind doing business in this state, as well as its agent, attorney or servant found guilty of violating the preceding section, or any part thereof, shall be fined not less than five hundred dollars and not exceeding two thousand dollars, or confined in the county jail not less than one month and not exceeding one year, or both such fine and imprisonment."

Section 3768 reads: "Any workman who shall be influenced, induced or persuaded to engage with any persons mentioned in § 3765, through or by means of any of the things therein prohibited, shall have the right of action for recovery of all damages that he has sustained in consequence of the false or deceptive representation, false advertisement and false pretenses used to induce him to change his place of employment, against any companies, corporations, or other employers of labor directly or indirectly causing such damages, and, in addition to all actual damages such workman may have sustained, he shall be entitled to recover such reasonable attorney's fees as the jury shall fix, to be taxed as costs in any judgment recovered."

The contention of the defendant is: "(1) That the statute in toto is void because it violates § 59 [art. 5] of the Constitution of this state. (2) That that part of § 3768, allowing attorney's fee in case of recovery, is in violation of the 14th Amendment of the Constitution of the United States"

Section 59, art. 5, of the Constitution of this state, reads: "Laws of a general nature shall have a uniform operation throughout the state, and

where a general law can be made applicable, no special law shall be enacted."

The 14th Amendment of the Constitution of the United States reads: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The instant case is brought under § 3768, and therefore it clearly appears that the law involved in this action is the exercise of a police power, and the attorney's fee given under § 3768, Revised Laws, is an additional penalty imposed.

In *Arkansas Ins. Co. v. McManus*, 86 Ark. 115, 110 S. W. 797, it is held: "The Statute of 1905 (Laws 1905, p. 308), providing for the collection of a 12 per-cent penalty and reasonable attorney's fees from an insurer who fails to pay a loss within the time prescribed by the policy after demand, is not unconstitutional as a denial of equal protection of the laws, nor as a deprivation of property without due process of law."

This holding finds support in *Union Cent. L. Ins. Co. v. Chowning*, 86 Tex. 654, 24 L.R.A. 504, 26 S. W. 982; *New York L. Ins. Co. v. Orlopp*, 25 Tex. Civ. App. 284, 61 S. W. 336, *Merchants' Life Asso. v. Yoakum*, 39 C. C. A. 56, 98 Fed. 251; and by the Supreme Court of the United States in *Fidelity Mut. Life Asso. v. Mettler*, 185 U. S. 308, 46 L. ed. 922, 22 Sup. Ct. Rep. 662; *Iowa L. Ins. Co. v. Lewis*, 187 U. S. 335, 47 L. ed. 204, 23 Sup. Ct. Rep. 126. The Texas court held that the statute could be sustained as a proper exercise of the police power of the state, and the circuit court of appeals seems to have based its conclusion on the same ground, as the opinion quotes at length from the opinion in *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609, upholding, as a proper

exercise of the police power, a statute of the state of Kansas relating to the liability of railroads for damages by fire, and providing that in all actions against railroad companies to recover such damages the plaintiff may recover a reasonable attorney's fee as a part of the judgment.

The supreme court of Nebraska upholds a statute which provides that, in actions on insurance policies in cases of total loss by fire, the plaintiff may recover an attorney's fee. The court, in rendering judgment against an insurance company upon any such policies of insurance, shall allow the plaintiff a reasonable sum as an attorney's fee, to be taxed as a part of the costs. *Farmers Mut. Ins. Co. v. Cole*, 4 Neb. (Unof.) 130, 93 N. W. 730; *Lancashire Ins. Co. v. Bush*, 60 Neb. 116, 82 N. W. 313; *Farmers & M. Ins. Co. v. Dobney*, 62 Neb. 213, 97 Am. St. Rep. 624, 86 N. W. 1070.

The Supreme Court of the United States, in *Farmers' & M. Ins. Co. v. Dobney*, 189 U. S. 301, 47 L. ed. 821, 23 Sup. Ct. Rep. 565, following the doctrine of the *Mettler Case*, and affirming the decision of the supreme court of Nebraska, also upheld the statute. In the *Dobney Case* the line of reasoning would seem to indicate that the court meant to uphold the Nebraska statute as the exercise of the police power of the state, though it is not expressly so stated in the opinion.

The supreme court of Kansas upheld a similar statute in *British America Assur. Co. v. Bradford*, 60 Kan. 82, 55 Pac. 335. In the opinion in that case, by Chief Justice Doster, the court said: "Fire insurance has come to be a business public in its nature, . . . and is, therefore, properly a subject of legislative regulation. The state is interested in the preservation of the property of its citizens, that the general values of the commonwealth may not be impaired. Especially is it interested in the preservation of its homes and their rebuilding when destroyed. To the end that insurance companies

may be compelled to respect the obligations voluntarily taken upon themselves to subserve the policies of the state in these respects, the legislature may rightfully impose upon them the repayment to insurers of attorneys' fees necessarily incurred in suits to make good their delinquencies. To do so is no violation of the 14th Amendment, declaring that 'no state shall deny to any person within its jurisdiction the equal protection of the law.'"

The supreme court of Florida has upheld a statute of that state, authorizing the recovery of reasonable attorney's fees against life and fire insurance companies in suits upon policies. *Tillis v. Liverpool & L. & G. Ins. Co.* 46 Fla. 268, 110 Am. St. Rep. 101, 35 So. 171; *Hartford F. Ins. Co. v. Redding*, 47 Fla. 228, 67 L.R.A. 518, 110 Am. St. Rep. 118, 37 So. 62.

In *Lancashire Ins. Co. v. Bush*, 60 Neb. 116, 82 N. W. 313, it is held: "The provisions of § 3 of the Valued Policy Law, . . . permitting the taxation as costs of a reasonable attorney's fee upon rendering judgment against an insurance company on a contract insuring real estate, is grounded on considerations of public policy and is constitutional."

In the body of the opinion it is said (60 Neb. 122): "The question remaining yet to be considered is the validity of the statute under which the court acted in taxing an attorney fee of \$150 against the company as part of the costs. The 3d section of the Valued Policy Law is as follows: 'The court, upon rendering judgment against an insurance company upon any such policy of insurance, shall allow the plaintiff a reasonable sum as an attorney's fee, to be taxed as part of the costs.'"

. . . It is argued by counsel for the company that this provision of the act goes beyond the limits of valid legislation; that it is partial and oppressive, and denies to insurers of real property the equal protection of the laws. In *Insurance Co. of N. A. v. Bachler*, 44 Neb. 549, 62 N. W. 911, the law was assailed

as being unconstitutional; but the court held, in an opinion by Commissioner Ragan, that it was a warrantable exercise of legislative power. In other cases judgments of the district court were affirmed on the assumption that the law authorizing the taxation of attorneys' fees against insurance companies was a constitutional and valid law. *German Ins. Co. v. Eddy*, 37 Neb. 461, 55 N. W. 1073; *Hanover F. Ins. Co. v. Gustin*, 40 Neb. 828, 59 N. W. 375; *Home F. Ins. Co. v. Skoumal*, 51 Neb. 655, 71 N. W. 290; *Hartford F. Ins. Co. v. Corey*, 53 Neb. 209, 73 N. W. 674; *Home F. Ins. Co. v. Weed*, 55 Neb. 146, 75 N. W. 539. These decisions are vigorously attacked; but we are convinced, as the result of further investigation of the subject, that they are sound and should be adhered to. There is nothing in the Constitution of the United States, or of this state, which forbids classification of subjects for the purpose of legislation. *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Atchison, T. & S. F. R. Co. v. Matthews*, supra; *State ex rel. Dawson County v. Farmers & M. Irrig. Co.* 59 Neb. 1, 80 N. W. 52, . . . The legislature was, we think, within its constitutional power in selecting this class of insurance companies from all other litigants, and subjecting them, if unsuccessful, to the payment of attorneys' fees, because experience and observation had shown that the defenses upon which they generally rely are without merit, and constructed out of some of the forfeiture clauses with which their policies are thronged. The law in question was designed to repress an evil practice, to advance public interest, and promote justice. It was an exercise of legislative power justified by considerations of public policy. Similar statutes have been held valid in other jurisdictions. . . . *Atchison, T. & S. F. R. Co. v. Matthews*, 58 Kan. 447, 49 Pac. 602, 3 Am. Neg. Rep. 27; *Peoria, D. & E. R. Co. v. Duggan*, 109 Ill. 537, 50 Am. Rep. 619; *Perkins v. St. Louis*,

I. M. & S. R. Co. 103 Mo. 52, 11 L.R.A. 426, 15 S. W. 320; Burlington, C. R. & N. R. Co. v. Dey, 82 Iowa, 312, 12 L.R.A. 436, 3 Inters. Com. Rep. 584, 31 Am. St. Rep. 477, 48 N. W. 98; Wortman v. Kleinschmidt, 12 Mont. 316, 30 Pac. 280; Cameron v. Chicago, M. & St. P. R. Co. 63 Minn. 384, 31 L.R.A. 553, 65 N. W. 652; Vogel v. Pekoc, 157 Ill. 339, 30 L.R.A. 491, 42 N. E. 386."

In *Harp v. Fireman's Fund Ins. Co.* 130 Ga. 726, 61 S. E. 704, 14 Ann. Cas. 299, it is held: "The Civil Code, § 2140, providing for the recovery of damages and attorney's fees against insurance companies, is not violative of § 1 of the 14th Amendment of the Constitution of the United States, nor of any of the provisions of ¶¶ 2, 3, and 4 of art. 1 of the Constitution of the state of Georgia."

In *Cleveland, C. C. & St. L. R. Co. v. Hamilton*, 200 Ill. 633, 66 N. E. 389, it is held: "The provision of §§ 1 and 1½ of the Act on Fencing and Operating Railroads, authorizing the recovery of resulting damages and reasonable attorney's fees in any court where suit is brought, or to which the case may be appealed in case of violations of the act, is constitutional."

In the body of the opinion it is said: "The regulation designed to prevent the starting or spreading of fire has regard to the public welfare, and is within the police power. It does not seem to be denied that the legislature may impose a penalty for failure to comply with the requirement; but it is argued that this provision for attorney's fees is not a penalty for a failure to keep the right of way clear from dead . . . material, but rather an attempt to impose a penalty for exercising the right to resort to the courts for the purpose of securing justice by defending against exorbitant or illegal demands. Corporations have equal rights with natural persons to defend against claims which they believe to be illegal or exorbitant; but this statute does not provide for the recovery of attorney's fees, unless

it shall be judicially determined that the defendant had neglected its duty and been guilty of a violation of the statute. If no damages are recovered, there can be no attorney's fees; and, if the corporation deems the demand exorbitant, it is entitled to make a tender of the actual damages. Inasmuch as the statute does not provide for attorney's fees except upon proof of the violation of the duty, we do not regard the statute subject to the objection made in the argument."

In *Dow v. Beidelman*, 49 Ark. 455, 5 S. W. 718, it is held: "The Act of April 4, 1887, to regulate the rates of charges for the carriage of passengers by railroads, provides that for an overcharge beyond the maximum fixed by the act the company, or person operating the road, shall forfeit and pay not less than \$50, nor more than \$300 and costs of suit, including a reasonable attorney's fee. Held, that the attorney's fee is a part of the penalty for the wilful violation of the provisions of the act, and stands upon the same footing as the money judgment to be recovered; and including it as part of the penalty does not make the act obnoxious to the objection of being partial and unequal legislation."

In the body of the opinion it is said: "An attorney's fee may be included as a part of the penalty imposed for noncompliance with the duty imposed, without rendering the statute obnoxious to the objection of being partial and unequal legislation. *Peoria, D. & E. R. Co. v. Dugan*, 109 Ill. 537, 50 Am. Rep. 619; *Kansas P. R. Co. v. Yanz*, 16 Kan. 583; *Missouri P. R. Co. v. Abney*, 30 Kan. 41, 1 Pac. 385."

In *Burlington, C. R. & N. R. Co. v. Dey*, 82 Iowa, 312, 12 L.R.A. 436, 3 Inters. Com. Rep. 584, 31 Am. St. Rep. 477, 48 N. W. 98, it is held: "The provision in said act, entitling the plaintiff in actions against a railroad company for a breach of its provisions to recover, in addition to the damages therein provided for, an attorney's fee, grants no priv-

illegitimate to such litigants that is forbidden by the Constitution; nor can it be regarded as imposing a penalty upon the exercise of the right of defense."

We are not cited in either brief to a decision of this court which is decisive of the questions at issue, and, after a most diligent search, are unable to find that said questions have heretofore been passed upon by this court. There have been only two cases passed upon by this court in which the constitutionality of the provision for the recovery of an attorney's fee as part of the cost (Chicago, R. I. & P. R. Co. v. Mashore, 21 Okla. 275, 96 Pac. 630, 17 Ann. Cas. 277, and Oligschlager v. Stephenson, 24 Okla. 760, 104 Pac. 345) is involved, and in said last-named case Chief Justice Kane said: "The rule seems to be that, where the penalty has been imposed for some tortious or negligent act, the statute has generally, though not always, been sustained; but, on the contrary, where no wrongful or negligent conduct was imputed to the defeated party, any attempt to charge him with a penalty has not prevailed."

We think that there is no difficulty in differentiating the cases of Chicago, R. I. & P. R. Co. v. Mashore and Oligschlager v. Stephenson, supra, with the holding in the instant case; the rule prescribed in said cases being that in actions on contract the provision of the allowance, as part of the costs, of an attorney's fee for the plaintiff in event of recovery, and no provision for a like fee to the defendant upon a successful defense, is a violation of the Constitution of this state and the 14th Amendment of the Constitution of the United States, and the holding in said cases is abundantly sustained by authorities. While in the instant case the action is based upon the violation of a police regulation and provides for the taxing of an attorney's fee as a part of the costs as a penalty, it therefore appears that the holding in this case is not governed by, or in conflict with, said

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cases of Oligschlager v. Stephenson and Chicago, R. I. & P. R. Co. v. Mashore, supra, or either one of them.

In short, in cases based upon an assumpsit, as were the cases of Oligschlager v. Stephenson and Chicago, R. I. & P. R. Co. v. Mashore, supra, the right of the plaintiff, in event of recovery, to recover an attorney's fee as a part of the costs, without a similar provision for the opposing party in event of success, was unconstitutional, while the provision as to recovery of an attorney's fee as part of the costs alone by the plaintiff, and no provision for recovery of an attorney's fee in event of success on the part of the defendant, as in the instant case, the said action being based upon the violation of a police regulation, and such an attorney's fee being in the nature of a penalty, does not violate any provision of the Constitution of this state or the 14th Amendment of the Constitution of the United States.

"A statute will not be declared invalid as being repugnant to the provisions of the Constitution, unless such repugnancy is clear and appears beyond . . . doubt." Rakowski v. Wagoner, 24 Okla. 282, 103 Pac. 632.

"It is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers and its acts to be considered as void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other." Anderson v. Ritterbusch, 22 Okla. 761, 98 Pac. 1002.

Sections 3765 and 3768 are the exercise of the police power of the state, in part for the protection of this commonwealth from the turmoil and strife that would probably result upon the importation of laborers, at a place and business where a strike is on, and that the state has a right to penalize a violator of said §§ 3765 and 3768 by providing an attorney's fee for the workman who has been, in violation of said sec-

tions, induced to accept employment without being advised of the existence of a strike in the field in which he is employed to work; and we are unable to agree with the contention of defendant that providing for an attorney's fee, in the event of recovery by the workman,

Master and
servant—
soliciting
change of
employment.

as a part of the cost, is violative of the 14th Amendment of the Constitution of the United States, or that said §§ 3765 and 3768 are violative of the Constitution of this state.

It cannot be denied that the authorities as to the constitutionality of allowing a plaintiff an attorney's fee in successful actions, and not providing for an attorney's fee for the defendant, if successful, are not entirely harmonious. But we are of the opinion that the weight of authority, and the best-reasoned cases, force the conclusion that the provision for the recovery of an attorney's fee on the part of the plaintiff under § 3768, *supra*, is not in contravention of any provision of the 14th Amendment of the Constitution of the United States, or of § 59, art. 5, of the Constitution of this state.

We are unable to agree with the contention of the defendant that the statutes under review are "an attempt to regulate commerce among the states." We have not been cited to, nor have we been able to find, any Federal regulation upon the subject involved.

It was decided in *Missouri P. R. Co. v. Larabee Flour Mills Co.* 211 U. S. 612, 53 L. ed. 352, 29 Sup. Ct. Rep. 214, that the mere creation of the Interstate Commerce Commission, and the grant to it of a large measure of control over interstate commerce, do not, in the absence of action by it, change the rule that Congress by nonaction leaves power in the states over merely incidental matters. "In other words," and we quote from the opinion (211 U. S. page 623), "the mere grant by Con-

gress to the Commission of certain national powers in respect to interstate commerce does not of itself, and in the absence of action by the Commission, interfere with the authority of the state to make those regulations conducive to the welfare and convenience of its citizens. . . . Until specific action by Congress or the Commission, the control of the state over these incidental matters remains undisturbed."

We are unable to see that the cases cited by the defendant (*International Textbook Co. v. Pigg*, 217 U. S. 91, 54 L. ed. 678, 27 L.R.A. (N.S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103; *Cincinnati, N. O. & T. P. R. Co. v. Rankin*, 154 Ky. 549, 45 L.R.A. (N.S.) 534, 157 S. W. 926; *Stubbs v. People*, 40 Colo. 414, 11 L.R.A. (N.S.) 1071, 122 Am. St. Rep. 1068, 90 Pac. 1114, 13 Ann. Cas. 1025) in support of its contention that the statutes under review "are an attempt to regulate commerce among the states, and to punish a defendant for an act committed in a sister state," throw any light whatever upon said question.

Finding no error in the record, this case is affirmed.

It appearing from the record that a supersedeas bond was given by the defendant in this case, with the Fidelity & Deposit Company of Maryland, a corporation, as surety, it is hereby ordered that the plaintiff have and recover of and from the said Fidelity & Deposit Company of Maryland \$176, with interest thereon from the 4th day of October, 1915, at 6 per cent per annum, and costs.

Per Curiam:
Adopted in whole.

NOTE.

As to the validity of statutory provisions for attorneys' fees, see note following *UNION TERMINAL CO. v. TURNER CONSTR. CO.* post, 884, particularly subd. IV., which deals with spe-

cial proceedings. If the Workmen's Compensation Statutes are valid, there seems to be no good objection to making the compensation cover the expense of securing it, including attorneys' fees.

CLARENCE W. ALEXANDER, Doing Business under the Name of Consolidated Coal Company, Respt.,

v

CHICAGO, MILWAUKEE, & ST. PAUL RAILWAY COMPANY, Appt.

Missouri Supreme Court (In Banc) — April 1, 1920.

(— Mo. —, 221 S. W. 712.)

Constitutional law — assessing attorney's fee — equal protection.

1. A statute allowing attorney's fees to be taxed against a common carrier, which subjects a shipper to undue or unreasonable prejudice or disadvantage, is not unconstitutional as depriving him of property without due process of law or of the equal protection of the law.

[See note on this question beginning on page 884.]

Pleading — action for penalty for refusal to deliver shipment — allegation of intrastate character.

2. That a shipment, to recover a penalty for refusal to deliver which suit is brought under a state statute, was interstate and therefore not within the operation of the statute, is a matter of defense, so that failure to allege its intrastate character does not render the complaint insufficient.

[See 21 R. C. L. 491.]

Statute — construction — plain intent.

3. A statute imposing a penalty upon a railroad company for subjecting a shipper to undue or unreasonable prejudice or disadvantage will be so construed as not to include within its scope any act or person not plainly or fairly intended to be included, but it will not be so construed as to defeat a plain and proper legislative intent.

[See 25 R. C. L. 1084.]

Carrier — discrimination against shipper — ill will.

4. Ill will or disfavor on the part of a carrier towards a shipper is not necessary to subject it to a penalty for violating a statute forbidding it to subject him to an undue or unreasonable disadvantage.

[See 4 R. C. L. 568.]

— necessity of showing preference to another.

5. To subject a carrier to a penalty for violating a statute forbidding the subjecting of any particular person to undue or unreasonable prejudice or disadvantage it is not necessary that the giving of an undue or unreasonable preference to another person be shown.

Appeal — verdict based on evidence.

6. The supreme court will not disturb a verdict supported by evidence, when the trial judge has refused to interfere.

[See 2 R. C. L. 193, 197.]

Constitutional law — when statute declared unconstitutional.

7. A statute will not be held to be unconstitutional unless its unconstitutionality is so obvious as to be beyond all reasonable doubt.

[See 25 R. C. L. 1000.]

Damages — treble — reasonableness.

8. A penalty of treble damages against a common carrier for undue or unreasonable prejudice or disadvantage to a shipper, with respect to transportation, is not void for severity or unreasonableness.

(Graves and Woodson, JJ., dissent.)

APPEAL by defendant from a judgment of the Circuit Court for Jackson County (Seehorn, J.) in favor of plaintiff in an action brought to recover

damages arising from defendant's alleged violation of a statute forbidding preferences or subjection of person to prejudice, and for an attorney's fee. *Affirmed.*

Statement by Williamson, J.:

Clarence W. Alexander, doing business under the name of Consolidated Coal Company, brought this suit against the Chicago, Milwaukee & St. Paul Railway Company, under the provisions of §§ 3184 and 3191 of the Revised Statutes of Missouri of 1909, to recover damages arising from an alleged violation of said § 3184 on the part of the defendant, and for treble damages and attorney's fees as provided by § 3191.

The petition, in substance, after formal allegations, states that the defendant, a common carrier, without just cause or legal excuse, refused to deliver shipments of coal consigned to plaintiff, and that, under the provisions of § 3184 of the Revised Statutes of Missouri of 1909, it is unlawful for a common carrier to subject any one shipper or consignee to any undue or unreasonable prejudice or disadvantage, but that it is the duty of such carriers to afford all equal facilities for traffic; that defendant's conduct was in violation of this statute, in that it refused to accept cars of coal consigned to plaintiff, and turned back and refused to deliver coal shipped to him; and that, by reason of these alleged unlawful acts of the defendant, plaintiff had sustained damages in the sum of \$1,000. The answer was a general denial. Upon a trial by jury, a verdict was rendered in favor of the plaintiff in the sum of \$200. Under the authority of § 3191, *supra*, this sum was by the court trebled, and judgment rendered in the amount of \$600, and the court also allowed to plaintiff the sum of \$75, as attorney's fees. It was agreed that the evidence would show that amount to be a reasonable allowance for the services of plaintiff's attorney. Motions for a new trial and in arrest of judgment were filed and overruled, and by appropriate steps the case has been brought to this court. Jurisdiction

is vested in this court because the constitutionality of the sections of the statute above mentioned is involved.

The essential facts out of which this controversy arose are, as shown by the record, as follows: The plaintiff was engaged in the business of selling coal at retail in Kansas City, Missouri, where he maintained a coal yard. The yard was about 50 feet in width at the rear end, where it abutted upon an alley in which a railroad switch was operated by defendant. From this switch plaintiff's coal yard was served. At the rear end of plaintiff's lot there was a board fence about 6 feet high, extending entirely across the lot. This fence stood about 18 inches west of the east line of the lot. Outside of the fence and between it and the railroad track above mentioned, there were two or three telephone or electric light poles, which appear to have been about 15 to 18 inches in diameter near the base. The fence was old and had gradually become inclined outward and toward the railroad track. Some time in the early part of 1913, an association of railroad employees known in this record as the "Safety First Committee" complained to Mr. W. L. Richards, the superintendent of defendant railway company, that the condition of this fence made it dangerous to set cars on the switch in the rear of plaintiff's lot. Thereupon, about May 21, 1913, Richards informed plaintiff of that fact by letter, claiming in the letter that the fence leaned to such an extent as that it was out over the track, and that a box car in passing barely cleared the fence, and requested plaintiff to correct this dangerous condition without delay. Several similar letters followed from defendant to plaintiff, including threats on the part of defendant to decline to render switch service to plaintiff unless the fence were repaired, and a number of petty bills

claimed by defendant to be due it from plaintiff were promptly paid. These bills amounted to less than \$20, and plaintiff disputed some of them. The parties agreed, however, upon an adjustment of these charges, and the balance found to be due to defendant was paid. Plaintiff made some repairs upon the fence in the early part of September, 1913, and about September 18, 1913, requested defendant to deliver a car of coal upon the switch above mentioned to be unloaded into plaintiff's coal yard. Defendant had received from the Burlington Railroad Company a car of coal shipped to plaintiff, but, after an examination of the fence as repaired, notified plaintiff that the repairs were not sufficient, and refused to place the car of coal upon the switch. Plaintiff declined to make further repairs, and defendant, after holding the car of coal for three days, returned it to the Burlington Railroad Company. Plaintiff had closed down his coal yard during the summer, but in September tried to reopen it for business, with the results above stated. After the car of coal above mentioned had been delivered to defendant in Kansas City, Missouri, for plaintiff, defendant notified plaintiff that it would lift the embargo which it had placed upon his shipping facilities, provided he would put the fence in satisfactory condition and agree to pay "all just car service bills when found to be correct by the bureau," and further agree to pay all damages which might accrue to defendant's cars and equipment by reason of plaintiff's employees handling such cars and equipment. The "bureau" mentioned seems to have been an organization maintained by defendant alone, or by it and other railroad companies. Thereupon plaintiff brought this suit.

There is a sharp conflict in the evidence as to the extent to which the fence in question leaned toward the railroad track. The evidence in behalf of plaintiff tended to show that the fence was about 6 feet high; that it set back about 18 inches west of

the property line; that the telephone poles in question stood adjoining the fence and between it and the switch track at intervals along in the rear of plaintiff's lot; that the fence never at any time inclined to a point beyond the east line of these poles; and that the poles mentioned were set west of the switch track far enough to permit the safe operation of cars on that track. The evidence in behalf of the defendant tended to show that the fence inclined so far into the alley as to make the handling of cars upon the switch dangerous, that in places the cars had a clearance of only 2 to 4 inches, and that in at least one instance a car was scraped by the fence while being set upon this track. No personal hostility was shown to exist between Richards or any other employee of the defendant company and the plaintiff. There was evidence tending to support plaintiff's claim for damages in the amount of the verdict found in his behalf by the jury. The evidence tended to show that plaintiff was rarely at the yard during the summer season, and for that reason he did not receive the letters above mentioned, which were written prior to August 1st, until some time in August, and that he moved the coal which was piled against the fence and repaired the fence some time from the first to the middle of September, and that defendant at various times during the summer season did in fact set cars upon this track for the use of other consignees.

Defendant objected to the allowance of an attorney's fee, on the ground that the court had no jurisdiction to allow it, and that its action deprived defendant of its right to a trial by jury, as provided in § 28 of article 2 of the Constitution of the state of Missouri, and for the further reason that the provisions of the statutes in question, permitting the assessment of an attorney's fee, were unconstitutional and void, and in conflict with § 1 of article 14 of the Amendments to the Constitution of the United States, and in violation of § 30 of article 2 of the Constitu-

tion of Missouri; and defendant also objected to the trebling of the damages for the same reasons. The objection as to the alleged deprivation of a right to a trial by a jury upon the amount of the attorney's fee allowed by the court is not urged here, and is for that reason treated as waived.

We think that the foregoing, in addition to such other matters of fact as may be noted in the opinion, is a sufficiently full statement of the facts.

Mr. Fred S. Hudson, for appellant:

The verdict is not supported by the evidence, and therefore cannot be upheld.

McFarland v. United States Mut. Acci. Asso. 124 Mo. 204, 27 S. W. 436; Cole v. Armour, 154 Mo. 333, 55 S. W. 476; Hewitt v. Steele, 136 Mo. 327, 38 S. W. 82; Peffer v. Missouri P. R. Co. 98 Mo. App. 291, 71 S. W. 1073; Peck v. Missouri P. R. Co. 31 Mo. App. 128.

Plaintiff is suing for penalties, therefore his case must be strictly construed, nothing taken by intentment, and he must bring himself within all the provisions of the statute.

Rixke v. Western U. Teleg. Co. 96 Mo. App. 406, 70 S. W. 265; Eddington v. Western U. Teleg. Co. 115 Mo. App. 98, 91 S. W. 438; Connell v. Western U. Teleg. Co. 108 Mo. 459, 18 S. W. 883.

Before plaintiff can recover, he must plead and prove that the shipment complained of was intrastate.

Steel v. St. Louis, I. M. & S. R. Co. 165 Mo. App. 314, 147 S. W. 217.

The court had no right to assess an attorney fee as costs in this case.

Paddock v. Missouri P. R. Co. 155 Mo. 524, 56 S. W. 453; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255.

Before plaintiff can recover, he must show that defendant showed undue and unreasonable preference or advantage to another shipper, and that ill will, coercion, or disfavor was shown the plaintiff.

Cohn v. St. Louis, I. M. & S. R. Co. 151 Mo. App. 688, 133 S. W. 59; Winn v. Wabash R. Co. 111 Mo. App. 648, 86 S. W. 562.

Sections 3184 and 3191, in which this suit is brought, are in violation of the Constitutions of the state of Missouri and of the United States, as they discriminate against one class of lit-

igants and in favor of another, and the penalty is unreasonable, unjust, and excessive.

Chicago, M. & St. P. R. Co. v. Polt, 232 U. S. 165, 58 L. ed. 554, 34 Sup. Ct. Rep. 301; Yazoo & M. Valley R. Co. v. Jackson Vinegar Co. 226 U. S. 217, 57 L. ed. 193, 33 Sup. Ct. Rep. 40.

Messrs. Albert S. Marley and Strother & Campbell, for respondent:

The petition is sufficient, when considered in connection with the evidence introduced in support of it, and under it, by the plaintiff, and received as evidence by the trial court without any objection on the part of defendant.

Fitzpatrick v. Garver, 253 Mo. 189, 161 S. W. 714; Thomasson v. Mercantile Town Mut. Ins. Co. 217 Mo. 485, 116 S. W. 1092; Robinson v. Levy, 217 Mo. 498, 117 S. W. 577; Reineman v. Larkin, 222 Mo. 157, 121 S. W. 307; Collins v. Andriano, 264 Mo. 475, 175 S. W. 194; Sexton v. Metropolitan Street R. Co. 245 Mo. 254, 149 S. W. 21; Sawyer v. Wabash R. Co. 156 Mo. 468, 57 S. W. 108; Winn v. Kansas City Belt R. Co. 245 Mo. 406, 157 S. W. 98; Rivers v. Norman, — Mo. App. —, 179 S. W. 990; Culbertson v. St. Louis, I. M. & S. R. Co. — Mo. App. —, 178 S. W. 269; Morrison v. Kansas City & W. Belt R. Co. 162 Mo. App. 662, 145 S. W. 137; Wardell v. Chicago, R. I. & P. R. Co. 163 Mo. App. 303, 146 S. W. 813; Madden v. Missouri P. R. Co. 167 Mo. App. 143, 151 S. W. 489; Bolger v. Kansas City Material Co. 171 Mo. App. 261, 157 S. W. 87; Jones v. Banner, 172 Mo. App. 132, 157 S. W. 967; Coulter v. Coulter, 175 Mo. App. 1, 161 S. W. 281; Pickel Stone Co. v. McClintin, 177 Mo. App. 494, 160 S. W. 833; State ex rel. Gardner v. Webb, 177 Mo. App. 60, 164 S. W. 184; Nichols v. R. J. & W. M. Boyd Constr. Co. 187 Mo. App. 127, 172 S. W. 1183; Miller v. St. Louis & S. F. R. Co. 188 Mo. App. 402, 174 S. W. 166.

The court had the right to assess attorney fees and costs in this case.

Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; Missouri, K. & T. R. Co. v. Cade, 233 U. S. 642, 648, 58 L. ed. 1135, 1137, 34 Sup. Ct. Rep. 678; Cohn v. St. Louis, I. M. & S. R. Co. 181 Mo. 30, 79 S. W. 961; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 98, 43 L. ed. 909, 910, 19 Sup. Ct. Rep. 609; Kansas City Southern R. Co. v. Anderson, 233 U. S. 325, 58 L. ed. 983,

(— Mo. —, 821 S. W. 712.)

84 Sup. Ct. Rep. 599; *Rodgers v. Western Home Town Mut. F. Ins. Co.* 186 Mo. 248, 85 S. W. 369; *Martin v. Mutual L. Ins. Co.* 190 Mo. App. 703, 176 S. W. 266; *Williamson v. Liverpool & L. & G. Ins. Co.* 72 C. C. A. 542, 141 Fed. 54, 5 Ann. Cas. 402; *Farmers' & M. Ins. Co. v. Dobney*, 189 U. S. 301, 47 L. ed. 821, 23 Sup. Ct. Rep. 565.

Sections 3184 and 3191 of the statute are not unconstitutional.

Seaboard Air Line R. Co. v. Seegers, 207 U. S. 73, 52 L. ed. 108, 28 Sup. Ct. Rep. 28; *Yazoo & M. Valley R. Co. v. Jackson Vinegar Co.* 226 U. S. 217, 57 L. ed. 193, 33 Sup. Ct. Rep. 40; *Kansas City Southern R. Co. v. Anderson*, 233 U. S. 325, 58 L. ed. 983, 34 Sup. Ct. Rep. 599; *Missouri, K. & T. R. Co. v. Cade*, 233 U. S. 642, 651, 58 L. ed. 1135, 1138, 34 Sup. Ct. Rep. 678.

Williamson, J., delivered the opinion of the court:

I. Appellant claims that the petition in this cause does not state a cause of action, the gist of the complaint being that it does not charge that the car of coal in question was an intrastate shipment. There is no such allegation in the petition, it is true, but appellant made no attack upon the petition either by demurrer or by motion to make more definite and certain, nor did appellant even question the sufficiency of the petition by an objection to the introduction of evidence. But this objection cannot avail appellant, in any event, for the reason that such an allegation was not necessary. Section 3184, Rev. Stat. 1909, under which this suit was brought, contains no provision limiting its application to intrastate shipments. This limitation arises by virtue of a Federal statute, covering the field of interstate commerce, and if this shipment was, in fact, an interstate shipment, and for that reason was not

Pleading—
action for
penalty for
refusal to de-
liver shipment—
allegation of
intrastate
character.

within the scope and
purview of the Mis-
souri statute, that
fact was a matter
of defense which
should have been set

up by respondent in its answer.

"So, in an action upon a penal statute, if the proviso be in a separate section or a substantive clause,

it is matter of defense, and should be left to the other party." Bliss, Code Pl. 3d ed. p. 319, § 202; 36 Cyc. p. 1238; 16 Enc. Pl. & Pr. p. 278; *United States v. Cook*, 17 Wall. 168, 21 L. ed. 538; *Steel v. Smith*, 1 Barn. & Ald. 99, 106 Eng. Reprint, 37.

And this was the rule at common law. *Jones v. Axen*, 1 Ld. Raym. 120, 91 Eng. Reprint, 976; *Stephen, Pl. (Heard)* 443.

"In pleading upon statutes, where there is an exception in the enacting clause, the plaintiff must show that the defendant is not within the exemption, but if there be an exception in a subsequent clause, that is matter of defense, and the other party must show it to exempt himself from the penalty." Chitty, Pl. 16th ed. p. 318.

A fortiori is this the rule, where the exemption, if any, grows, as here, out of a totally different law enacted by a wholly different law-making body.

II. Appellant calls our attention to the fact that this suit is brought upon a statute penal in its nature, and insists that the rule of strict construction applies. This is true. But it is also true that a statute is, nevertheless, to be construed according to its true intent and meaning. The court will take care so to construe a penal statute as not to include within its scope any act or person not plainly and fairly intended to be included therein, but it will take equal care so to construe it as not to defeat a plain and proper legislative intent.

Statute—
construction—
plain intent.

"But though penal laws are to be construed strictly, yet the intention of the legislature must govern in the construction of penal as well as other statutes, and they are not to be construed so strictly as to defeat the obvious intention of the legislature." Fuller, Ch. J., in *United States v. Lacher*, 134 U. S. 624, loc. cit. 628, 33 L. ed. 1080, 1083, 10 Sup. Ct. Rep. 626.

The pertinent portion of the statute upon which this suit is brought is as follows: "It shall be unlawful

for any . . . common carrier . . . to subject any particular person . . . to any undue or unreasonable prejudice or disadvantage, with respect to such transportation." Mo. Rev. Stat. 1909, § 3184.

That an arbitrary and unreasonable refusal by any common carrier to deliver shipments to any person would fall within the true intent and meaning of this statute seems plain. We do not understand that ill will or disfavor on the part of the carrier

Carrier-discrimination against shipper-ill will.

er toward the consignee is a necessary element of any violation of it. The

statute is not leveled at such acts only as are done with malicious intent. If there is in fact an unlawful disadvantage imposed by the carrier upon the consignee, the motive with which that injury is inflicted is immaterial. We therefore think that appellant's contention that respondent failed to make out a case because no "ill will or disfavor" was shown to exist on the part of appellant toward respondent is without merit.

III. Neither do we think that appellant's contention that, "before appellant

-necessity of showing preference to another.

can be held liable, it must be shown that it gave undue or unreasonable

preference" to some person other than respondent, is well taken. If appellant's construction of this statute were sustained, a common carrier could refuse to deliver shipments to one consignee, and yet, if it gave no special preference to any other consignees, it could not be held to have violated the law. We do not understand the law to mean that a common carrier may, without just reason, ruin a man's business by refusing to serve him, and then escape liability therefor merely because the injured one cannot prove that the carrier has shown an undue preference toward another. Section 3184, supra, does, it is true, forbid a common carrier "to give any undue or unreasonable preference or advantage to any particular person," but with equal clearness it also forbids a

common carrier "to subject any particular person . . . to any undue or unreasonable prejudice or disadvantage." Either act is an offense against the law. Both might be committed at the same time, and, conceivably, in the same transaction; but the offenses are not necessarily concomitant, nor in any sense interdependent. It is not necessary for the carrier to violate the law twice in order to be held liable once. Cohn v. St. Louis, I. M. & S. R. Co. 151 Mo. App. 661, 133 S. W. 59, and Wynn v. Wabash R. Co. 111 Mo. App. 642, 86 S. W. 562, cited by appellant upon this proposition, do not support its contention.

Appellant somewhat perfunctorily claims, but does not argue, that the evidence fails to support the verdict. It is not for us to pass upon the weight of the evidence, where any substantial evidence is found to exist in favor of the prevailing party. That there was such evidence in this instance admits, we think, of no dispute. In such case, the verdict of the jury is conclusive upon us, particularly when, as in the case at bar, the trial court ^{Appeal-verdict based on evidence.} has overruled a motion for a new trial based, in part, upon the alleged insufficiency of the evidence.

V. Appellant assigns as error the action of the trial court in assessing an attorney's fee as costs in this case, and also contends that §§ 3184 and 3191, Rev. Stat. 1909, are in violation of the Constitution of this state and the Constitution of the United States. The specific sections of the respective Constitutions thus alleged to be violated are § 30 of article 2 of the Constitution of the state of Missouri, and § 1 of article 14 of the Amendment to the Constitution of the United States. Section 30 of the Missouri Constitution relates to due process of law, and § 1 of the 14th Amendment to the Constitution of the United States is the section referring to "due process and equal protection of the law." No question is made in this court concerning the method by

which the attorney's fee was allowed to respondent in the trial court, nor is the amount allowed assailed as unreasonable. The attack is made upon the fact that a fee was allowed at all, because, as it is claimed, the allowance both of the attorney's fee and of treble damages was in violation of the section of the Constitution of Missouri and of the United States securing to appellant due process of law on the one hand, and due process of law and the equal protection of the law on the other.

In discussing this question, it is well to bear in mind that it is the settled law of this state that a statute will not be held

Constitutional law—when statute declared unconstitutional.

to be unconstitutional unless its unconstitutionality is so

obvious as to be beyond all reasonable doubt. *Bledsoe v. Stallard*, 250 Mo. 154, loc. cit. 165, 157 S. W. 77; *Waite, Ch. J.*, in *Sinking Fund Cases*, 99 U. S. 718, 25 L. ed. 496. The statutes in question are a part of chapter 33, art. 2, of the Revised Statutes of Missouri of 1909. By § 3179 of that article, "All individuals, companies, corporations, trustees, receivers and lessees running and operating cars and trains" upon all railways in this state are declared to be common carriers. Section 3191, *supra*, is as follows:

"In case any such common carrier shall do or cause to be done any act or thing in §§ 3179 to 3207, inclusive, prohibited, or declared to be unlawful, or shall omit to do any act or thing in said sections required to be done, then such common carrier shall be liable to the person or persons injured thereby for three times the amount of damages sustained in consequence of the violation of the provisions of said sections, together with a reasonable attorney's fee, to be fixed by the court, which fee shall be taxed and collected as part of the costs in the case."

The specific grounds here urged in support of appellant's contention are: That §§ 3184 and 3191, *supra*, "discriminate against one class of litigants, and in favor of an-

other, and the penalty is unreasonable, unjust, and excessive." In view of the state of the law involved, a brief discussion of the authorities in point seems necessary.

In *Paddock v. Missouri P. R. Co.* 155 Mo. 524, 56 S. W. 453, the right to have an attorney's fee taxed under a statute involved in that case was challenged, and in an opinion of this court, Marshall, J., said, in substance, that such a fee had been allowed and held valid in *Perkins v. St. Louis, I. M. & S. R. Co.* 103 Mo. 52, 11 L.R.A. 426, 15 S. W. 320, but that "since then the constitutionality of such a statute has undergone examination by the Supreme Court of the United States in the case of *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255, and the statute was held to be in conflict with the 5th Amendment to the Constitution of the United States, and therefore void." *Paddock v. Missouri P. R. Co. supra*, 155 Mo. loc. cit. 537.

In obedience to the decision in the *Ellis Case*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255, *supra*, this court held the allowance of the attorney's fee to be error, and in effect overruled the *Perkins Case*, *supra*, on that point. The *Paddock Case* was followed, again upon the authority of the *Ellis Case*, in *Thompson v. Traders' Ins. Co.* 169 Mo. 12, loc. cit. 30, 68 S. W. 889. But the *Paddock Case*, though discussed, was not followed by this court in *Keller v. Home L. Ins. Co.* 198 Mo. 440, loc. cit. 459, 95 S. W. 903, where an attorney's fee was held properly taxable under the provisions of § 8012, Rev. Stat. Mo. 1899 (now § 7068, Rev. Stat. Mo. 1909), notwithstanding the decision of the United States Supreme Court in the *Ellis Case*, which was also discussed, but not followed. It may be noted that the decision in the *Ellis Case* was by a divided court, Justices Gray, Fuller, and White dissenting on the conclusions therein announced. In view of the large number of decisions by the same court in which the *Ellis Case* has either been distinguished or

ignored, we think it may fairly be said that that decision turned upon the construction of the peculiar statute there under consideration. As construed by the United States Supreme Court, the statute involved in the *Ellis Case* applied to railway corporations only—not to all common carriers. This was held to be an arbitrary classification, and therefore void.

In *Seaboard Air Line R. Co. v. Seegers*, 207 U. S. 73, 52 L. ed. 108, 28 Sup. Ct. Rep. 28, the court had before it a case involving a statute of the state of South Carolina, whereby it was provided, in substance, that every claim for loss or damage to property while in the possession of a common carrier should be adjusted and paid within forty days after the filing of such claim with an agent of the carrier, and that, in the event the carrier failed so to adjust and pay, it should be liable to a penalty of \$50 for every such failure. The amount involved in that specific instance was \$1.75. The penalty of \$50 had been allowed by the trial court, and the supreme court of South Carolina had affirmed the decision. Speaking of this statute, Justice Brewer in the *Seegers Case*, *supra*, said:

"It is not an act leveled against corporations alone, but includes all common carriers. The classification is based solely upon the nature of the business, that being of a public character. . . .

"It may be stated as a general rule that an act which puts in one class all engaged in business of a special and public character, requires of them the performance of a duty which they can do better and more quickly than others, and imposes a not exorbitant penalty for a failure to perform that duty within a reasonable time, cannot be adjudged unconstitutional as a purely arbitrary classification. . . .

"Further, it must be remembered that the purpose of this legislation is not primarily to enforce the collection of debts, but to compel the performance of duties which the carrier

assumes when it enters upon the discharge of its public functions. We know there are limits beyond which penalties may not go—even in cases where classification is legitimate—but we are not prepared to hold that the amount of penalty imposed is so great or the length of time within which the adjustment and payment are to be made is so short that the act imposing the penalty and fixing the time is beyond the power of the state."

The *Ellis Case*, *supra*, is cited in the opinion in this case, but not followed, although both opinions were written by the same learned justice. In the *Ellis Case*, however, it should be noted that the statute there in question applied to railway corporations only, whereas in the *Seegers Case* the statute applied to all common carriers. The two cases were distinguished on that point.

In *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609, the United States Supreme Court had under consideration a Kansas statute that allowed a reasonable attorney's fee to a successful plaintiff in an action for damages against a railroad company. The court there distinguished the *Ellis Case*, and upheld the Kansas statute.

In the same court, in the case of *Fidelity Mut. Life Asso. v. Mettler*, 185 U. S. 308, 46 L. ed. 922, 22 Sup. Ct. Rep. 662, the *Ellis Case* was again distinguished, and a statute imposing upon life and health insurance companies a liability to the holders of policies for damages and reasonable attorney's fees in the event of a failure to pay a loss within a prescribed time after demand was upheld. This rule was reiterated in *Iowa L. Ins. Co. v. Lewis*, 187 U. S. 335, 47 L. ed. 204, 23 Sup. Ct. Rep. 126; *Farmers' & M. Ins. Co. v. Dorney*, 189 U. S. 301, 47 L. ed. 821, 23 Sup. Ct. Rep. 565; *Kansas City Southern R. Co. v. Anderson*, 233 U. S. 325, 58 L. ed. 983, 34 Sup. Ct. Rep. 599 (in which double damages as well as attorney's fees were allowed); *Yazoo & M. Valley R. Co. v.*

(— Mo. —, 221 S. W. 712.)

Jackson Vinegar Co. 226 U. S. 217, 57 L. ed. 193, 33 Sup. Ct. Rep. 40; Missouri, K. & T. R. Co. v. Cade, 233 U. S. 642, 58 L. ed. 1135, 34 Sup. Ct. Rep. 678; Missouri, K. & T. R. Co. v. Harris, 234 U. S. 412, 58 L. ed. 1377, L.R.A.1915E, 942, 34 Sup. Ct. Rep. 790; Missouri P. R. Co. v. Larabee, 234 U. S. 459, 58 L. ed. 1398, 34 Sup. Ct. Rep. 979; St. Louis, I. M. & S. R. Co. v. Williams, 251 U. S. 63, 64 L. ed. 139, 40 Sup. Ct. Rep. 71; and many other cases.

In *Yazoo & M. Valley R. Co. v. Jackson Vinegar Co.* 226 U. S. 217, 57 L. ed. 193, 33 Sup. Ct. Rep. 40, the constitutionality of a statute of Mississippi, imposing a penalty upon a common carrier for failure to settle claims for damages to goods in shipment, was involved. The amount for which suit was brought in that instance was \$4.75. A penalty of \$25 was allowed the plaintiff in the court below. The statute was leveled against "railroad corporations and individuals engaged as common carriers" in that state. In that case the court, speaking through Mr. Justice Van Devanter, said: "As applied to such a case, we think the statute is not repugnant to either the due process of law or the equal protection clause of the Constitution, but, on the contrary, merely provides a reasonable incentive for the prompt settlement, without suit, of just demands of a class admitting of special legislative treatment. See *Seaboard Air Line R. Co. v. Seegers*, 207 U. S. 73, 52 L. ed. 108, 28 Sup. Ct. Rep. 28; *St. Louis, I. M. & S. R. Co. v. Wynne*, 224 U. S. 354, 56 L. ed. 799, 42 L.R.A. (N.S.) 102, 32 Sup. Ct. Rep. 493; *Yazoo & M. Valley R. Co. v. Jackson Vinegar Co.* supra, 226 U. S. loc. cit. 219.

In the case of *Missouri, K. & T. R. Co. v. Cade*, 233 U. S. 642, 58 L. ed. 1135, 34 Sup. Ct. Rep. 678, a statute of the state of Texas imposing an attorney's fee on the defeated defendant in certain classes of cases was under review, upon the charge that the act was void because in conflict with the same section of the Federal Constitution here cited. The Texas

statute was directed against "any person or corporation doing business in this state." As stated in that opinion, the plaintiff in error relied chiefly upon the *Ellis Case*, supra. After calling attention to the fact that this statute was applicable to all persons both natural and artificial, the court said:

"As has been said before, the 14th Amendment does not require that state laws shall be perfect; and we cannot judicially denounce this act as based upon arbitrary distinctions, in view of the wide discretion that must necessarily reside in a state legislature about resorting to classification when establishing regulations for the welfare of those for whom they legislate. *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 293, 42 L. ed. 1037, 1042, 18 Sup. Ct. Rep. 594; *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 562, 43 L. ed. 552, 554, 19 Sup. Ct. Rep. 281; *Louisville & N. R. Co. v. Melton*, 218 U. S. 36, 52, 54 L. ed. 921, 927, 47 L.R.A. (N.S.) 84, 30 Sup. Ct. Rep. 676; *Lindsley v. Natural Carbonic Gas Co.* 220 U. S. 61, 78, 55 L. ed. 369, 377, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160. . . .

"If the classification is otherwise reasonable, the mere fact that attorney's fees are allowed to successful plaintiffs only, and not to successful defendants, does not render the statute repugnant to the 'equal protection' clause. This is not a discrimination between different citizens or classes of citizens, since members of any and every class may either sue or be sued. Actor and reus differ in their respective attitudes towards litigation; the former has the burden of seeking the proper jurisdiction and bringing the proper parties before it, as well as the burden of proof upon the main issues; and these differences may be made the basis of distinctive treatment respecting the allowance of an attorney's fee as a part of the costs. *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; *Farmers' & M. Ins. Co. v. Dobney*, 189 U. S. 801, 304, 47 L.

ed. 821, 825, 23 Sup. Ct. Rep. 565; *McMullin v. Doughty*, 68 N. J. Eq. 776, 781, 55 Atl. 115, 284, 64 Atl. 1134." *Missouri, K. & T. R. Co. v. Cade*, supra, 233 U. S. loc. cit. 650.

In the same case it was held that the allowance of an attorney's fee should not be regarded as a penalty, but that it stood upon the same basis as ordinary court costs, and the court said: "If a reasonable penalty may be imposed for failure to satisfy a demand found to be just, it follows a fortiori that costs and an attorney's fee may be." *Missouri, K. & T. R. Co. v. Cade*, supra, 233 U. S. loc. cit. 652.

In *Missouri P. R. Co. v. Larabee*, 234 U. S. 459, 58 L. ed. 1398, 34 Sup. Ct. Rep. 979, the rights of the plaintiff to recover attorney's fees in a mandamus proceeding was involved. Such a right was conferred by the statutes of Kansas. The attack was made there, as here, that the allowance of an attorney's fee in such a case was void under the provisions of the 14th Amendment. The allowance was held proper under the authority of the *Cade Case*, supra. In the *Larabee Case*, however, the liability to pay an attorney's fee seems to have applied to all persons against whom the mandamus was issued.

In the case of *Chicago, M. & St. P. R. Co. v. Polt*, 232 U. S. 165, 58 L. ed. 554, 34 Sup. Ct. Rep. 301, a statute which is not set out in the opinion was held to offend against the 14th Amendment, in a very brief utterance by Justice Holmes. It appears from a portion of the statute quoted in the opinion that under a statute of South Dakota a railroad company was held absolutely responsible for property destroyed by a fire communicated from its locomotive, and the damages should be doubled unless paid within sixty days from the date of service of notice of the claim; but if within sixty days after notice of loss it should "offer in writing to pay a fixed sum, being the full amount of the damages sustained, and the owner shall refuse to accept the same, then in any action there-

after brought for such damages when such owner recovers a less sum as damages than the amount so offered, then such owner shall recover only for damages, and the railway company shall recover its costs." In the trial court the plaintiff recovered a judgment of \$780. The railway company had offered to pay \$500. A judgment for double damages was affirmed by the supreme court of South Dakota. Justice Holmes said in that case:

"No doubt the states have a large latitude in the policy that they will pursue and enforce, but the rudiments of fair play required by the 14th Amendment are wanting when a defendant is required to guess rightly what a jury will find, or pay double if that body sees fit to add one cent to the amount that was tendered, although the tender was obviously futile because of an excessive demand. The case is covered by *St. Louis, I. M. & S. R. Co. v. Wynne*, 224 U. S. 354, 56 L. ed. 799, 42 L.R.A.(N.S.) 102, 32 Sup. Ct. Rep. 493. It is not like those in which a moderate penalty is imposed for failure to satisfy a demand found to be just. *Yazoo & M. Valley R. Co. v. Jackson Vinegar Co.* 226 U. S. 217, 57 L. ed. 193, 33 Sup. Ct. Rep. 40;" *Chicago, M. & St. P. R. Co. v. Polt*, 232 U. S. 165, loc. cit. 168.

The judgment was reversed for the reasons set forth in the quotation. The *Ellis Case* was cited in the briefs, but not noticed in the opinion.

In *Chicago, R. I. & P. R. Co. v. Hardwick Farmers' Elevator Co.* 226 U. S. 426, 57 L. ed. 284, 46 L.R.A.(N.S.) 203, 33 Sup. Ct. Rep. 174, the same question was presented to the United States Supreme Court, under a Minnesota statute, and the judgment in favor of the plaintiff below, which had been affirmed in the supreme court of Minnesota, was reversed. The decision of the United States Supreme Court, however, turns solely upon the point that by the passage of the Hepburn Act (34 Stat. at L. 584, chap. 3591, Comp. Stat. § 8563, 4 Fed. Stat. Anno. 2d ed. p. 337) Congress had taken ex-

clusive possession of the field of legislation relating to such commerce, and for that reason the Minnesota statute was void.

In the case of *Atchison, T. & S. F. R. Co. v. Vosburg*, 238 U. S. 56, 59 L. ed. 1199, L.R.A.1915E, 953, 35 Sup. Ct. Rep. 675, the court had under consideration a statute of Kansas which required a railway company to furnish cars to shippers, and provided a penalty of \$5 per day for each car not supplied, and for a reasonable attorney's fee in addition. By a reciprocal provision of this statute, shippers who failed to use cars placed at their disposal were subject to a penalty for their detention, but were not liable for attorney's fees. Vosburg recovered judgment against the railway company for violation of this statute, including an attorney's fee, and the case was taken to the United States Supreme Court on the ground that the statute denied the railway company the equal protection of the law guaranteed by the Federal Constitution, because of the fact that under the same statute the railway company might be compelled to pay a fee, but no such liability attached to the other party. This contention was sustained by the Supreme Court. The case is said to be essentially different from the *Matthews, Cade, and Anderson* line of cases, because of the distinction made in the statute in question between the parties to such suits.

The whole question seems to be set at rest in the very recent case of *St. Louis, I. M. & S. R. Co. v. Williams*, 251 U. S. 63, 64 L. ed. 139, 40 Sup. Ct. Rep. 71, decided December 8, 1919. In this case a statute of Arkansas regulating the rates for the transportation of passengers provided that any railroad company which should collect a greater compensation than that prescribed in the statute should, for every such offense, be subjected to a penalty of "not less than fifty dollars nor more than three hundred dollars, and costs of suit, including a reasonable attorney's fee." The aggrieved pas-

senger was given the right to recover the penalty and costs, including the attorney's fee, in a civil action. In that case the railway company had charged each of two passengers 66 cents more than the prescribed fare. Suit was brought to recover the penalty and attorney's fees, and judgment obtained for a penalty of \$75 and \$25 attorney's fee in each case. The constitutionality of the Arkansas statute was attacked upon the same grounds as in the cases above mentioned and the case at bar. The judgment of the trial court was, however, affirmed, in an opinion by Justice Van Devanter, in which the court points out that it is immaterial that the penalty goes to the aggrieved passenger and not to the state, and holds that this is not contrary to due process of law, nor is it requisite that the amount of the penalty should be confined or proportioned to the passenger's loss or damages, for the reason that it is imposed as a punishment for the violation of a public law. Although the penalty and the attorney's fee in that case amounted to \$100, and the offense of the carrier involved only 66 cents, the court nevertheless said: "We think it properly cannot be said to be so severe and oppressive as to be wholly disproportioned to the offense or obviously unreasonable." 251 U. S. 67.

The constitutionality of statutes similar to the one here in question has been upheld repeatedly by the Federal courts, and by the courts of last resort of probably a majority of the states of the Union; at least, to the extent of allowing a reasonable attorney's fee to be taxed and reasonable damages to be awarded against the offender. A careful review of the authorities leads, we think, irresistibly to this conclusion. *St. Louis Southwestern R. Co. v. Cone*, 111 Ark. 309, 163 S. W. 1170; *Atlantic Coast Line R. Co. v. Perry*, 69 Fla. 133, 67 So. 639; *Peoria, D. & E. R. Co. v. Duggan*, 109 Ill. 537, 50 Am. Rep. 619; *Illinois C. R. Co. v. Crider*, 91 Tenn. 489, 19 S. W. 618; *Missouri, K. & T. R. Co. v. Simonson*,

64 Kan. 802, 57 L.R.A. 765, 91 Am. St. Rep. 248, 68 Pac. 653; Burlington, C. R. & N. R. Co. v. Dey, 82 Iowa, 312, 12 L.R.A. 436, 3 Inters. Com. Rep. 584, 31 Am. St. Rep. 477, 48 N. W. 98; Cameron v. Chicago, M. & St. P. R. Co. 63 Minn. 384, 31 L.R.A. 553, 65 N. W. 652, are a few of the cases which may be cited in support of this statement. It is necessary, however, as said in the Williams Case, supra, that the penalty so imposed shall not be "so severe and oppressive as to be wholly disproportioned to the offense or obviously unreasonable."

Is the penalty of treble damages imposed by our statute in this instance so severe as to fall within that rule? In the consideration of this question it is proper to give much weight to the fact that the general assembly, whose duty it was in the first instance to fix the amount of the penalty, evidently thought treble damages to be justified under the conditions involved and in view of the character of the ills to be remedied. State legislatures are still accorded "wide discretion" and "large latitude" in these matters, even under the decisions of the United States Supreme Court. The sections here assailed were first enacted in 1887, and we do not find that the penalty provided has ever before been questioned on the ground of excessiveness, and certainly it has never been adjudged to be so in any appellate court. Practical experience for almost a whole generation has thus apparently justified the wisdom of the law and the amount of the penalty. Furthermore, we think it may safely be assumed that, in most claims arising from the nondelivery of freight shipments, the amount involved as damages is rarely large, and generally is quite small. In the case in hand, although the amount claimed was \$1,000, the amount allowed was only \$200, and this sum, though trebled, cannot be said to involve a great hardship. A penalty which is not sufficiently severe to prevent frequent infractions of the law falls

short of its purpose. In view of the enormous amount of freight annually handled by common carriers in this state, and of the infrequency with which the penalty provided in this instance has been a subject of litigation, it would seem to be a fair inference, after a fair test in actual experience, that the section in question has demonstrated the wisdom of the legislature in enacting it. It is a matter of common knowledge that, during the time that this law has stood upon our statute books, the common carriers of this state have not lacked either the means or the disposition to appeal to the law-making body and to the courts for redress of their grievances, or for protection of their rights. It cannot be said that they have been accorded an unkindly reception in either forum, and hence the fact that in more than thirty years the validity of this penalty has rarely, if ever, been questioned on the ground that it is excessive, is strongly persuasive that it has not been found to be oppressive. We do not think that we would be justified in holding § 3191, supra, to be unconstitutional on this ground.

Damages—
treble—reason-
ableness.

In view of the present attitude of the Supreme Court of the United States upon the questions here involved, as evidenced by the opinions we have cited, we conclude that §§ 3184 and 3191, supra, are not repugnant to the provisions of the Federal Constitution relating to due process of law or equal protection of the law. By parity of reasoning, they are not in conflict with the due process of law clause of our state Constitution. Paddock v. Missouri P. R. Co. 155 Mo. 524, 56 S. W. 453, and Thompson v. Traders' Ins. Co. 169 Mo. 12, 68 S. W. 889, in so far as they may be thought to be authority to the contrary, are hereby overruled. Few graver duties devolve upon the courts than that of passing upon questions of constitutional law. The power of a court to annul an act

Constitutional
law—assessing
attorney's fee—
equal protection.

of Congress or of a legislature is peculiar to American jurisprudence and was long hotly contested. While the existence of that power has been firmly established both upon reason and authority, it is to be exercised only after solemn deliberation, with the utmost care, and upon conviction beyond a reasonable doubt. The great master of constitutional law, in discussing this question, said: "The question whether a law be void for its repugnancy to the Constitution is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other." Marshall, Ch. J., in *Fletcher v. Peck*, 6 Cranch, 87, loc. cit. 128, 3 L. ed. 162, 175.

For the reasons stated the judgment should be affirmed. It is so ordered.

All concur, except Graves, J., who dissents in separate opinion in which Woodson, J., concurs.

Graves, J., dissenting:

I. From the facts stated, I agree to most that is written in the majority opinion, except the latter part thereof, which deals with the reasonableness of the penalty imposed by our statute, and the statement in the first paragraph thereof, wherein it is said: "The statute under which this suit is brought contains no provisions limiting its application to intrastate shipments." I think the penalty imposed is so unreasonable as to make the statute in question violative of the provisions of the Federal Constitution, discussed, and

learnedly discussed, by my brother. Many of the cases cited by my brother would so indicate. The mere fact that this statute has not heretofore reached the Federal court, or this court, may as well be explained upon the theory that the lawyers of the state feared the results, and hence refrained from asking the doubling or trebling of damages, as upon the theory that the corporations reached thereby recognized its reasonableness. The divers and sundry McGrew Cases upon our books are illustrative. There were penalty clauses in the statutes covering those cases, but astute counsel for plaintiff never invoked them. Nor are claims for damages under statutes having penalty clauses always or usually trivial in amount. The McGrew Cases, *supra*, are illustrative. Others might be cited, but these suffice.

What is the actual penalty fixed by this statute? In my judgment it is (1) the attorney's fee, and (2) the giving to a plaintiff of twice the amount of his adjudicated claim, in addition, as a penalty. In other words, the statute not only allows the plaintiff to recover that to which he is entitled as damages, but it goes further and requires the defendant to pay an attorney's fee, and, in addition to the adjudicated actual damages, twice the amount of the adjudged damages; for such is the result of treble damages. It cannot be well said that the allowance of an attorney's fee is other than a penalty. I think the statute violates the provision of the Federal Constitution discussed by my brother, and, as the action is under the statute, the judgment should be simply reversed.

II. The action is brought under §§ 3184 and 3191, Rev. Stat. 1909. Section 3204 limits in specific terms these statutes to intrastate shipments, and for that reason I dissent from what is said in ¶ 1 of the majority opinion, quoted *supra*. Section 3204, Rev. Stat. 1909, reads: "All the provisions of said § 3179 to 3207 shall be held to apply to ship-

ments made from any point *within* the state to any point *within* the state, whether the transportation of the same shall be wholly within this state or partly within this and adjoining state or states."

The italics are ours. It will be noted that this section covers both sections involved in this action. It is a qualification to the broad language of these sections, and limits their application to intrastate transactions. We have so specifically ruled. *Seawell v. Kansas City, Ft. S. & M. R. Co.* 119 Mo. loc. cit. 233 et seq., 5 Inters. Com. Rep. 262, 24 S. W. 1002.

So whilst we concur in the ruling that defendant should have pleaded an interstate shipment, if in fact there was one, yet we do not concur in the view that our statutes cover anything further than intrastate shipments. Had the plaintiff's petition shown this car of coal to have been an interstate shipment, it would have been demurrable. Not only has this court held these statutes applicable only to intrastate shipments, but in *Steel v. St. Louis, I. M. & R. Co.* 165 Mo. App. loc. cit. 316 et seq.,

147 S. W. 217, the St. Louis court of appeals has so ruled.

Our statute would seem to make intrastate commerce out of a shipment which started in this state and ended in this state, although the shipment traversed through another state between the starting and stopping points. That kind of a shipment has been denominated interstate by the United States Supreme Court. *Hanley v. Kansas City Southern R. Co.* 187 U. S. 617, 47 L. ed. 333, 23 Sup. Ct. Rep. 214. Clear it is that our statutes have no reference to interstate matters, and this suffices. For the reasons stated, I dissent.

Woodson, J., concurs.

Petition for rehearing denied April 30, 1920.

NOTE.

Upon the question of the validity of statutory provisions for attorney's fees as part of a penalty for discrimination by a carrier, see subd. II. of the note following *UNION TERMINAL CO. v. TURNER CONSTR. Co.* post, 885.

UNION TERMINAL COMPANY et al., Appts.,

v.

TURNER CONSTRUCTION COMPANY.

United States Circuit Court of Appeals, Fifth Circuit—January 25, 1918.

(159 C. C. A. 585, 247 Fed. 727.)

Constitutional law — allowance of attorney's fee to mechanic's lien claimant.

1. A statute giving materialmen and mechanics an attorney's fee in case of recovery against the property owner in a lien proceeding is unconstitutional as denying equal protection of the laws.

[See note on this question beginning on page 884.]

Mechanics' liens — priority over mortgage — loan of money.

2. One contracting to construct a building with knowledge that the money to pay for the work was to be borrowed from a bank cannot enforce a lien against the property for an amount in excess of the contract price superior to the mortgage to the bank on the ground that the mortgage was

not recorded until after he began his work, since he is charged with notice of the mortgage, although he is entitled, as against the mortgagee, to the percentage of the contract price withheld pending completion of the work, and deposited in bank awaiting such completion.

[See 18 R. C. L. 955, 956.]

APPEAL by defendants from a decree of the District Court of the United States for the Southern District of Florida (Call, Dist. J.) in favor of complainant in an action brought to recover the balance alleged to be due on a construction contract, and for attorney's fees. *Modified and affirmed.*

The facts are stated in the opinion of the court.

Argued before Walker and Batts, Circuit Judges, and Evans, District Judge.

Mr. J. T. G. Crawford, for appellants:

Complainant is not entitled to recover any amount as attorney's fees, because § 2218 of the General Statutes of Florida is contrary to the 14th Amendment to the Constitution of the United States.

Lewis's Sutherland, Stat. Constr. 107; Dell v. Marvin, 41 Fla. 221, 45 L.R.A. 201, 79 Am. St. Rep. 171, 26 So. 188; Mills v. Olsen, 43 Mont. 129, 115 Pac. 33; Builders' Supply Depot v. O'Connor, 150 Cal. 265, 17 L.R.A. (N.S.) 909, 119 Am. St. Rep. 193, 88 Pac. 982, 11 Ann. Cas. 712; Los Angeles Pressed Brick Co. v. Higgins, 8 Cal. App. 514, 97 Pac. 414, 420; Hill v. Clark, 7 Cal. App. 609, 95 Pac. 382; Farnham v. California Safe Deposit & T. Co. 8 Cal. App. 266, 96 Pac. 788; Union Lumber Co. v. Simon, 150 Cal. 751, 89 Pac. 1077, 1081; Davidson v. Jennings, 27 Colo. 187, 48 L.R.A. 340, 83 Am. St. Rep. 49, 60 Pac. 354; Los Angeles Gold Mine Co. v. Campbell, 18 Colo. App. 1, 56 Pac. 246; Atkinson v. Woodmansee, 68 Kan. 71, 64 L.R.A. 325, 74 Pac. 640; Hocking Valley Coal Co. v. Rosser, 53 Ohio St. 12, 29 L.R.A. 386, 53 Am. St. Rep. 622, 41 N. E. 263; Randolph v. Builders & P. Supply Co. 106 Ala. 501, 17 So. 721; Brubaker v. Bennett, 19 Utah, 401, 57 Pac. 170; Openshaw v. Halpin, 24 Utah, 426, 91 Am. St. Rep. 796, 68 Pac. 139; Becker v. Hopper, 22 Wyo. 237, 138 Pac. 179, Ann. Cas. 1916D, 1041; Grand Rapids Chair Co. v. Runnels, 77 Mich. 104, 43 N. W. 1006; Oligschlager v. Stephenson, 24 Okla. 760, 104 Pac. 345; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255.

Mr. H. B. Hurd also for appellants.

Messrs. Marks, Marks, & Holt, for appellee:

Defendants are not entitled to urge the unconstitutionality of the statute of Florida providing for the allowance of attorney's fees.

Rosenthal v. New York, 226 U. S. 260, 57 L. ed. 212, 33 Sup. Ct. Rep. 27, Ann. Cas. 1914B, 71; Missouri, K. & T. R. Co. v. Cade, 233 U. S. 642, 58 L. ed. 1135, 34 Sup. Ct. Rep. 678; Union Mut. L. Ins. Co. v. Kirchoff, 169 U. S. 103, 42 L. ed. 677, 18 Sup. Ct. Rep. 11 A.L.R.—58.

260; Taylor v. Robertson, 27 Fed. 537; Story v. Livingston, 13 Pet. 359, 10 L. ed. 200; Southern R. Co. v. King, 87 C. C. A. 284, 160 Fed. 332; Brothers v. Cunningham, 111 C. C. A. 146, 189 Fed. 884.

Even if defendants are permitted to question the statute, it is apparent that the act is sufficiently broad and comprehensive in its provisions to be free from the objectionable features urged.

Dell v. Marvin, 41 Fla. 221, 45 L.R.A. 201, 79 Am. St. Rep. 171, 26 So. 188; Tillis v. Liverpool & L. & G. Ins. Co. 46 Fla. 268, 110 Am. St. Rep. 89, 35 So. 171; Hartford F. Ins. Co. v. Redding, 47 Fla. 228, 67 L.R.A. 518, 110 Am. St. Rep. 118, 37 So. 62; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Builders' Supply Depot v. O'Connor, 17 L.R.A. (N.S.) 910, note; Missouri, K. & T. R. Co. v. Harris, L.R.A.1915E, 943, note.

Batts, Circuit Judge, delivered the opinion of the court:

The Union Terminal Company negotiated with the Central Trust Company of Illinois, for funds with which to construct warehouses and other improvements at Jacksonville, and, contemporaneously, with the Turner Construction Company of New York, to construct the buildings. The latter company knew of the negotiations with the trust company, and had notice of the fact that the trust company was to furnish the money, or most of the money, required for the construction, and that the amount was to be secured by a lien upon the buildings. It was agreed that \$205,000 of the amount to be furnished by the trust company was to be paid over to the construction company. As the work progressed, payments were made of 85 per cent of the estimates. The balance was put in the Barnett Bank, and at the time of the institution of the suit this deposit amounted to \$20,219.98. A part of the contract price for the construction not having been paid, suit was instituted by the Turner Construc-

tion Company against the Union Terminal Company for the balance due. The Central Trust Company, having been made a party, set up its mortgage. The construction company asserted a materialman's lien, claiming that by the making of the contract, the furnishing of material, and the beginning of work prior to the record of the mortgage of the Central Trust Company, it fixed a lien superior to that of the mortgage.

The construction company had knowledge of the mortgage, and of the arrangement made by the warehouse company for financing the building, and participated in its benefits. It was to have received the sum of \$205,000 from the fund to be provided by the trust company, and actually received \$140,695.89, and is to get the benefit of \$20,219.98 deposited in the Barnett Bank, as the retained 15 per cent on estimates. A judgment was given the construction company against the Union Terminal Company for \$78,370.45, with interest at 8 per cent per annum from August 15, 1913, and 10 per cent attorney's fees. Of this amount \$44,084.13, with interest and attorney's fees, was adjudged a first lien on the property, and \$34,286.32 thereof, with interest and attorney's fees, a lien subject to the mortgage of the Central Trust Company. The \$44,084.13 was the difference between the amount to have been received by the Turner Construction Company from the Central Trust Company, and the amount actually paid by the latter. With interest and attorney's fees, the aggregate is \$60,767.36.

The construction company now contends that all of its debt should have been given a first lien, upon the ground that its rights were fixed prior to the record of the mortgage of the trust company. It also insists that to the judgment should be added an amount equal to the deposit in the Barnett Bank. The Central Trust Company objects to the judgment, upon the ground that interest and attorney's fees ought

not to have been included in the amount for which a preferential lien was given.

The contention of the Turner Construction Company, based on the record of the mortgage after the beginning of the work, is without merit. This concern knew that the trust company was

Mechanics' liens—priority over mortgage—loan of money.

to furnish the money, and looked to it for \$205,000 of the contract price. It must have known that the intention was to secure the advances made by the trust company to the warehouse company by the mortgage on the property of the latter company. With this notice it accepted more than \$140,000 of the money furnished by the Central Trust Company, and judgment has been given it for the difference between the amount paid for its benefit and the \$205,000 it was to have received from the trust company. It has no cause to complain of this part of the judgment. As to the amount in the Barnett Bank, the construction company is entitled to its receipt, and the judgment herein should be so reformed as to require its payment to the construction company. The bank is not a party to this suit, but an order may be issued to the warehouse company to join the construction company in the execution of a joint check to cover the amount.

The objection of the Central Trust Company to the allowance of interest in the preference lien will be held without merit, inasmuch as the money was in possession of the bank during the period for which interest is charged, and it was held under conditions which did not preclude the trust company from receiving interest on it, and was not paid to the construction company when it should have been paid.

Attorney's fees were awarded upon an Act of Florida of 1903 (chap. 5143), entitled: "An Act to Provide Liens for Materialmen, Mechanics, Artisans and Laborers, and to Provide the Manner in Which

Such Liens Shall Be Acquired and to Provide a Remedy for the Enforcement of Such Liens."

Section 17 of this act, constituting § 2218 of the General Statutes of Florida of 1906, is to this effect: "If the plaintiff shall prevail, the court shall allow him reasonable attorney's fees, to be fixed by the court, not to exceed \$10 if the amount recovered do not exceed \$100, and not to exceed 10 per cent, of any recovery greater than \$100."

The statutes of Florida do not make like provisions for any other character of cases. Similar statutes with reference to attorney's fees in favor of materialmen and laborers have been passed in Montana, Illinois, Washington, California, Colorado, Kansas, Ohio, Alabama, Utah, Wyoming, Michigan, and Oklahoma, in all of which states the provision, in so far as it applies to the materialmen, has been held in violation of the 14th Amendment to the Constitution of the United States. Like statutes in Idaho, Oregon, New Mexico, Indiana, and Florida have been maintained. The question has not come directly before the Supreme Court of the United States, nor has it been passed on in any other Federal court. In the case of Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255, a Texas statute, providing that reasonable attorney's fees might be recovered against railroad companies on claims not exceeding \$50 for labor, etc., was held unconstitutional. The Supreme Court used this language in disposing of the case: "The act singles out a certain class of debtors and punishes them, when for like delinquencies it punishes no others. They are not treated as other debtors, or equally with other debtors. They cannot appeal to the courts as other litigants under like conditions and with like protection. If litigation terminates adversely to them, they are mulcted in the attorney's fees of the successful plaintiff; if it terminates in their favor, they recover no attorney's fees. It is no sufficient answer to say that

they are punished only when adjudged to be in the wrong. They do not enter the courts upon equal terms. They must pay attorney's fees, if wrong; they do not recover any, if right; while their adversaries recover if right, and pay nothing if wrong. In the suits, therefore, to which they are parties, they are discriminated against, and are not treated as others. They do not stand equal before the law. They do not receive its equal protection."

After the decision in the case of Ellis, the statutes of Texas were amended, and in the case of Missouri, K. & T. R. Co. v. Cade, 233 U. S. 642, 58 L. ed. 1135, 34 Sup. Ct. Rep. 678, the court held the amended act constitutional. The amended act had application to any person or corporation, gave the attorney's fees only in case the full amount of the claim was established, confined its application to personal services rendered, for material furnished, for overcharges on freight, and for stock killed or injured, and limited the amount of the recovery of attorney's fees to \$20. This act was sustained as "a police regulation, designed to promote the prompt payment of small [but well-founded] claims, and to discourage unnecessary litigation in respect to them."

In so far as the claim of the construction company for attorney's fees in this case is concerned, the statute of Florida would be open to every objection pointed out in the Ellis Case, and would have none of the merits indicated in the Cade Case.

The statute in question requires the allowance of attorney's fees, though the claim asserted by the suit is an excessive one. If the amount of the attorney's fees required to be allowed to the plaintiff is more than that of the difference between what he claimed and what he recovers, the result is to give him the unconscionable advantage of being able to make it cheaper for the defendant to forego his rights than to assert them. The statute not only undertakes to give to plaintiffs,

in the character of suits mentioned, a right not accorded to plaintiffs in other suits, but it discriminates between plaintiffs and defendants in the suits to which it applies, in that the former may resort to litigation at the latter's expense, though only a fraction of the amount claimed is recoverable, while the latter is subjected to the expense of an attorney's fee, though he is wholly or partially successful in the suit. The result of the statute passed on in the last case cited (*Missouri, K. & T. R. Co. v. Cade*) is to protect a class having claims small in amount, from losing all or a substantial part of what is due them in doing what is required to get it. Those who claim more than is due them get no benefit from that statute. An effect of the statute now under consideration is to make defendants in only one class of suits chargeable with expenses incurred by plaintiffs who sue for more than they are entitled to re-

cover, with the result that the defendant, though he successfully controverts the amount of the claim made against him, may be required to pay more than he owes, or than the plaintiff claimed.

Under the weight of authority in the state courts, under the reasoning of the Supreme Court of the United States, and because of the results detailed, we hold the Florida statute unconstitutional. The judgment of the construction company against the warehouse company should be reduced the amount of the attorney's fees allowed, with corresponding reduction of the preferential lien.

Constitutional law—allowance of attorney's fee to mechanic's lien claimant.

The judgment should be made to conform to the views herein expressed, and it is accordingly reformed and affirmed, with costs against the appellee.

ANNOTATION.

Validity of statutory provision for attorneys' fees.

- I. General principles, 884.
- II. Attorneys' fees as penalty, 885.
- III. Contract rights and reciprocal allowances, 894.
- IV. In certain special proceedings, 895.
- V. To enforce payment of debts:
 - a. Generally, 896.
 - b. Insurance claims, 900.
 - c. Mechanics' liens, 906.

I. General principles.

Many of the cases upon this question have been decided by what may be called "main force," with little regard to the sound constitutional principles involved. The principal difficulty is to justify, under constitutional provisions for equal protection of the law and against the granting of special privileges, an allowance of attorney's fees in favor of one party to a litigation which are not allowed to another, or against a class of defendants which are not allowed against a class similarly situated. There are three main constitutional provisions which are involved in the controversy. Those

guaranteeing equal protection of the laws, due process of law, and forbidding the granting of special privileges under the various forms found in the state constitutions, some of which provide directly against the granting of special privileges, and others are in the form of guaranteeing free and equal rights in the courts and in the forms of procedure. There are some propositions with respect to which there can be little controversy. For example: If the attorney's fees are made part of the costs and granted to the winning party, whether plaintiff or defendant, in a group forming a proper subject of classification, there can be no question of the validity of the allowance. Also there is good ground for argument in favor of a provision allowing an attorney's fee as a penalty, or part of a penalty, for violation of a statutory provision which is passed under the police power of the state to provide for the public welfare. But there is little justi-

fication for extending such principle to the mere enforcement of private contracts or the collection of private debts.

The true legal principle seems to be stated in *Gano v. Minneapolis & St. L. R. Co.* (1901) 114 Iowa, 713, 55 L.R.A. 266, 89 Am. St. Rep. 393, 87 N. W. 714, where it is said that almost without exception, whenever the attorneys' fees may reasonably be said to be a part of the penalty for violation of a public regulation, statutes allowing them to be taxed against the party in default, or guilty of the wrong, have been sustained. But when imposed as a penalty for resorting to the courts to enforce a natural or common-law right, they have been declared invalid.

This statement, however, while sound in legal principle, is not well borne out by the cases, because decisions may be found which are contrary to both hypotheses stated by the court.

Cases where the question depended on the sufficiency of the title of the statute, such as *Missouri, K. & T. R. Co. v. Mahaffey* (1912) 105 Tex. 394, 150 S. W. 881, and similar constitutional provisions which do not involve class legislation or special privileges, are not included in this annotation.

II. Attorneys' fees as penalty.

The courts with very few exceptions have upheld statutes allowing attorneys' fees as a penalty, or part of a penalty, for violating a statute passed under the police power. If the allowance of the fee is regarded merely as a penalty for violation of the statute, there seems to be little ground for questioning the soundness of the decisions.

United States.—*Atchison, T. & S. F. R. Co. v. Matthews* (1899) 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; *St. Louis, I. M. & S. R. Co. v. Williams* (1919) 251 U. S. 63, 64 L. ed. 139, 40 Sup. Ct. Rep. 71; *Chicago, B. & Q. R. Co. v. Feintuch* (1911) 112 C. C. A. 126, 191 Fed. 482.

Arkansas. — *Dow v. Beidelman* (1887) 49 Ark. 455, 5 S. W. 718; *Chicago, R. I. & P. R. Co. v. Davis* (1914) 114 Ark. 519, 170 S. W. 245.

California. — *Engelbrechtsen v. Gay*

(1910) 158 Cal. 30, 28 L.R.A.(N.S.) 1062, 109 Pac. 880, Ann. Cas. 1912A, 690; *People v. Seymour* (1860) 16 Cal. 332, 76 Am. Dec. 521.

Florida.—*Atlantic Coast Line R. Co. v. Perry* (1915) 69 Fla. 133, 67 So. 639; *Seaboard Air Line R. Co. v. Robinson* (1914) 68 Fla. 407, 67 So. 139; *Jacksonville, J. & K. W. R. Co. v. Prior* (1894) 34 Fla. 271, 15 So. 760.

Georgia. — *Johnson v. Hudspeth* (1911) 136 Ga. 771, 72 S. E. 69.

Idaho.—*Hindman v. Oregon Short Line R. Co.* (1918) 32 Idaho, 133, 178 Pac. 837.

Illinois.—*Peoria, D. & E. R. Co. v. Duggan* (1884) 109 Ill. 537, 50 Am. Rep. 619; *Cleveland, C. C. & St. L. R. Co. v. Hamilton* (1903) 200 Ill. 633, 66 N. E. 389.

Indiana.—*Terre Haute & L. R. Co. v. Salisbury* (1906) 38 Ind. App. 100, 77 N. E. 1097; *Terre Haute & L. R. Co. v. Salmon* (1903) 161 Ind. 181, 67 N. E. 918; *Pittsburgh, C. C. & St. L. R. Co. v. Taber* (1906) 168 Ind. 419, 77 N. E. 741, 11 Ann. Cas. 808; *Brown v. Central Bermudez Co.* (1903) 162 Ind. 452, 69 N. E. 150; *Pittsburgh, C. C. & St. L. R. Co. v. Fish* (1902) 158 Ind. 525, 63 N. E. 454; *Dowell v. Talbot Pav. Co.* (1894) 138 Ind. 675, 38 N. E. 389; *Lake Erie & W. R. Co. v. Walters* (1895) 13 Ind. App. 275, 41 N. E. 465.

Iowa.—*Burlington, C. R. & N. R. Co. v. Dey* (1891) 82 Iowa, 312, 12 L.R.A. 436, 3 Inters. Com. Rep. 584, 31 Am. St. Rep. 477, 48 N. W. 98.

Kansas.—*Fritz v. State* (1909) 80 Kan. 168, 101 Pac. 1013; *Kansas P. R. Co. v. Mower* (1876) 16 Kan. 573; *Missouri River, Ft. S. & G. R. Co. v. Shirley* (1878) 20 Kan. 660; *Missouri P. R. Co. v. Merrill* (1888) 40 Kan. 404, 19 Pac. 793; *Chicago, R. I. & P. R. Co. v. Spring Hill Cemetery Asso.* (1899) 9 Kan. App. 882, 57 Pac. 252; *Atchison & N. R. Co. v. Harper* (1878) 19 Kan. 529.

Louisiana. — *Liquidating Comrs. v. Marrero* (1901) 106 La. 130, 30 So. 305; *State ex rel. Stempel v. New Orleans* (1901) 105 La. 763, 30 So. 97; *Methodist Episcopal Church, South v. New Orleans* (1902) 107 La. 611, 32 So. 101; *Globe Lumber Co. v. Clement* (1903) 110 La. 438, 34 So. 595.

Maryland.—United States Electric Power & Light Co. v. State (1894) 79 Md. 63, 28 Atl. 768.

Massachusetts.—Com. v. Munn (1860) 14 Gray, 361.

Minnesota.—Johnson v. Chicago, M. & St. P. R. Co. (1882) 29 Minn. 425, 13 N. W. 673; Hardwick Farmers Elevator Co. v. Chicago, R. I. & P. R. Co. (1910) 110 Minn. 25, 124 N. W. 819, 19 Ann. Cas. 1088, reversed in (1913) 226 U. S. 426, 57 L. ed. 284, 46 L.R.A. (N.S.) 203, 32 Sup. Ct. Rep. 174.

Missouri.—Perkins v. St. Louis, I. M. & S. R. Co. (1890) 103 Mo. 52, 11 L.R.A. 426, 15 S. W. 320; Briggs v. St. Louis & S. F. R. Co. (1892) 111 Mo. 168, 20 S. W. 32, overruled in Paddock v. Missouri P. R. Co. (1900) 155 Mo. 524, 56 S. W. 453; State ex rel. Rosenblatt v. Kerr (1879) 8 Mo. App. 125.

Nebraska.—Singer Mfg. Co. v. Fleming (1894) 39 Neb. 679, 23 L.R.A. 210, 42 Am. St. Rep. 613, 58 N. W. 226.

Oklahoma.—RITER-CONLEY MFG. CO. v. WRYN (reported herewith) ante, 859.

Tennessee.—Illinois C. R. Co. v. Crider (1892) 91 Tenn. 489, 19 S. W. 618.

Texas.—Gulf, C. & S. F. R. Co. v. Ellis (1892) — Tex. —, 17 L.R.A. 286, 18 S. W. 723.

Intoxicating liquor cases.

The legislature may provide an attorney's fee to be taxed as part of the costs against one convicted of unlawfully selling intoxicating liquor. *Com. v. Munn* (Mass.) *supra*.

So a statute authorizing an attorney's fee against one convicted of maintaining a liquor nuisance does not deny equal protection of the laws. *Fritz v. State* (Kan.) *supra*. The court says the statute authorizing the allowance of an attorney's fee is quite unlike a provision for the allowance of such a fee in private litigation, as, for instance, the collection of a debt. It is an exercise of the police power of the state, designed to promote the public morals and good order of society, and, although somewhat special in character, it cannot be regarded as an infringement of the rule guaranteeing equal protection of the laws.

Failure to fence railroad tracks.

For the preservation of the lives of the traveling public, the legislature may require railroad companies to fence their tracks, and provide a penalty for their failure to do so, and this penalty may take the form of an attorney's fee to be allowed to one recovering damages against the company for killing or injuring his live stock because of absence of, or defect in, a fence.

And a statute giving attorneys' fees to an abutting property owner who constructs a fence along a railroad right of way upon the failure of the railroad company to do so, and brings suit to recover his outlay from the railroad company, was held constitutional in *Terre Haute & L. R. Co. v. Salmon* (1903) 161 Ind. 131, 67 N. E. 918. The court says: "These statutes were passed by the legislature, in the exercise of the police power, to compel railroad companies to fence their tracks, and are for the protection of persons and property carried upon railroads. It is the undoubted right of the legislature, in the exercise of the police power, not only to require all railroad companies within the limits of its jurisdiction to inclose their roads with suitable and sufficient fences, as a matter of public safety, but also to impose penalties for failure to perform such duty. Such penalties may be in the shape of double the actual damages suffered, double costs, attorneys' fees, and absolute liability in case of injury to animals."

In *Kansas P. R. Co. v. Mower* (1876) 16 Kan. 573, a statute allowing attorney's fees in case of cattle killed in the absence of fences was held constitutional as against a claim that it gave a successful plaintiff rights denied a successful defendant. But the court says it is no uncommon thing for legislatures to provide, in cases where a failure to pay seems to entail more than ordinary wrong, that such failure should carry with it something in the nature of a penalty.

In *Missouri River, Ft. S. & G. R.*

Co. v. Shirley (1878) 20 Kan. 660, the fee was allowed after trial in the district court for stock killed, where plaintiff had been defeated before a justice of the peace, on the ground that the question of the validity of the law allowing the fee had theretofore been solved in favor of the law.

A statute allowing an attorney's fee as a penalty in case of recovery for injury to stock because of absence of a fence does not grant a special privilege, and is not special legislation. *Perkins v. St. Louis, I. M. & S. R. Co.* (1890) 103 Mo. 52, 11 L.R.A. 426, 15 S. W. 320. The court said the attorney fee could be imposed as a penalty for violation of the law, and, further, that it is as much a police regulation as is the double-damage section. This case was followed in *Briggs v. St. Louis & S. F. R. Co.* (1892) 111 Mo. 168, 20 S. W. 32, but was overruled by three of the seven judges of the court, on the authority of the *Ellis Case* (Tex.) *infra*; in *Paddock v. Missouri P. R. Co.* (1900) 155 Mo. 524, 56 S. W. 453, two of the judges expressly dissenting, and two not sitting. The necessity of holding that the *Perkins Case* was overruled will appear from a statement of the *Paddock Case* (Mo.) *infra*.

The provision of attorneys' fees in actions to hold railroad companies liable for killing stock because of failure to fence their rights of way is not unconstitutional. *Hindman v. Oregon Short Line R. Co.* (1918) 32 Idaho, 133, 178 Pac. 887. The court says this statute is not designed to compel the railroad company to pay its debts, but the evident purpose is to compel them to comply with the law requiring them to maintain lawful fences along their right of way for public safety, and to provide a penalty for violation of this statutory duty.

In *Peoria, D. & E. R. Co. v. Duggan* (1884) 109 Ill. 537, 50 Am. Rep. 619, a provision for attorney's fees in case of animals killed for failure to fence was upheld against an objection that it was special or class legislation. The court says it may be upheld as being in the nature of a penalty for non-compliance with the statutory duty of

fencing. The requirement of the fencing of railroad tracks is not alone for the private benefit of the owners of stock along the line, but it is conducive to the public welfare, as well as a measure for the safety of traveling on railroads. As a police regulation for the promotion of the public safety in that respect, the legislature may well require the fencing of their tracks by railroad companies, and provide penalties for nonperformance of the duty.

In *Atlantic Coast Line R. Co. v. Perry* (1915) 69 Fla. 133, 67 So. 639, a statute allowing an attorney's fee for killing stock because of failure to comply with the fencing laws was upheld, and the court says the statute is founded strictly on the police power of the state, being designed to protect the traveling public from the dangers incident to collisions with cattle upon the tracks of the railroad company. The statute allowed the fee only when the claimant proved the value of the animal killed to be at least equal to the preliminary demand, but the necessity for the action being absolute denial by the railroad company of all liability, the fee was allowed, notwithstanding the value proved was less than that claimed.

In *Seaboard Air Line R. Co. v. Robinson* (1914) 68 Fla. 407, 67 So. 139, the court allowed double damages and attorney's fees for killing a mule at a place where the track should have been, but was not fenced, following *Kansas City Southern R. Co. v. Anderson* (1914) 233 U. S. 325, 58 L. ed. 983, 34 Sup. Ct. Rep. 599, affirming (1912) 104 Ark. 500, 149 S. W. 58, *infra*, upon the principle that the demand was fully established.

In *Gulf, C. & S. F. R. Co. v. Ellis* (1892) — Tex. —, 17 L.R.A. 286, 18 S. W. 723, the court stated that the particular allowance could be upheld as a penalty for neglect to fence the track.

In *Johnson v. Chicago, M. & St. P. R. Co.* (1882) 29 Minn. 425, 13 N. W. 673, where a statute authorized an extra allowance of costs in case of recovery for cattle killed on an unfenced railroad track, the court said the prin-

ciple that governs the allowance of costs does not require that they shall be uniform in all actions, nor the same to each of the litigants in an action; and so a double or extra allowance of costs is sometimes made to the plaintiffs or defendants, as the case may be, because deemed proper from the nature and circumstances of certain species of litigations. Examples are given of actions against public officers and in mortgage foreclosures. Attention, however, should be called to the fact that the examples referred to by the court were largely special classes of litigation which might fairly be held not to come within the operation of constitutional provisions, or were from English courts where the constitutional provisions were not in force.

A statute imposing an attorney's fee in case the railroad failed to defeat the appraised value of stock killed on an unfenced track was upheld against an objection that it was special legislation, in *Illinois C. R. Co. v. Crider* (1892) 91 Tenn. 489, 19 S. W. 618. The court held that it was in the nature of a penalty, and said: "The state has not, by this act, imposed double or triple damages, as it might have done, but it has subjected the offending company to actual damages, and to an increase of this damage to the extent of the reasonable attorney's fees incurred by the successful plaintiff in the establishment of his claim. This additional penalty is not imposed except upon the contingency that the company shall refuse settlement upon the basis of the *prima facie* valuation, and upon the further condition that the owner of the live stock killed or injured shall establish both the liability of the company and that the appraised value was not excessive. What the state may impose as a penalty without condition, it may impose subject to condition. The measure of the damages for failure to fence, as well as the disposition of any recovery in excess of actual compensation, was wholly within the legislative discretion. The addition or increase of damages, in case the company unsuccessfully contests its liability for the full

amount of the appraisement, is to be measured by the reasonable expense thrown upon the plaintiff in what is thereby established to have been an unnecessary litigation. The view we have taken of this act, its objects and scope, excludes the assumption that the statute is one merely imposing a burden upon one class of litigants not borne by all others. The subject of the legislation being within the police power of the state, it is not objectionable that additional or increased damages are imposed, upon such terms and subject to such contingencies as the public interest shall demand."

In *Wilder v. Chicago & W. M. R. Co.* (1888) 70 Mich. 382, 38 N. W. 289, where the question was as to the validity of the statute allowing an attorney's fee in case of recovery for killing stock because of neglect to fence the track, the court said: "The legislature cannot make unjust distinctions between classes of suitors without violating the spirit of the Constitution. Corporations have equal rights with natural persons as far as their privileges in the courts are concerned. They can sue and defend in all courts the same as natural persons, and the law must be administered as to them with the same equality and justice which it bestows upon every suitor, and without which the machinery of the law becomes the engine of tyranny. This statute proposes to punish a railroad company for defending a suit brought against it with a penalty of \$25 if it fails to successfully maintain its defense. The individual sues for the loss of his cow, and if it is shown that such loss was occasioned by his own neglect, and through no fault of the company, and he thereby loses his suit, the railroad company can recover only the ordinary statutory costs of \$10 in justice's court; but if he succeeds because of the negligence of the company, the plaintiff is permitted to tax the \$10 and an additional penalty of \$25; for it is nothing more or less than a penalty. Calling it an 'attorney fee' does not change its real nature or effect. It is a punishment to the company, and a reward to the plaintiff, and an

incentive to litigation on his part. This inequality and injustice cannot be sustained upon any principle known to the law. It is repugnant to our form of government and out of harmony with the genius of our free institutions. The legislature cannot give to one party in litigation such privileges as will arm him with special and important pecuniary advantages over his antagonist." And in response to the suggestion that the fee was imposed as a penalty upon the corporation for not obeying the law as to the fencing of the right of way, the court said that penalties cannot be prescribed and enforced in this way, and whatever may have been the object or intent of the legislature, the result of the statute is an injustice and an inequality which the courts cannot tolerate, and must disregard in the administration of the laws. And that case was followed in *Schut v. Chicago & W. M. R. Co.* (1888) 70 Mich. 433, 38 N. W. 291; *Rinear v. Grand Rapids & I. R. Co.* (1888) 70 Mich. 620, 38 N. W. 599; *Lafferty v. Chicago & W. M. R. Co.* (1888) 71 Mich. 85, 38 N. W. 660.

In *Paddock v. Missouri P. R. Co.* (1900) 155 Mo. 524, 56 S. W. 453, reversing (1895) 60 Mo. App. 328, the action was brought for loss of hogs because of failure of the railroad company to furnish a car with trapdoors in the top as required by statute. The statute provided that failure to comply with its terms would subject the carrier to damages and a reasonable attorney's fee. Two questions arose in the case, one as to whether or not the provision for damages applied to failure to furnish cars with trapdoors, or only to furnish cars. The other was whether or not the arrangement of the statutes in the Revision had made other penalties applicable. The question may be an open one whether or not the penalty could lawfully be provided for failure to comply with the requirements as to style of car furnished, but the court regarded the *Ellis Case* (1892) — Tex. —, 17 L.R.A. 286, 18 S. W. 723, as settling the question against the validity of the attorney's fee, and three of the judges

thought that the *Perkins Case* (1890) 103 Mo. 52, 11 L.R.A. 426, 15 S. W. 320, *supra*, was expressly overruled. The *Paddock Case* was followed in *West v. Wabash R. Co.* (1906) 118 Mo. App. 482, 94 S. W. 310, on the question of killing stock through absence of fence.

The principle of the Fence Laws has been extended by the legislatures of some states to the extent of making railroad companies absolutely liable for killing any stock, whether due to their negligence or not. This has been achieved in some states by providing the penalty of attorneys' fees only in case of failure to pay the claim within the time specified in the statute. There seems to be no sound principle for sustaining such legislation.

In *Denver & R. G. R. Co. v. Outcalt* (1892) 2 Colo. App. 395, 31 Pac. 177, the court held that a statute making railroad companies absolutely liable for all stock killed or injured by them, and subjecting them to double damages and attorneys' fees for failure to settle the claim within thirty days, was unconstitutional. With respect to the provision for attorneys' fees, the court said it could only be regarded as punitive damages or a penalty for violation of law, and could not be sustained where no law is violated.

So a statute authorizing an attorney's fee in case of recovery for injury to stock by collision with a moving train is unconstitutional, as an attempt to grant a special privilege. *Jolliffe v. Brown* (1896) 14 Wash. 155, 53 Am. St. Rep. 863, 44 Pac. 149. The court says there is a broad distinction to be recognized between legislation requiring a person to pay actual damages occasioned, and that which would impose a penalty in addition thereto. Such legislation can be sustained only where the person on whom the penalty is imposed is in fault, or guilty of a wrong.

Allowing an attorney's fee in favor of one suing a railroad company for killing stock, either by negligent operation of trains or failure to fence tracks, deprives it of the equal protection of the laws. *Dewell v. Northern P. R. Co.* (1917) 54 Mont. 350, 170

Pac. 753. The court says if the statute applied only to cases arising out of failure to fence, it would not be open to the attack made upon it, but because it applies equally to ordinary cases of negligence, it is invalid.

So, exacting a penalty and attorneys' fees for refusal promptly to pay an excessive demand for killing live stock takes the railroad company's property without due process of law. *St. Louis, I. M. & S. R. Co. v. Wynne* (1912) 224 U. S. 354, 56 L. ed. 799, 42 L.R.A. (N.S.) 102, 32 Sup. Ct. Rep. 493, reversing (1909) 90 Ark. 538, 119 S. W. 1127, 17 Ann. Cas. 631. The court said: "We think the conclusion is unavoidable that the statute, as so construed and applied, is an arbitrary exercise of the powers of government, and violative of the fundamental rights embraced within the conception of due process of law. It does not merely provide a reasonable incentive for the prompt settlement, without suit, of just demands of a class admitting of special treatment by the legislature . . . but attaches onerous penalties to the nonpayment of extravagant demands, thereby making submission to them the preferable alternative. Thus, it takes property from one and gives it to another, not because of a breach by the former of a duty to the latter or to the public, but because of a lawful exercise of an undoubted right. Plainly this cannot be done consistently with due process of law."

But in *Kansas City Southern R. Co. v. Anderson* (1914) 233 U. S. 325, 58 L. ed. 983, 34 Sup. Ct. Rep. 599, affirming (1912) 104 Ark. 500, 149 S. W. 58, a provision for penalty and attorneys' fees for refusal to pay a claim for stock killed within thirty days was held not to violate the due process or equal protection clauses of the Federal Constitution, where the claim was established to be just. It thus plainly appears that the railroad company is penalized for resorting to the courts to determine whether or not the claim is just. In many such cases it is impossible to determine whether the claim is just or not, and the railroad company has a right, under all the

constitutional provisions, to try that question, and the mere fact that the decision goes against it does not in any way justify the infliction of a penalty upon it. The court does not discuss this question, but relies for its decision on two penalty cases: *Seaboard Air Line R. Co. v. Seegers* (1907) 207 U. S. 73, 52 L. ed. 108, 28 Sup. Ct. Rep. 28, and *Yazoo & M. Valley R. Co. v. Jackson Vinegar Co.* (1912) 226 U. S. 217, 57 L. ed. 193, 33 Sup. Ct. Rep. 40. The clause quoted from the *Seegers* Case as governing the decision is: "It must be remembered that the purpose of this legislation is not primarily to enforce the collection of debts, but to compel the performance of duties which the carrier assumes when it enters upon the discharge of its public functions." It may be questioned, however, what portion of the public functions of the carrier consists in promptly paying demands for stock killed, which may be just or unjust, and the justice of which cannot be determined until after the question is decided by the courts. However, this case was followed in *St. Louis Southwestern R. Co. v. Cone* (1914) 111 Ark. 309, 163 S. W. 1170, allowing attorneys' fees for failure promptly to pay for animals negligently killed.

Injury by fire.

Imposing attorneys' fees in case of injury done by fire set out by railroad locomotives comes a little nearer the border line of sound doctrine. If the use of proper appliances will prevent the setting out of fire, and such use is made compulsory by the statute, violation of the statute may perhaps justify the imposition of penalties, including attorneys' fees. But some of the cases, at least, which have upheld the fees, have ignored the necessity of the statutory imposition of the duty, and penalized the railroad company for setting out the fire, even though it did not thereby infringe any statutory requirements.

Thus, in *Atchison, T. & S. F. R. Co. v. Matthews* (1899) 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609, affirming (1897) 58 Kan. 447, 49 Pac. 602, 3 Am. Neg. Rep. 27, it was held that

the statute imposing an attorney's fee in case of recovery for losses caused by fire in the operation of a railroad does not deprive the railroad company of the equal protection of the laws, nor is it class legislation.

In *Missouri P. R. Co. v. Merrill* (1888) 40 Kan. 404, 19 Pac. 793, the court said that the objection that a statute imposing an attorney's fee upon railroad companies in case of recovery against them for losses caused by fire set out by their locomotives was special and unequal could not be sustained. The dangerous element employed, and the hazards to person and property arising from the running of trains and the operation of railroads, justifies such a law, and the fact that all persons and corporations brought under its influence are subjected to the same duties and liability, under similar circumstances, disposes of the objections raised.

That case was followed in *Clark v. Ellithorpe* (1898) 7 Kan. App. 337, 51 Pac. 940, and *Chicago, R. I. & P. R. Co. v. Spring Hill Cemetery Asso.* 9 Kan. App. 382, 57 Pac. 252.

Providing an attorney's fee in cases to recover for losses caused by failure of the railroad company to comply with the provisions of the statute, requiring it to keep its right of way free from combustible material, is not unconstitutional. *Cleveland, C. C. & St. L. R. Co. v. Hamilton* (1903) 200 Ill. 633, 66 N. E. 389. The court says: The regulation designed to prevent the starting or spreading of fire has regard to the public welfare, and is within the police power. It does not seem to be denied that the legislature may impose a penalty for failure to comply with the requirement, but it is argued that this provision for attorneys' fees is not a penalty for a failure to keep the right of way clear from dead grass, dry weeds, and other dangerous combustible material, but rather an attempt to impose a penalty for exercising the right to resort to the courts for the purpose of securing justice by defending against exorbitant or illegal demands. Corporations have equal rights with natural persons to defend against claims which they

believe to be illegal or exorbitant; but this statute does not provide for the recovery of attorneys' fees unless it shall be judicially determined that the defendant had neglected its duty and been guilty of a violation of the statute.

Failure to pay taxes.

The welfare of the state is so vitally connected with the collection of taxes and assessments that penalties may be imposed for failure to pay them promptly, or for delaying the proper authorities in making collections. And these penalties may include an imposition of attorney's fees upon the delinquent.

So a statute allowing a special fee to one assisting in collecting a tax against the unsuccessful resistant does not deny the equal protection of the laws. *Liquidating Comrs. v. Marrero* (1901) 106 La. 130, 30 So. 305. The court says the constitutionality of statutes allowing one party only to a litigation to recover attorney's fees as part of the judgment, in particular classes of cases, appears to have been upheld by the courts in most of the states in which it has been challenged.

In *State ex rel. Rosenblatt v. Kerr* (1879) 8 Mo. App. 125, a provision for attorney's fees against a delinquent taxpayer was upheld against the claim that it was retrospective in operation.

The state may compel delinquents to pay attorney fees in actions for the collection of taxes. *People v. Seymour* (1860) 16 Cal. 332, 76 Am. Dec. 521.

So, a statute is constitutional which provides that the attorney who represents a tax collector in all proceedings for the reduction of assessments and the collection of taxes, and in all injunction proceedings wherein the tax collector is sought to be restrained from collecting taxes, shall receive a compensation of 10 per cent on the amount collected. *State ex rel. Stempel v. New Orleans* (1901) 105 La. 768, 30 So. 97; *Methodist Episcopal Church, South v. New Orleans* (1902) 107 La. 611, 32 So. 101; *Globe Lumber Co. v. Clement* (1903) 110 La. 438, 34 So. 595.

So, too, a statute is constitutional which provides that, if a property owner refuses to pay a special assessment made against his property, the contractor may sue and recover, in addition to the assessment, a reasonable attorney's fee.' *Pittsburgh, C. C. & St. L. R. Co. v. Taber* (1906) 168 Ind. 419, 77 N. E. 741, 11 Ann. Cas. 808.

For legislative power so to provide can be upheld upon the ground that an assessment is laid by virtue of the state's power to tax, and that the state may impose a penalty upon the property owner for delay in discharging his obligation. *Brown v. Central Bermudez Co.* (1903) 162 Ind. 452, 69 N. E. 150.

Such a provision does not make the attorney's fees a part of the assessment, but pertains to the remedy. *Pittsburgh, C. C. & St. L. R. Co. v. Fish* (1902) 158 Ind. 525, 63 N. E. 454. And therefore it cannot be regarded as unconstitutionally invading any vested right because it is made to extend to assessments levied before its enactment. *Dowell v. Talbot Pav. Co.* (1894) 138 Ind. 675, 38 N. E. 389; *Lake Erie & W. R. Co. v. Walters* (1895) 13 Ind. App. 275, 41 N. E. 465.

In a tax proceeding the court held that the statute allowing an attorney's fee in favor of the state's attorney, was valid. *United States Electric Power & Light Co. v. State* (1894) 79 Md. 63, 28 Atl. 768. The court said the legislature had the undoubted right to prescribe what costs shall be taxed in a case, and when an unsuccessful attempt is made to resist and defeat the collection of a just debt due the state, the general assembly may lawfully cast upon the defendant not only the costs usually taxed, but further costs by way of a fee to the attorney who represents the state.

An attorney's fee may be allowed against one whose delinquency makes necessary a proceeding to enforce a special assessment for public improvements, although such fee is not allowed in his favor. *Engelbrechtsen v. Gay* (1910) 158 Cal. 30, 28 L.R.A. (N.S.) 1062, 109 Pac. 880, Ann. Cas. 1912A, 690.

Violating statutory rates for transportation.

When rates for passenger or freight transportation have been validly fixed by the proper authorities, compliance with the rates may be enforced by penalties imposed for their violation, and this penalty may be composed in whole, or in part, of an attorney's fee.

A statute imposing a penalty of not less than \$50, or more than \$300, with costs and attorney's fee, to be recovered by the aggrieved passenger, upon a railroad company, for charging fares in excess of those fixed by law, was upheld against the charge that it contravened due process of law, in *St. Louis, I. M. & S. R. Co. v. Williams* (1919) 251 U. S. 63, 64 L. ed. 139, 40 Sup. Ct. Rep. 71, affirming (1917) 131 Ark. 442, 199 S. W. 376. The court said when the penalty is considered with due regard for the interests of the public, the numberless opportunities for committing the offense, and the necessity for securing uniform acquiescence in established passenger rates, we think it properly cannot be said to be so severe and oppressive as to be wholly disproportioned to the offense, or obviously unreasonable.

The Interstate Commerce Act, making it unlawful to depart from established rates, and giving the Commission power to order reparation in case of such departure, and allowing an attorney's fee in a proceeding to enforce the order of the Commission, is not unconstitutional class legislation. *Chicago, B. & Q. R. Co. v. Feintuch* (1911) 112 C. C. A. 126, 191 Fed. 482. The court says the act deals with railroad and transportation traffic, and is designed to afford an adequate remedy to all patrons who may sustain injury by a nonobservance of the law. It applies alike to all common carriers engaged in the transportation of persons and property, doing an interstate business, and cannot be justly termed an arbitrary, unnatural, or unreasonable classification. This ruling is placed, however, on the exclusiveness of the penalty, not on the attorney's fee.

Allowing an attorney's fee in case of the charge of freight rates in excess of those fixed by the proper of-

officials does not deprive the railroad of the equal protection of the laws, nor is it a penalty for exercising the right of defense. *Burlington, C. R. & N. R. Co. v. Dey* (1891) 82 Iowa, 312, 12 L.R.A. 436, 3 Inters. Com. Rep. 584, 31 Am. St. Rep. 477, 48 N. W. 98.

A provision for attorney's fee in actions for the penalty imposed upon carriers for charging rates in excess of those fixed by statute is a valid police regulation. *Dow v. Beidelman* (1887) 49 Ark. 455, 5 S. W. 718. The court says the attorney's fee is part of the penalty imposed for the wilful violation of the provisions of the act.

In *Chicago, R. I. & P. R. Co. v. Davis* (1914) 114 Ark. 519, 170 S. W. 245, the statute fixed a penalty of from \$50 to \$300 in case of overcharge of passenger rates, and an attorney's fee. The court held that this was not so enormous, arbitrary, and oppressive, and so in excess of any amount allowed for the infliction of equal injury under other circumstances, as to deprive the carrier of due process of law or the equal protection of the laws. The court said: It is commonly known that carriers are not prone to adhere uniformly to rates lawfully prescribed, and it is necessary that deviation from such rates be discouraged and prohibited by adequate liabilities and penalties, and we regard the penalties prescribed as no more than reasonable and adequate to accomplish the purpose of the law and remedy the evil intended to be reached.

But the imposition of a penalty of \$500 and attorney's fees for deviation by a carrier from rates arbitrarily fixed by the state, the validity of which it has no opportunity to test without subjecting itself to the penalty, takes its property without due process of law. *Missouri P. R. Co. v. Tucker* (1913) 230 U. S. 340, 57 L. ed. 1507, 33 Sup. Ct. Rep. 961, reversing (1910) 82 Kan. 222, 108 Pac. 89.

Failure to furnish cars.

The legislature may require carriers to furnish cars promptly on demand, and impose a penalty for failure to do so which may consist in

whole, or in part, of an attorney's fee. Of this class of cases is *ALEXANDER v. CHICAGO, M. & ST. P. R. CO.* (reported herewith) ante, 867.

In *Hardwick Farmers Elevator Co. v. Chicago, R. I. & P. R. Co.* (1910) 110 Minn. 25, 124 N. W. 819, 19 Ann. Cas. 1088, followed in *Gray v. Minneapolis & St. L. R. Co.* (1910) 110 Minn. 527, 124 N. W. 1100, a provision allowing attorney's fees against a railroad company which fails to furnish cars when called for by shipper was held not invalid because it does not apply to debtors generally. The court said the law was enacted in the exercise of the police power. The case was, however, reversed by the Supreme Court of the United States (1913) 226 U. S. 426, 57 L. ed. 284, 46 L.R.A. (N.S.) 203, 33 Sup. Ct. Rep. 174, on the ground that the Damage Law had been superseded by the Hepburn Act of June 29, 1906.

A mutual demurrage law which imposes an attorney's fee upon the railroad for refusal promptly to furnish cars, but does not impose such fee upon a shipper who fails promptly to use them, denies the equal protection of the laws. *Atchison, T. & S. F. R. Co. v. Vosburg* (1915) 238 U. S. 56, 59 L. ed. 1199, L.R.A. 1915E, 953, 35 Sup. Ct. Rep. 675. This statute was held to be a police regulation, but the requirement of equal protection of the laws was held to apply to police regulations. The statute in that case made it reciprocally obligatory upon the carrier to furnish the cars, and upon the shipper to use them promptly, so that delinquency on the part of either would be a violation of the statute. The court says: "The statute recognizes that the duty of the company to promptly furnish cars, and the duty of the shipper to promptly use them, are reciprocal, and for a breach of either duty the delinquent is penalized in favor of the other party in precisely the same amount—\$5 per day per car. The shipper may also recover his actual damages, if any. The company recovers actual damages, in addition to the penalty, only under special circumstances. . . . No reason is suggested, and none occurs to

us, why the railroad company, when plaintiff in such an action, will not require the services of an attorney as well as the shipper, when he is plaintiff. There is nothing in the nature of the cause of action that renders the burden of preparation more onerous, as a rule, to the shipper when he is plaintiff, than to the company when it is plaintiff. There is nothing discernible, therefore, in the purposes of the legislation—which are: to require the prompt furnishing of cars for use, and the prompt use of cars when furnished, and to redress a disregard of either of these requirements by suit when necessary—to give ground for a distinction granting attorney's fees to the shipper when he sues, and denying attorney's fees to the company when it sues."

That decision reversed (1918) 89 Kan. 114, 130 Pac. 667, where the court said that the statute could be sustained under the principles of the Matthews Case (1899) 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609. That the act was clearly a police regulation, that the duty to furnish cars may properly be enforced, and penalties in the form of per diem forfeitures and attorneys' fees imposed.

Other cases of penalties.

A statute allowing costs and attorney's fees in case of violation of a statute forbidding the assignment of a claim against a laborer, so as to permit garnishment of his wages out of the state, was held not to impose a penalty, but simply compensatory damages for the injuries thereby inflicted upon the laborer, and to be valid. *Singer Mfg. Co. v. Fleming* (1894) 39 Neb. 679, 23 L.R.A. 210, 42 Am. St. Rep. 613, 58 N. W. 226.

A provision in a statute fixing the penalty for interfering with the relations between employer and employee, or landlord and tenant, and allowing an attorney's fee to defendant in case the action fails, does not violate the constitutional provision against impartial protection of the laws. *Johnson v. Hudspeth* (1911) 136 Ga. 771, 72 S. E. 69.

III. *Contract rights and reciprocal allowances.*

Where the undertaking of a depository for county funds provides that counsel fees shall be allowed in case it becomes necessary to resort to the courts to enforce repayment of the deposit, the sureties on the bond cannot complain of the allowance of the fees. The court says the liability was not arbitrarily imposed, but voluntarily assumed as a condition to receiving the deposit. *Fidelity & D. Co. v. Wilkinson County* (1915) 109 Miss. 879, 69 So. 865.

A statute permitting attorneys' fees of both parties in partition proceedings to be paid out of the common fund where the property is sold, and taxed as costs where the property is partitioned in kind, does not violate any provision of the Constitution. *Scott v. Marley* (1911) 124 Tenn. 388, 137 S. W. 493.

In *McMullin v. Doughty* (1905) 68 N. J. Eq. 776, 55 Atl. 284, which involved the allowance of an attorney's fee for plaintiff out of the estate in a partition suit, where the statute made no provision for a like fee for defendant, the court says, in answer to the contention that it denies the equal protection of the laws: That "defendants who might be successful in equitable suits are not included in the benefit of this legislation cannot be considered, if complainants in such suits form a proper class for such legislation. That they are improperly classified by this act does not seem to me to be so clear that a court of primary jurisdiction would be justified in pronouncing the legislation for their benefit wholly invalid." This was affirmed by the court of errors and appeals.

A statute allowing an attorney's fee to the successful party to an election contest is not unconstitutional as denying the equal protection of the laws, or granting special privileges. The court says the statute applies to all election contests, and it treats the adverse parties thereto alike. *Doty v. Reece* (1917) 53 Mont. 404, 164 Pac. 542.

A statute providing for the allowance of \$100 to cover counsel fees in actions for libel and slander, to the plaintiff in case he recovers judgment, or to the defendant in case the action is dismissed or he recovers judgment, is not subject to the "equal protection of the law objection," as all litigants in this class of cases, whether plaintiffs or defendants, are placed upon an equal footing, and the statute is constitutional and valid. *Skrocki v. Stahl* (1910) 14 Cal. App. 1, 110 Pac. 957; *Carpenter v. Ashley* (1911) 16 Cal. App. 302, 116 Pac. 983; *Engel v. Ehret* (1913) 21 Cal. App. 112, 130 Pac. 1197.

In *South & North Ala. R. Co. v. Morris* (1880) 65 Ala. 193, a provision allowing an attorney's fee against either party appealing from a justice of the peace, in a proceeding against a railroad for killing animals, who fails to sustain his appeal, was held to be unconstitutional. The court said the provision was not general in its operations, or applicable to all parties, but was confined to such as own or control railroads generally.

A statute providing an attorney's fee against an unsuccessful appellant from the award of a board appointed to fix damages for stock killing is unconstitutional. *St. Louis, I. M. & S. R. Co. v. Williams* (1887) 49 Ark. 492, 5 S. W. 883. The court says the object and effect of the act are to require both parties to abide by the award of the board, and deter them from going into the courts to have their rights and liabilities determined. This violates the constitutional right to relief in the courts.

IV. In certain special proceedings.

There are certain types of special proceedings in which an attorney's fee may properly be allowed to one party and not to the other. The most conspicuous example of this kind is the eminent domain proceeding. In it the authority of the state is conferred to enable one to secure property in invitum for a public purpose, and the one upon whom this right is conferred should bear all the expense of the proceeding, including the attorney's fees

of the property owner if they are made necessary.

Eminent domain proceedings are so different from the ordinary legal proceedings as to justify the taxing of an attorney's fee against one who abandons the proceeding after securing a favorable judgment. And such allowance does not, therefore, deprive him of the equal protection of the laws. *Sacramento v. Swanston* (1915) 29 Cal. App. 212, 155 Pac. 101. The court says: "The persons, artificial or otherwise, upon whom the right to exercise or invoke on specified occasions the power of eminent domain is conferred by the state or the legislature, are mere agents of the state for that particular purpose. They are, in other words, by the state, specially clothed with power to exercise a right of sovereignty which they could not exercise but for the action of the legislature in clothing them with the authority of agents for that purpose. The act of conferring that power upon those persons is entirely and purely voluntary upon the part of the state. The state cannot be compelled to part with it by conferring it upon other persons desiring to exercise it, but may withhold it and itself exercise it, subject, of course, to the constitutional restraints referred to, to the exclusion of all other persons or instrumentalities. Therefore, no one will dispute the right in the legislature, in conferring the right to exercise the power of eminent domain upon others, to impose any reasonable condition upon its exercise by those others as it sees fit."

The legislature in conferring the right of eminent domain on railroad companies may require them to pay the attorney's fees upon appeal from the commissioners, unless the landowner fails to increase the amount of the award. *Gano v. Minneapolis & St. L. R. Co.* (1901) 114 Iowa, 713, 55 L.R.A. 263, 89 Am. St. Rep. 393, 87 N. W. 714, affirmed without opinion in (1903) 190 U. S. 557, 47 L. ed. 1183, 23 Sup. Ct. Rep. 854. The court says that the costs are a part of the purchase price or damages; the attorney's fees are, also, and if a part of

the purchase price, the statute imposing them is not invalid. The fact that the statute does not apply to other classes of corporations is not a matter of which the railroad can complain.

A provision requiring a railroad company which takes possession of real estate without instituting eminent domain proceedings, to pay attorney's fees in an action by the owner to recover possession of the land taken, is not invalid class legislation. *Cameron v. Chicago, M. & St. P. R. Co.* (1896) 63 Minn. 384, 31 L.R.A. 553, 65 N. W. 652. The court says when a railroad company takes possession of land for railroad purposes, and unreasonably neglects to make compensation therefor, its conduct menaces, in a measure, the public peace and the safety of the traveling public, for nothing is better calculated to arouse the evil passions of men than a wanton and unredressed invasion of their constitutional and property rights. It is entirely competent for the legislature, as a means of correcting such abuses and as a matter of justice, to give the persons injured by such acts increased damages or indemnity for their expenses incurred in actions to right their wrongs by allowing them double costs and reasonable attorney's fees.

The legislature may impose attorney's fees against one dismissing a proceeding in eminent domain. *Sanitary Dist. v. Bernstein* (1898) 175 Ill. 215, 51 N. E. 720.

A statute making sanitary districts liable for attorney's fees in case of injury caused by overflow of lands is not invalid because not applicable to corporations generally. *Sanitary Dist. v. Ray* (1902) 199 Ill. 63, 93 Am. St. Rep. 102, 64 N. E. 1048; *Miller v. Sanitary Dist.* (1909) 242 Ill. 321, 90 N. E. 1.

In *Gentleman v. Sanitary Dist.* (1913) 260 Ill. 317, 103 N. E. 234, a provision for attorneys' fees in the charter of the sanitary district of Chicago, in case of actions for property injured by it, was held valid not only because of the large powers conferred upon the district, but because liability for the attorneys' fees was a part of the terms of the granted power. The

district agreed to pay the fees when it organized under the statute.

In *Missouri P. R. Co. v. Larabee* (1914) 234 U. S. 459, 58 L. ed. 1398, 34 Sup. Ct. Rep. 979, it was held that a statute allowing attorneys' fees against one refusing to obey a writ of mandamus, and not allowing them in other cases, or in his favor, if successful, did not deny equal protection of the laws. The court said: "To call attention to the difference between the duty to perform a ministerial act concerning which there is room neither for the exercise of judgment nor discretion, and the right, on the other hand, to bring into play judgment and discretion as prerequisites to the performance of an act of a different character, and the distinction which justifies the classification made by the statute, also answers the argument that the equal protection clause of the 14th Amendment is violated because the allowance of attorneys' fees was not reciprocal."

A statute permitting the appointment of an attorney for nonresidents served by publication, and allowing them a fee to be taxed as costs against plaintiff, is not unconstitutional as imposing a burden on plaintiffs in such suits, not imposed on plaintiffs in other classes of cases. *Williams v. Sapieha* (1900).—Tex. Civ. App.—, 59 S. W. 947. The court says the law imposes the responsibility on all plaintiffs who institute suits against nonresidents. It is a part of the law prescribing the rules under which such suits may be maintained.

In *Openshaw v. Halpin* (1902) 24 Utah, 426, 91 Am. St. Rep. 796, 68 Pac. 138, the court followed its rule with respect to mechanics' liens, and held unconstitutional a statute allowing the mortgagor an attorney's fee in a suit to compel discharge of a satisfied mortgage.

V. To enforce payment of debts.

a. Generally.

The proposition that the threat of imposition of an attorney's fee can be used to force a debtor to pay his debt, when the creditor is not liable to a similar imposition in case his

claim is not supported, is so startling that it does not seem possible that such a course could be upheld under constitutional provisions requiring equal protection of the laws and forbidding special privileges. Yet the claim for such an imposition has been advanced in such insidious ways, and, in many instances, with such political pressure behind it, that many courts have yielded to the claim and actually permitted the threat of an attorney's fee to be used as a collection agency, although they have never acknowledged that they were doing so, but have always justified the measure by some specious argument which tended to divert attention from what was actually being accomplished; and it would seem that, in some instances, even the courts have deceived themselves as to what the full result of their decisions was.

Principle is overwhelmingly against the validity of such statutes, and the numerical weight of authority is believed to be also against it; but there are respectable courts which uphold such statutes, and the number of decisions in favor of them is such as to make it somewhat doubtful where the numerical weight of authority lies. One of the leading cases holding statutes providing attorneys' fees to enforce payments of debts invalid is *Gulf, C. & S. F. R. Co. v. Ellis* (1897) 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255, reversing (1894) 87 Tex. 19, 26 S. W. 985. In that case a statute imposing an attorney's fee upon railroads for neglect to pay claims growing out of labor contracts, service charges, or stock killing was held unconstitutional as denying the equal protection of the laws. The court said of the statute: "It is simply a statute imposing a penalty upon railroad corporations for a failure to pay certain debts. No individuals are thus punished, and no other corporations. The act singles out a certain class of debtors and punishes them, when for like delinquencies it punishes no others. They are not treated as other debtors, or equally with other debtors. They cannot appeal to the courts as other litigants under like conditions and

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with like protection. If litigation terminates adversely to them, they are mulcted in the attorney's fees of the successful plaintiff; if it terminates in their favor, they recover no attorney's fees. It is no sufficient answer to say that they are punished only when adjudged to be in the wrong. They do not enter the courts upon equal terms. They must pay attorney's fees if wrong; they do not recover any if right; while their adversaries recover if right, and pay nothing if wrong. In the suits, therefore, to which they are parties, they are discriminated against, and are not treated as others. They do not stand equal before the law. They do not receive its equal protection. . . . Statutes have been sustained giving special protection to the claims of laborers and mechanics, but no such idea underlies this legislation. It does not aim to protect the laborer or the mechanic alone, for its benefits are conferred upon every individual in the state, rich or poor, high or low, who has a claim of the character described."

A statute allowing an attorney's fee against every manufacturer who fails to pay the wages of employees promptly denies the equal protection of the laws. *Sorenson v. Webb* (1916) 111 Miss. 89, 71 So. 273. The court says the act singles out a certain class of debtors and punishes them, when for like delinquencies it punishes no others.

A statute allowing attorneys' fees to plaintiffs in actions brought by laborers, clerks, nurses, or other persons, for compensation for personal services, is unconstitutional. *Chicago, R. I. & P. R. Co. v. Mashore* (1908) 21 Okla. 275, 96 Pac. 630, 17 Ann. Cas. 277. The court says: "The defendant being sued for wages under this statute is not on an equal footing with the plaintiff. If he makes an unsuccessful defense, he is mulcted in an attorney's fee, to be paid to the plaintiff, while, if he is successful, the plaintiff is not required to pay any attorney's fee to him. In other words, justice is not dispensed with an im-

partial and equal hand to these litigants."

That case was followed in *Oligschlager v. Stephenson* (1909) 24 Okla. 760, 104 Pac. 345.

A statute allowing attorneys' fees to plaintiffs in actions for wages denies the equal protection of the laws. *Hocking Valley Coal Co. v. Rosser* (1895) 53 Ohio St. 12, 29 L.R.A. 386, 58 Am. St. Rep. 622; 41 N. E. 263. The court says: "Upon what principle can a rule of law rest which permits one party, or class of people, to invoke the action of our tribunals of justice at will, while the other party, or another class of citizens, does so at the peril of being mulcted in an attorney fee, if an honest but unsuccessful defense should be imposed? A statute that imposes this restriction upon one citizen or class of citizens, only, denies to him or them the equal protection of the law. . . . If the general assembly has power to enact the statute in question, it could also enact one providing that lawyers, doctors, grocers, or any other class of citizens, might make out their accounts, demand in writing their payment within a short time, which, if not complied with, would entitle the plaintiff to an attorney fee in addition to his claim if he recover the amount demanded. We do not think the general assembly has power to discriminate between persons or classes respecting the right to invoke the arbitrament of the courts in the adjustment of their respective rights."

A provision giving a lien on corporate property for wages, and authorizing an attorney's fee in cases of suits to collect them, is invalid as conferring special privileges and denying the equal protection of the laws, and taking property without due process of law. The ruling is put on the ground that the statute applies as against corporations only. *Johnson v. Goodyear Min. Co.* (1899) 127 Cal. 4, 47 L.R.A. 338, 78 Am. St. Rep. 17, 59 Pac. 304.

In *Chicago, St. L. & N. O. R. Co. v. Moss* (1882) 60 Miss. 641, a provision for an attorney's fee in favor of appellee, in case of an appeal from a

judgment for damages against any corporation, was held unconstitutional. The court says the right of appellee cannot be fettered and clogged with reference to the parties litigant, or the attitude they occupy as plaintiff or defendant. All must have the equal protection of the law.

After the decision in the *Ellis Case* (U. S.) *supra*, the Texas legislature amended the statute involved therein so as to make it apply to any person or corporation doing business in the state, and when that statute came before the Supreme Court of the United States, it held that a statute allowing an attorney's fee against any person or corporation doing business in the state, which refuses promptly to pay a claim of \$200, or under, for personal services, or material, overcharge of freight, and goods lost in transit, or stock killed, does not deprive them of due process or equal protection, although a similar fee is not allowed against an unsuccessful plaintiff. The court first holds that there is no discrimination against any class of debtors so as to bring the case within the equal protection clause, and then says: "It is a police regulation, designed to promote the prompt payment of small claims and to discourage unnecessary litigation in respect to them. The claims included appear to be such as are susceptible of being readily adjusted by the party responsible, within the thirty days that must intervene between the presentation of the claim and the institution of suit. . . . If the classification is otherwise reasonable, the mere fact that attorneys' fees are allowed to successful plaintiffs only, and not to successful defendants, does not render the statute repugnant to the 'equal protection' clause. This is not a discrimination between different citizens or classes of citizens, since members of any and every class may either sue or be sued. Actor and reus differ in their respective attitudes towards a litigation; the former has the burden of seeking the proper jurisdiction and bringing the proper parties before it, as well as the burden of proof upon the main issues; and these differences may be made the

basis of distinctive treatment respecting the allowance of an attorney's fee as a part of the costs. . . . Even were the statute to be considered as imposing a penalty upon unsuccessful defendants in cases within its sweep, such penalty is obviously imposed as an incentive to prompt settlement of small but well-founded claims, and as a deterrent of groundless defenses, which are the more oppressive when the amount involved is small. . . . But we think it is not correct to consider this statute as imposing a penalty. The allowance is confined to a reasonable attorney's fee, not exceeding \$20, where an attorney is actually employed; the amount to be determined by the court or jury trying the case. Manifestly, the purpose is merely to require the defendant to reimburse the plaintiff for a part of his expenses not otherwise recoverable as 'costs of suit.' So far as it goes, it imposes only compensatory damages upon a defendant who, in the judgment of the legislature, unreasonably delays and resists payment of a just demand. The outlay for an attorney's fee is a necessary consequence of the litigation, and since it must fall upon one party or the other, it is reasonable to impose it upon the party whose refusal to pay a just claim renders the litigation necessary. The allowance of ordinary costs of suit to the prevailing party rests upon the same principle." The court concludes that the statute does not violate the due process clause. *Missouri, K. & T. R. Co. v. Cade* (1914) 233 U. S. 642, 58 L. ed. 1135, 34 Sup. Ct. Rep. 678. With due respect to the eminent court which rendered this decision, it is submitted that the only way in which the decision can be justified is upon the supposition that the defendant knew that the claim was invalid, and wilfully refused to pay it for the purpose of defrauding the plaintiff, or of maliciously taking advantage of the situation to gain advantage from the plaintiff's necessities. If this is the case, it may be that the defendant's conduct brings it within the police power of the state, and subjects it to the penal law. But if there is any ground for difference

of opinion as to the validity of the claim, so that the defendant has a right to take the judgment of the court upon it, it is impossible to see how equal protection of the laws can be accorded to defendant if he is mulcted in an attorney's fee, if the jury decides against him, as it is quite likely to do. The statute applies to any claim against a person or corporation doing business in the state. Suppose a bill has been presented for labor for repairs on a building, which is \$50 more than the contract price, and the extra amount is claimed for alleged extra work which defendant alleges was not authorized. Under the statute and this decision, defendant must pay the overcharge, although all parties know it is unjust, or, in case the jury allows it, which is more than likely, as all practitioners know, he will be mulcted in an attorney's fee in addition, although the plaintiff runs no such risk in presenting a padded bill.

But, the *Cade Case* has been followed in *Missouri, K. & T. R. Co. v. Harris* (1914) 234 U. S. 412, 58 L. ed. 1377, L.R.A.1915E, 942, 34 Sup. Ct. Rep. 790, where the court also states that there is no violation of the commerce clause of the Federal Constitution.

In *Missouri, K. & T. R. Co. v. Simonson* (1902) 64 Kan. 802, 57 L.R.A. 768, 91 Am. St. Rep. 248, 68 Pac. 653, the court, although holding void a statute making the bill of lading issued by a carrier for goods tendered for transportation conclusive, held a provision for attorney's fees, in a suit for failure to deliver property transported, valid, and said that the reason for it was the negligence of the carrier in failing safely to transport and deliver the goods committed to its charge, and that the point was ruled in the *Matthews Case* (1897) 58 Kan. 447, 49 Pac. 602, 8 Am. Neg. Rep. 27, affirmed in (1899) 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609.

There is, however, a valid ground of distinction between the cases. The *Matthews Case* was one of those in which the attorney's fees were allowed against a railroad company setting out

fire in the operation of its trains, which might very properly come within the police power; while the Simonson Case dealt merely with a failure to pay a bill for goods lost in transportation.

In *Vogel v. Pekoc* (1895) 157 Ill. 339, 30 L.R.A. 491, 42 N. E. 386, a statute allowing attorney's fees to an employee establishing a claim for wages was upheld against a claim that it was special legislation, but the court considered only the question of classification as between plaintiffs, and did not consider the question of allowance of a fee to plaintiff and denying it to defendant.

A statute imposing a penalty and attorneys' fees upon all common carriers who fail to pay claims for overcharges on freight, or for freight lost or damaged, within a specified time after presentation, is not unconstitutional because not applying to the shipper in case he is defeated in his action. *Atlantic Coast Line R. Co. v. Coachman* (1910) 59 Fla. 130, 52 So. 377, 20 Ann. Cas. 1047. The court says: The shipper and the carrier are not similarly situated. The shipper assumes the discharge of no duty to the public. He injures no one. And so the statute applies to the carrier—to all carriers similarly situated—and places its penalty or burden upon the carrier, and not upon the shipper, because the carrier only is within the sphere of its operation. This statute designs, also, to bring about a reasonably prompt settlement of all proper claims, and a reasonably speedy trial thereon. The statute tends to avoid expensive and annoying delays in litigation. These delays become annoying to lawyers, expensive and damaging to litigants, and affecting, as they must do, large numbers of people in all parts of the state, become the source of much irritation and the cause of much friction between the carriers and the people, resulting sometimes in drastic legislation harmful to the carriers. Giving full force to the presumption that the legislature had full knowledge of the conditions within this state, we may well conclude that this statute was really

designed to accomplish a legitimate public purpose. Legislation of this nature will tend to lessen litigation, prevent a multiplicity of suits, save to the state and litigants expenses thereof, remove a source of friction and unrest in the state, bring the shipper and the carrier to walk hand in hand, promote the public welfare and the good order of the people, increase the industries of the state, develop its resources, and add to its wealth and prosperity—results devoutly to be wished by all lovers of good government, whether on or off the bench.

A statute allowing an attorney's fee against all common carriers who fail to settle, within a specified time, claims for loss of goods or overcharges of freight, does not violate the due process or equal protection clause of the Constitution. *Smith v. Chicago, St. P. M. & O. R. Co.* (1916) 99 Neb. 719, 157 N. W. 622. The court calls attention to the fact that the statute applies equally to all engaged in the same line of business, and says: "Individual claims against common carriers for loss or damage to shipments of freight, and for overcharges for freight, are in most cases so small that the consignor could not afford to litigate such claims if he were compelled to pay attorney's fees. To remedy this wrong, which the shipper might otherwise be required to suffer without redress, it is within the power of the legislature to provide for the recovery by the shipper of a reasonable attorney's fee in a successful action, upon a claim within the class comprehended by the act referred to. This act, being applicable to all persons and corporations engaged in the business of common carriers in the state, and applying only to a certain class or kind of claims admitting of special legislative treatment, is valid."

b. Insurance claims.

Considering the attitude which the courts have taken towards insurance companies in all litigation which has come before them, the managers of such companies must have dealt on a very low plane of morality in their

transactions with the public. Common experience has shown that the managers seem to have made every effort to write as many policies as possible, and pay as few losses as possible. This has caused drastic legislation against the companies, which has, to a large extent, corrected the evils which formerly existed. But if the insurance companies have been guilty of all the delinquencies which are charged against them it does not deprive them of their constitutional rights, or make them outlaws, so long as the legislature permits them to continue to write policies. This seems to be a self-evident fact, but the courts, from the Supreme Court of the United States down, not without protest and adverse decisions from other courts, to be sure, have proceeded on the theory that it was perfectly proper to compel them to pay claims against them within a specified period after they accrued, or be subject to a penalty for attorneys' fees if they could not make good any defense which they thought they had against a claim on a policy. Few persons have had any extended experience in life who have not learned that insurance companies are the victims of many fraudulent claims, which they have a perfect right to contest, and they should not be deprived of this right by imposing on them an attorney's fee for the exercise of it. The numerical weight of authority, however, holds that there is no constitutional objection to the imposition of such fees upon the companies, without a like imposition of them upon unsuccessful plaintiffs.

United States.—*Fidelity Mut. Life Asso. v. Mettler* (1902) 185 U. S. 308, 46 L. ed. 922, 22 Sup. Ct. Rep. 662; *Farmers' & M. Ins. Co. v. Dobney* (1903) 189 U. S. 301, 47 L. ed. 821, 23 Sup. Ct. Rep. 565; *Iowa L. Ins. Co. v. Lewis* (1902) 187 U. S. 344, 47 L. ed. 209, 23 Sup. Ct. Rep. 126; *Merchants' Life Asso. v. Yoakum* (1899) 39 C. C. A. 56, 98 Fed. 251.

Arkansas.—*Arkansas Ins. Co. v. McManus* (1908) 86 Ark. 115, 110 S. W. 797; *Pacific Mut. L. Ins. Co. v. Carter* (1909) 92 Ark. 378, 123 S. W. 384, 124 S. W. 764.

Florida.—*Tillis v. Liverpool & L. & G. Ins. Co.* (1903) 46 Fla. 263, 110 Am. St. Rep. 89, 35 So. 171; *Hartford F. Ins. Co. v. Redding* (1904) 47 Fla. 228, 67 L.R.A. 518, 110 Am. St. Rep. 118, 37 So. 62; *L'Engle v. Scottish Union & Nat. F. Ins. Co.* (1904) 48 Fla. 82, 67 L.R.A. 581, 111 Am. St. Rep. 77, 37 So. 462, 5 Ann. Cas. 748.

Georgia.—*Harp v. Fireman's Fund Ins. Co.* (1908) 130 Ga. 726, 61 S. E. 704, 14 Ann. Cas. 299.

Kansas.—*British America Assur. Co. v. Bradford* (1898) 60 Kan. 85, 55 Pac. 335; *Shawnee F. Ins. Co. v. Bayha* (1898) 8 Kan. App. 169, 55 Pac. 474.

Missouri.—*Keller v. Home L. Ins. Co.* (1906) 198 Mo. 440, 95 S. W. 903; *Barber v. Hartford L. Ins. Co.* (1916) 269 Mo. 21, 187 S. W. 868.

Nebraska.—*Insurance Co. of N. A. v. Bachler* (1895) 44 Neb. 549, 62 N. W. 911; *Lancashire Ins. Co. v. Bush* (1900) 60 Neb. 116, 82 N. W. 313; *Farmers Mut. Ins. Co. v. Cole* (1903) 4 Neb. (Unof.) 180, 98 N. W. 730.

Texas.—*Union Cent. L. Ins. Co. v. Chowning* (1894) 86 Tex. 654, 24 L.R.A. 504, 26 S. W. 982; *Mutual L. Ins. Co. v. Blodgett* (1894) 8 Tex. Civ. App. 45, 27 S. W. 288; *Fidelity & C. Co. v. Allibone* (1897) 15 Tex. Civ. App. 178, 39 S. W. 632, writ of error denied in (1897) 90 Tex. 660, 40 S. W. 399; *Washington L. Ins. Co. v. Gooding* (1898) 19 Tex. Civ. App. 490, 49 S. W. 127; *New York L. Ins. Co. v. Orlopp* (1901) 25 Tex. Civ. App. 284, 61 S. W. 338; *Sun L. Ins. Co. v. Phillips* (1902) — Tex. Civ. App. —, 70 S. W. 608; *Manhattan L. Ins. Co. v. Cohen* (1911) — Tex. Civ. App. —, 139 S. W. 51; *Mutual L. Ins. Co. v. Walden* (1894) — Tex. Civ. App. —, 26 S. W. 1012; *Mutual L. Ins. Co. v. Simpson* (1894) — Tex. Civ. App. —, 28 S. W. 837.

The leading case upholding an allowance of attorneys' fees is *Fidelity Mut. Life Asso. v. Mettler* (1902) 185 U. S. 308, 46 L. ed. 922, 22 Sup. Ct. Rep. 662, which holds that the state may impose as a condition to the doing of business in the state by life and health insurance companies, the requirement that they shall be liable to a penalty and attorneys' fees for

not paying claims promptly, notwithstanding such terms are not imposed on other classes of insurance companies, without infringing the provision against equal protection of the laws. The court said: The ground for placing life and health insurance companies in a different class from fire, marine, and inland insurance companies is obvious, and we think that putting them in a different class from mutual benefit and relief associations doing business through lodges, and benevolent associations of the character mentioned in the Texas statutes, is not an arbitrary classification, but rests on sufficient reason.

This reasoning is possibly sound if the liability to attorneys' fees for failure to pay promptly was actually made a condition precedent to doing business in the state, but there was nothing to show that the provision was in any way a condition to doing business, but was merely a statutory requirement, passed, so far as appears, after the defendant had begun to do business in the state, providing that failure to pay a claim within thirty days would subject it to a penalty and attorneys' fees. As the dissenting judge says: "It is one thing for a state to forbid a particular foreign corporation, or a particular class of foreign corporations, from doing business at all within its limits. It is quite another thing for a state to admit or license foreign corporations to do business within its limits, and then subject them to some statutory provision that is repugnant to the Constitution of the United States."

In *Farmers' & M. Ins. Co. v. Dobney* (1903) 189 U. S. 301, 47 L. ed. 821, 23 Sup. Ct. Rep. 565, affirming (1901) 62 Neb. 213, 97 Am. St. Rep. 624, 86 N. W. 1070, a statute allowing an attorney's fee in cases of fire insurance policies where the property was totally destroyed was upheld against the objection that it was an arbitrary classification and did not provide equal protection of the laws. The key to the decision seems to be in the clause from the opinion stating that, in case of a total loss, the amount to be paid is determined under the statute by the

value fixed on the property in the policy, and the question of legal liability under the policy would be, as a general rule, the only matter to be considered in determining whether payment under the contract would be made. The court, however, did not consider the question of the possibility of valid defense to actions upon the policies, or the discrimination between plaintiff and defendant in allowing an attorney's fee to one and not to the other.

In *Merchants' Life Asso. v. Yoakum* (1899) 39 C. C. A. 56, 98 Fed. 251, the court upheld the provisions of the Texas statute imposing penalty and attorneys' fees upon life and health insurance companies which failed to pay their losses promptly. The court makes much of the avarice of insurance companies, and the hardship often inflicted upon beneficiaries of policies in their collection. The court then says: "It must be manifest to the most casual observation that the parties to these insurance contracts and to such a controversy are unequally matched. It is human nature and human experience that the stronger will use his strength. He may piously declare his benevolent intentions, and disclaim any purpose to profit by his power, but he will use it none the less. Without the aid of a legal fiction, we cannot say or think that the minds of these contracting parties do or can ever meet. . . . It seems to us that the state legislation drawn in question by this assignment is not in conflict with the 14th Amendment to, or any other provision of, the Constitution. It is not simply a statute imposing a penalty on life or health insurance companies for failing to pay certain debts, but is one to enforce reasonable regulations and conditions on which such companies are permitted to do business in Texas. The purpose of this statute is not to compel the payment of debts. Life and health insurance companies do not usually neglect or defer the payment of their admitted debts. . . . The obvious purpose of the act is to secure a righteous degree of care in writing policies of insurance, so that

the immoral insurer will not receive premiums from an honest recipient of one of its policies, which does not bind it to meet the loss that he bargains it shall meet, and in consideration for which he parts with his money while he is alive and able to make earnings, that he may, to the extent stipulated, protect his family or his creditors against the contingency of his death, which must occur. To enforce the exercise of this righteous care on the part of the very strong, in contracting with the weaker and less learned, and in conducting humanely this peculiar business that reaches so often across the graves of the insured to the homes of afflicted dependents, so that the insurers will not receive premiums from honest parties whom the contracts as written do not insure, would seem to be within the legislative power. The classification here involved is, therefore, not arbitrary, but has reasonable relation to the peculiar features of the business to which it applies. It does not discriminate against some and favor others, but, though limited in its application, does, within the sphere of its operation, affect alike all persons similarly situated. It seeks to subserve the general interests of the public. It must be sustained." The argument of the court seems to warrant the conclusion that some regulation of the business of insurance is necessary, but it nowhere justifies a denial of the application of the equal protection of the law provision of the Constitution to the litigants, so as to prevent the awarding of costs to one which are not given to the other.

In *Arkansas Ins. Co. v. McManus* (1908) 86 Ark. 115, 110 S. W. 797, a statute imposing a penalty and attorneys' fees upon insurance companies failing to pay losses promptly was upheld, the court saying: "The business of insurance is of such a public character that it is a proper subject of distinct regulation, and the state is so interested in the speedy adjustment and payment of indemnity under insurance policies for loss of life, health, or property of its citizens that penalties may be prescribed for unreason-

able delay in that respect. These statutes are correctly based upon the theory that insurance companies, after loss occurs, have the insured at a great disadvantage and are in position to inflict great damage by mere delay in payment of losses. Therefore it is neither unjust nor unreasonable to inflict a penalty which will in some degree compensate for that injury where the resisted claim is finally adjudged to be just, and which will also tend to deter the company liable from interposing unnecessary delay in settlement."

The court, in *Harp v. Fireman's Fund Ins. Co.* (1908) 130 Ga. 726, 61 S. E. 704, 14 Ann. Cas. 299, followed the *Mettler* and *Dobney* Cases, and stated that its earlier decisions could no longer be followed.

The allowance of attorneys' fees in suits upon fire insurance policies is not unconstitutional. *British America Assur. Co. v. Bradford* (1898) 60 Kan. 85, 55 Pac. 335. The court says: "Fire insurance has come to be a business public in its nature. It has come to be 'clothed with a public interest,' and is therefore properly a subject of legislative regulation. The state is interested in the preservation of the property of its citizens that the general values of the commonwealth may not be impaired. Especially is it interested in the preservation of its homes, and their rebuilding when destroyed. To the end that insurance companies may be compelled to respect the obligations voluntarily taken upon themselves to subserve the policies of the state in these respects, the legislature may rightfully impose upon them the repayment to insurers of attorneys' fees necessarily incurred in suits to make good their delinquencies."

In *Insurance Co. of N. A. v. Bachler* (1895) 44 Neb. 549, 62 N. W. 911, the court considered the objection that the statute allowing an attorney's fee in the case of policies on real estate, where the property was wholly consumed by fire, was special legislation under the state Constitution. This objection was overruled, the court saying: "We know of nothing in the Con-

stitution which prohibits the legislature from enacting that the successful party in litigation may recover a judgment against his adversary for the amount of the costs expended or accrued by him in the prosecution of such suit, nor do we know of anything that prohibits the legislature from including in the term costs a reasonable attorney's fee." But the court did not state whether or not the legislature could award costs to one party to the litigation, and deny them to the other.

And in *Lancashire Ins. Co. v. Bush* (1900) 60 Neb. 116, 82 N. W. 313, the court held that the classification in the statute was proper. As a reason for the classification, the court said: "It is a matter of common knowledge that corporations engaged in the business of insuring real estate have been long accustomed to vexatiously and oppressively resisting payment of claims arising under their policies. The reports of this court bear abundant evidence to the fact that no other class of litigants has so persistently endeavored to escape liability from their contract obligations, by interposing technical and unconscionable defenses to actions instituted against them. The legislature was, we think, within its constitutional power in selecting this class of insurance companies from all other litigants, and subjecting them, if unsuccessful, to the payment of attorneys' fees, because experience and observation had shown that the defenses upon which they generally rely are without merit, and constructed out of some of the forfeiture clauses with which their policies are thronged. The law in question was designed to repress an evil practice, to advance public interest, and promote justice. It was an exercise of legislative power, justified by considerations of public policy." Allowing an attorney's fee for vexatious delay in paying an insurance loss is valid. *Keller v. Home L. Ins. Co.* (1906) 198 Mo. 440, 95 S. W. 903.

In *Barber v. Hartford L. Ins. Co.* (1916) 269 Mo. 21, 187 S. W. 868, objection to the allowance of an attorney's fee for vexatiously refusing to pay an insurance loss, because it vio-

lated the due process and equal protection clauses of the Constitution, was held to be too stale to serve as a foundation for jurisdiction depending upon constitutional questions.

The Texas statute does not deny equal protection of laws because confined to health and life companies, and does not prevent their resort to the courts. *Union Cent. L. Ins. Co. v. Chowning* (1894) 86 Tex. 654, 24 L.R.A. 504, 26 S. W. 982, judgment entered by court of civil appeals (1894) 8 Tex. Civ. App. 455, 28 S. W. 117.

In *Mutual L. Ins. Co. v. Walden* (1894) — Tex. Civ. App. —, 26 S. W. 1012, the court says the provision for penalty and attorneys' fees is found among the precedent conditions upon which life insurance companies may do business in this state. A foreign company has no position to complain of the requirement.

Some of the courts cited in the above list at one time held the allowance of such fees unconstitutional. Thus, in *Thompson v. Traders' Ins. Co.* (1902) 169 Mo. 12, 68 S. W. 889, which involved the allowance of an attorney's fee for vexatious delay in payment of insurance losses, the court says that a statute which imposes a penalty upon an insurance company in the payment of its contract obligations, which is not imposed upon any other corporation or person for a similar delay, is unconstitutional. This case involved a contract made in another state, and the court regarded itself as bound by the *Ellis Case* (1897) 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255.

So *Phenix Ins. Co. v. Hart* (1901) 112 Ga. 765, 38 S. E. 67, held that allowing a penalty and attorney's fee against an insurance company which makes a defense to a claim on an insurance policy violates the equal protection clause of the Federal Constitution. This case was followed in *Phoenix Ins. Co. v. Schwartz* (1902) 115 Ga. 113, 57 L.R.A. 752, 90 Am. St. Rep. 98, 41 S. E. 240.

In *New York L. Ins. Co. v. Smith* (1897) — Tex. Civ. App. —, 41 S. W. 684, holding the Texas insurance statute invalid, the court says life and

health insurance companies are alone selected of all other companies doing business in Texas. They may be sued in our courts for recovery of a death claim; they may be made to pay 12 per cent penalties upon the claim, and a reasonable attorney's fee for the collection of the claim. There is no other debtor known to our law who is treated so harshly by the lawmaking power. It is not made a condition by any article of our statutes, upon which insurance companies can do business in Texas, that they shall pay such penalties as are provided in this article for failing to pay their debts at maturity.

In *Williamson v. Liverpool & L. & G. Ins. Co.* (1900) 105 Fed. 31, the court held that a statute imposing a penalty and attorney's fee upon insurance companies for vexatiously fighting losses violated the equal protection clause, and also the special privilege clause. The opinion is one of the most vigorous refutations of the fallacies of the arguments by which such legislation is supported, and will well repay a reading. The court says the very terms of the statute show that its purpose is not to protect the community from calamity by preventing the destruction of property by any recognized dangerous methods of operation, but its sole purpose is to coerce the payment of a private debt by deterring insurance companies from taking any chances of litigation, even though they may honestly believe that they have a meritorious defense. The penalty is imposed for refusing "to pay the loss." With respect to the term "vexatious," the court says, in practice, it is little more than an epithet. "The defendant may honestly rely upon what it is advised by counsel to be a correct construction of some provision of the contract, or upon some hitherto undetermined proposition of law, or upon a belief in the existence of some fact susceptible of proof, which ought to defeat a recovery. After the court has resolved the question of law in favor of the plaintiff, or after the defendant's witnesses to a controverted fact have been overborne by the weight of the plaintiff's

evidence, the jury, occupying the vantage ground, may think the proposition of law was so plain, and the evidence for the plaintiff so strong, it could conclude that the defense was meritless, and therefore vexatious. The trial judge, conceiving that there was some atom or scintilla of evidence to support the jury's inference, would decline to interfere. And, in view of the known inclination of juries in such trials, the result, in general, would practically be the same as if this qualifying phrase were eliminated from the statute. . . . If the assured has wantonly burned his own house, and the company refuses to pay, whereupon suit is brought against it, notwithstanding the defendant should clearly prove the act of incendiarism, and show that the suit was wholly vexatious, no damage or attorney's fee is taxable in its favor. If A owes B \$1,000, evidenced by a note to which he has not the shadow of a defense, and compels B to hire a lawyer to enforce payment by suit, although A defends solely to harass and delay his creditor, there is no statute of the state imposing upon such delinquent a like penalty."

In *Pacific Mut. L. Ins. Co. v. Van Fleet* (1910) 47 Colo. 401, 107 Pac. 1087, the court held that a statute, imposing attorneys' fees against a foreign insurance company which was defeated in contesting liability on a policy, was unconstitutional as discriminating in favor of the plaintiff in the action, and also in favor of domestic companies. The court stated that the decisions of the Supreme Court of the United States, upholding the Texas statute, merely accepted the meaning of the statute as interpreted by the state court, and followed the decisions of the latter as to whether it violated the state Constitution.

In *Continental F. Ins. Co. v. Whitaker* (1903) 112 Tenn. 151, 64 L.R.A. 451, 105 Am. St. Rep. 916, 79 S. W. 119, in which an attorney's fee was allowed plaintiff in an action on an insurance policy, under a statutory provision authorizing a penalty in case defense to the policy was not in good faith, the statute provided for a simi-

lar allowance to defendant in case the suit was not in good faith. The only question involved, therefore, was whether or not insurance business constituted a class capable of separate classification. But the language of the court in justifying the allowance is sometimes quoted as authorizing an allowance, when the right to the attorney's fee is not reciprocal.

c. Mechanics' Liens.

The courts have had difficulty also with the question whether or not a statute allowing an attorney's fee in a proceeding to foreclose a mechanic's lien was constitutional. The weight of authority as well as that of reason seems to be in favor of the invalidity of a statute making such allowance. There is, perhaps, more reason for denying the fee in case of a mechanic's lien than in some of the other cases where the legislature has attempted to allow it, because, in the case of a mechanic's lien, the effort is often to enforce the claim against property of one person for the debt of another. If the contractor who attempted to deliver the work free from liens has been fully paid, and has failed to satisfy the claims of all laborers and materialmen, a lien may be enforced against the property, and thus compel the owner to make double payment, which, of course, adds the element of unfairness to the constitutional objections to the proceeding.

The following decisions have held the imposition of the fee to be unconstitutional.

United States. — *UNION TERMINAL CO. v. TURNER CONSTR. CO.* (reported herewith) ante, 880.

Alabama. — *Randolph v. Builders & P. Supply Co.* (1894) 106 Ala. 507, 17 So. 721.

California. — *Builders' Supply Depot v. O'Connor* (1907) 150 Cal. 265, 17 L.R.A. (N.S.) 909, 119 Am. St. Rep. 193, 88 Pac. 982, 11 Ann. Cas. 712; *Union Lumber Co. v. Simon* (1907) 150 Cal. 751, 89 Pac. 1077, 1081; *Mannix v. Tryon* (1907) 152 Cal. 31, 91 Pac. 983; *Merced Lumber Co. v. Bruschi* (1907) 152 Cal. 372, 92 Pac. 844; *Hill v. Clark* (1908) 7 Cal. App. 609, 95 Pac. 382;

Farnham v. California Safe Deposit & T. Co. (1908) 8 Cal. App. 266, 96 Pac. 788; *Los Angeles Pressed Brick Co. v. Higgins* (1908) 8 Cal. App. 514, 97 Pac. 414, 420; *Stimson Mill Co. v. Nolan* (1907) 5 Cal. App. 754, 91 Pac. 262.

Colorado. — *Los Angeles Gold Mine Co. v. Campbell* (1899) 13 Colo. App. 1, 56 Pac. 246, writ of error denied in (1901) 28 Colo. 256, 64 Pac. 194; *Davidson v. Jennings* (1900) 27 Colo. 187, 48 L.R.A. 340, 88 Am. St. Rep. 49, 60 Pac. 354; *Antlers Park Regent Min. Co. v. Cunningham* (1902) 29 Colo. 284, 68 Pac. 226; *Burleigh Bldg. Co. v. Merchant Brick & Bldg. Co.* (1899) 13 Colo. App. 455, 59 Pac. 83; *Perkins v. Boyd* (1901) 16 Colo. App. 266, 65 Pac. 350.

Illinois. — *Manowsky v. Stephan* (1908) 233 Ill. 409, 84 N. E. 365; *Olson v. Nilson* (1908) 142 Ill. App. 436.

Kansas. — *Atkinson v. Woodmansee* (1903) 68 Kan. 71, 64 L.R.A. 325, 74 Pac. 640.

Michigan. — *Grand Rapids Chair Co. v. Runnels* (1889) 77 Mich. 104, 43 N. W. 1006.

Montana. — *Mills v. Olsen* (1911) 43 Mont. 129, 115 Pac. 33.

Utah. — *Brubaker v. Bennett* (1899) 19 Utah, 401, 57 Pac. 170.

Wyoming. — *Becker v. Hopper* (1914) 22 Wyo. 237, 138 Pac. 182, Ann. Cas. 1916D, 1041.

In *Los Angeles Gold Mine Co. v. Campbell* (1899) 13 Colo. App. 1, 56 Pac. 246, the court, in denying the validity of the provision of the Mechanic's Lien Law for attorney's fees, says there is no reason apparent to the average intelligence which ought to give a man who undertakes to build a house any other or greater rights in the collection of his debts and the enforcement of his claim, than any other tradesman who furnishes supplies to the individual or his family. All debtors should occupy the same common plane, and no creditor should have the right to maintain his suit with any other or greater advantage than that which is given to other creditors for the purpose of collecting their claims. "In the controversy between the lien claimant and the debt-

or, grave and legitimate questions may arise in regard to the amount of the debt and the extent of the plaintiff's claim. The materialman may assert a claim for materials furnished, in a very considerable sum beyond that which, according to the debtor's contention, is well based. The prices may not be according to the contract, or, if there be no special agreement concerning the price, they may be charged at a sum beyond that which the debtor believes to be a fair and reasonable price. He is either compelled to pay the claim as asserted, or he must litigate with the materialman as to the amount of his recovery." Defendant may have "a legitimate right to contest with his adversary, be successful in reducing the claim, and yet the law visits on him a penalty for an honest and a just litigation, in a sum which would consume the reduction which he had legitimately established." A writ of error was denied in (1901) 28 Colo. 256, 64 Pac. 194.

A provision of a Mechanic's Lien Law, giving plaintiff a lien for attorney's fees, violates the equal rights and due process clauses of the Constitution, and is invalid class legislation. *Randolph v. Builders & P. Supply Co.* (1894) 106 Ala. 501, 17 So. 721.

A statute allowing an attorney's fee to one who establishes a mechanic's lien, which is not allowed to other classes of litigants, violates the constitutional guaranty of equal protection of the laws, uniformity of laws, and equal rights in the acquisition and protection of property. *Builders' Supply Depot v. O'Connor* (1907) 150 Cal. 265, 17 L.R.A. (N.S.) 909, 119 Am. St. Rep. 193, 88 Pac. 982, 11 Ann. Cas. 712.

That case overruled *Peckham v. Fox* (1905) 1 Cal. App. 307, 82 Pac. 91, which held that the allowance of attorneys' fees in mechanics' lien cases did not conflict with the equal protection clause of the Constitution.

Allowing an attorney's fee to one establishing a mechanic's lien violates the constitutional provisions that the courts shall be open to every person, and that right and justice shall be administered without sale, denial, or

delay. The court says: This section imposes a penalty upon defendant for exercising the common right of making a defense which is accorded to every other litigant, by subjecting him to the payment of plaintiff's attorney's fees, if he is successful, without giving defendant the reciprocal right, if he is victorious. The attorney's fee allowed by the statute is not in the nature of a penalty for the violation of a statutory duty, but a punishment for failure to pay the claim of the lienor. *Davidson v. Jennings* (1900) 27 Colo. 187, 48 L.R.A. 340, 83 Am. St. Rep. 49, 60 Pac. 354.

A statute allowing an attorney's fee in favor of a successful mechanic's lien claimant is invalid as special legislation. The court says no reason exists for singling out those holding mechanics' liens and granting to them this right, while denying it to other lienholders such as landlords, agisters, and carriers. *Manowsky v. Stephan* (1908) 233 Ill. 409, 84 N. E. 365.

A statute allowing an attorney's fee upon enforcement of a mechanic's lien in favor of an artisan or day laborer denies the equal protection of the laws, in that it applies only against those constructing buildings and only in favor of persons working on such structures. *Atkinson v. Woodmansee* (1903) 68 Kan. 71, 64 L.R.A. 325, 74 Pac. 640. The court says: "The homely and highly beneficial act of building or repairing some structure upon his premises, or otherwise improving them, by any man, whether rich or poor, who possesses property, whether much or little, does not so stand out from his other ordinary and innocent employments, or so stand out from similar employments of other men, as naturally to distinguish it from them. . . . They [property owners] are not treated as other debtors, or equally with other debtors. They cannot appeal to the courts as other litigants under like conditions and with like protection. If litigation terminates adversely to them, they are mulcted in the attorney's fees of the successful plaintiff; if it terminates in their favor, they recover no attorney's fees. It is no sufficient answer to say

that they are punished only when adjudged to be in the wrong. They do not enter the courts upon equal terms. They must pay attorney's fees if wrong; they do not recover any if right; while their adversaries recover if right, and pay nothing if wrong. In the suits, therefore, to which they are parties, they are discriminated against, and are not treated as others. They do not stand equal before the law."

No attorney's fee can be allowed to plaintiff in an action to recover for personal services under a Log Lien Statute. *Grand Rapids Chair Co. v. Runnels* (1889) 77 Mich. 104, 48 N. W. 1006.

The court, in *Mills v. Olsen* (1911) 43 Mont. 129, 115 Pac. 33, overrules its former decision of *Wortman v. Kleinschmidt* (1892) 12 Mont. 316, 30 Pac. 280, on the authority of the California and other cases, stating that "they think the reasoning of those cases is unanswerable."

In the *Wortman Case* the court had held that the statute allowing attorneys' fees in lien cases was valid, against the objection that it violated the constitutional provision that courts of justice should be open to every person and a speedy remedy afforded for every injury; that right and justice should be administered without sale, denial, or delay. The court says the statute operates equally upon corporations and persons. The court followed some early California cases which allowed the lien without considering its constitutionality, but which were subsequently rendered obsolete by the decisions holding the statute unconstitutional. The dissenting judge says of the statute: "It gives a weapon, and a powerful one, to the plaintiff, which it withholds from the defendant. If plaintiff is successful, he obtains his attorney's fee. If defendant is victorious, he does not. The parties are not equal before the law. Defendant must buy his right to defend by submitting to the liability of paying plaintiff's attorney's fees. The attorney's fee is not like the costs of the case. If defendant prevailed, he could recover

his costs of the action against plaintiff, but he could not recover the attorney's fee, as could plaintiff, under the statute. The statute absolutely takes from defendant, and gives to plaintiff, that which defendant could never recover from plaintiff if the result of the action were favorable to defendant. . . . Courts of justice are not equally open to every person, if the defendant, in every lawsuit of a certain character, must come into court knowing that his adversary, if victorious, may throw a heavy burden upon him, and that he cannot, if successful, cast a similar burden upon his opponent."

The *Wortman Case* was followed in *Helena Steam Heating & Supply Co. v. Wells* (1895) 16 Mont. 65, 40 Pac. 78.

In *Brubaker v. Bennett* (1899) 19 Utah, 401, 57 Pac. 170, a provision allowing attorneys' fees in favor of lien claimants was held void, because applying only to a certain class of litigants. The court says such a discrimination in favor of this class of litigants is violative of fundamental principles and the provisions of the state Constitution.

In *Becker v. Hopper* (1914) 22 Wyo. 237, 138 Pac. 182, Ann. Cas. 1916D, 1041, the court held that awarding attorneys' fees to mechanics' lien holders denied the equal protection of the laws.

Statutes allowing attorneys' fees in mechanics' lien cases have been sustained in the following states:

Florida.—*Dell v. Marvin* (1899) 41 Fla. 221, 45 L.R.A. 201, 79 Am. St. Rep. 171, 26 So. 188.

Idaho.—*Thompson v. Wise Boy Min. & Mill. Co.* (1903) 9 Idaho, 363, 74 Pac. 958; *Robertson v. Moore* (1904) 10 Idaho, 115, 77 Pac. 218; *Nelson Bennett Co. v. Twin Falls Land & Water Co.* (1908) 14 Idaho, 5, 93 Pac. 799; *Shaw v. Martin* (1911) 20 Idaho, 168, 117 Pac. 853.

Indiana.—*Duckwall v. Jones* (1900) 156 Ind. 682, 58 N. E. 1055, 60 N. E. 797.

Minnesota.—*Pfaender v. Chicago & N. W. R. Co.* (1902) 86 Minn. 218, 90 N. W. 393; *Lindquist v. Young* (1912) 119 Minn. 219, 138 N. W. 28; *Behrens*

v. Kruse (1913) 121 Minn. 90, 140 N. W. 339.

New Mexico.—Genest v. Las Vegas Masonic Bldg. Asso. (1902) 11 N. M. 251, 67 Pac. 743; Gray v. New Mexico Pumice Stone Co. (1910) 15 N. M. 478, 110 Pac. 603.

Oregon.—Title Guarantee & T. Co. v. Wrenn (1899) 35 Or. 62, 76 Am. St. Rep. 454, 56 Pac. 271.

Washington.—Ivall v. Willis (1897) 17 Wash. 645, 50 Pac. 467; Griffith v. Maxwell (1898) 20 Wash. 403, 55 Pac. 571; Fitch v. Applegate (1901) 24 Wash. 31, 64 Pac. 147; Littell v. Saulsberry (1905) 40 Wash. 550, 82 Pac. 909.

In *Thompson v. Wise Boy Min. & Mill. Co.* (1903) 9 Idaho, 363, 74 Pac. 958, the court held that a provision for attorneys' fees in a statute creating a lien in favor of one performing labor in a mine, or on any structure, does not violate a constitutional provision that justice shall be administered without prejudice. This ruling was put upon the ground that the statute applied alike to all debtors against whom a lien was allowed. The court says: We see no reason why the legislature have not the power to authorize the entry of a judgment for costs which will carry a reasonable sum for attorneys' fees in lien cases. But it is submitted that the court thereby misses the whole weight of the argument against the validity of the allowance in that it is given in favor of one party to the action and denied to the other. The argument of the court is: "Liens rest upon contracts. Someone must have originally contracted for the labor for which a lien is claimed, and, so soon as that contract is made, the Lien Statute steps in, and by operation of law writes into that contract the provision that, in case of failure to pay the laborer within a certain time, he shall have his lien, and, in case of a foreclosure thereof, reasonable attorney's fees. They must be deemed to have contracted with this statute in view, and it would seem to us that the party about to become the debtor must be said to have contracted for attorney's fees as much as for a lien or for costs."

The court attempts to meet that situation by stating that "the defendant in such cases is not prosecuting an action and is not seeking to recover any sum whatever from the lien claimants, and hence stands upon an entirely different principle from that of the party seeking to enforce his lien." How the situation of plaintiff and defendant in lien cases is different from that of plaintiff and defendant in suits generally is not clear, and it would be a strange law which would give an attorney's fee to all successful plaintiffs in litigation, and deny it to successful defendants. But the court further says: "These extra costs imposed upon a defendant in this class of cases under our statute are allowed as a penalty for not paying his honest debts, and to reimburse the plaintiff for the prosecution of his action."

In *Dell v. Marvin* (1899) 41 Fla. 221, 45 L.R.A. 201, 79 Am. St. Rep. 171, 26 So. 188, the allowance of an attorney's fee in cases of enforcement of mechanics' liens was upheld, on the ground that they must be regarded as incidents to the enforcement of the lien. The court holds that there is a ground for classification of lien claimants as against other plaintiffs, but fails to consider the question whether a fee can be given in favor of a plaintiff and denied to defendant in an action. But the chief justice, in dissenting, says: "Any law that says, in effect, to one suitor or class of suitors: 'You shall have from your adversary, in case of recovery, your just claim and all court costs and, besides, your attorney's fee, but your adversary, though he shall prove successful, and though he may establish the fact that your claim was fraudulent and unreal, and conceived in malice for the avowed purpose of subjecting him to the expense of employing skilled professional assistance to defend against and expose the fraud, shall recover nothing but his bare court costs, and nothing to remunerate him for the expense you have designedly forced him to incur,'—seems to me to be as flagrant an infraction of these constitutional inhibitions as can well be conceived."

Allowing plaintiff in actions to enforce mechanics' liens an attorney's fee, which is not allowed defendant, is not a taking of property without due process of law, nor is it class legislation. *Duckwall v. Jones* (1900) 156 Ind. 682, 58 N. E. 1055, 60 N. E. 797. The court said that the attorney's fee for enforcing the lien may well be allowed as part of the claimant's damages.

In upholding an allowance of attorney's fees in a suit to foreclose a mechanic's lien, against the objection that it guaranteed one litigant a privilege not granted the other, and therefore denied the equal protection of the laws, the court, in *Title Guarantee & T. Co. v. Wrenn* (1899) 35 Or. 62, 76 Am. St. Rep. 454, 56 Pac. 271, said: "It will be observed that the attorney's fees provided for in the Mechanic's Lien Act are not fixed and determined by the act, nor imposed strictly as a penalty, but rather in the nature of costs, of which the amount is to be determined by the court; and it is therefore, in our opinion, not obnoxious to the Constitution."

In *Ivall v. Willis* (1897) 17 Wash. 645, 50 Pac. 467, the court, in upholding an allowance of attorney's fees in foreclosure of a mechanic's lien, says: The fee is compensation to plaintiff for expenditures necessarily made by him in the foreclosure of his lien. It is in no sense a penalty inflicted upon defendant. It is allowed upon the same principle that costs are allowed.

In *Griffith v. Maxwell* (1898) 20

Wash. 403, 55 Pac. 571, the court follows the *Ivall* Case and relies on the early California cases, in which the question was not decided, but which were subsequently rendered obsolete when the court held the law unconstitutional.

In the Minnesota cases cited above, the court followed the *Cameron* Case (1896) 63 Minn. 384, 31 L.R.A. 553, 65 N. W. 652, which dealt with the validity of an attorney's fee allowed one compelled to take steps to recover property possessed under the writ of eminent domain without paying the compensation. It would seem that there was such a distinction between the two classes of cases that the latter could not be said to support statutes allowing an attorney's fee in mechanic's lien cases.

A statute allowing an attorney's fee to the successful party in a mechanic's lien proceeding, whether plaintiff or defendant, is valid. *Grace Lumber Co. v. Ortman* (1916) 190 Mich. 429, 157 N. W. 96.

And an act of Congress allowing attorneys' fees in foreclosure of mechanics' liens in the territories is valid, the equal protection of the laws provision of the Constitution being applicable only in the states, and there being no other constitutional provision applicable. *Cascaden v. Wimbish* (1908) 88 C. C. A. 277, 161 Fed. 245; *Pioneer Min. Co. v. Delamotte* (1911) 108 C. C. A. 90, 185 Fed. 753.

H. P. F.

J. P. WHITTINGHILL, Plff. in Err.,

v.

BOARD OF COUNTY COMMISSIONERS OF WOODWARD COUNTY.

Oklahoma Supreme Court — August 20, 1918.

(— Okla. —, 174 Pac. 489.)

Office — hiring assistants — tax ferret.

A board of county commissioners, in the absence of express legislative authority, has no power to contract with and employ another to perform duties which have by law been placed upon public officers.

[See note on this question beginning on page 913.]

Headnote by TISINGER, J.

(— Okla. —, 174 Pac. 489.)

ERROR to the District Court for Woodward County (Cullison, J.) to review a judgment sustaining a demurrer to plaintiff's claim for compensation for services rendered in collecting delinquent taxes. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Stuart, Cruce, & Cruce, for plaintiff in error:

The contract which the county commissioners entered into with plaintiff was valid and within their powers.

Von Rosenberg v. Lovett, — Tex. Civ. App. —, 173 S. W. 508; Disbrow v. Cass County, 119 Iowa, 538, 93 N. W. 585; Shinn v. Cunningham, 120 Iowa, 383, 94 N. W. 941; Wilhelm v. Cedar County, 50 Iowa, 254; Fleener v. Litsey, 30 Ind. App. 399, 66 N. E. 82; Garrigus v. Howard County, 157 Ind. 103, 60 N. E. 948; Richmond v. Dickinson, 155 Ind. 345, 58 N. E. 260; Wayne County v. Dickinson, 153 Ind. 682, 58 N. E. 929; Martin v. Whitman County, 1 Wash. 533, 20 Pac. 599; Burnett v. Markley, 23 Or. 436, 31 Pac. 1050; State ex rel. Herren v. Hall, 37 Or. 479, 63 Pac. 13; Blades v. Hawkins, 133 Mo. App. 328, 112 S. W. 979, 240 Mo. 187, 144 S. W. 1198, Ann. Cas. 1918B, 1082; Prothero v. Twin Falls County, 22 Idaho, 598, 127 Pac. 175; Harris v. Gibbins, 114 Cal. 418, 46 Pac. 292; Ottawa Gaslight & Coke Co. v. People, 138 Ill. 336, 27 N. E. 924; Chase v. Boulder County, 37 Colo. 268, 86 Pac. 1011, 11 Ann. Cas. 483.

Mr. L. A. Foster, for defendant in error:

In the absence of express authority so to do, there is no implied authority in county commissioners to contract with private persons to perform service which, by statute, it is the duty of other county officers to perform.

News-Dispatch Printing & Auditing Co. v. Grady County, 61 Okla. 259, 161 Pac. 207; Clough v. Hart, 8 Kan. 487; Brome v. Cuming County, 31 Neb. 362, 47 N. W. 1050; Tulsa Street R. Co. v. State, 26 Okla. 559, 110 Pac. 373; Johnson v. Grady County, 50 Okla. 188, 150 Pac. 497; Anderson v. Grant County, 44 Okla. 165, 143 Pac. 1145; Rackley v. Purcell, 40 Okla. 186, 137 Pac. 100; Baker v. Okmulgee County, 48 Okla. 737, 150 Pac. 714; Disbrow v. Cass County, 119 Iowa, 539, 93 N. W. 585; Pierson v. Minnehaha County, 28 S. D. 534, 38 L.R.A. (N.S.) 261, 134 N. W. 212.

Tisinger, J., delivered the opinion of the court:

On September 7, 1915, plaintiff in error, J. P. Whittinghill, and defend-

ants in error, the board of county commissioners of Woodward county, entered into the following written contract:

"Whereas, there is very much delinquent personal tax in Woodward county upon which warrants have been issued and returned by the sheriff, 'No property,' or, 'not found,' and, further whereas the said sheriffs are unable to locate said parties or property out of which to make said taxes: It is therefore agreed between the board of county commissioners of Woodward county, parties of the first part, and J. P. Whittinghill, of the second part, that said J. P. Whittinghill be, and is hereby, employed for the period of fifteen months from this date, to discover out said parties, and any property liable to said tax, and to assist the sheriff of said county thereby in the collection of said taxes. For said services said sheriff shall have the regular fees allowed by law, and said J. P. Whittinghill shall have 20 per centum of the amounts collected on alias tax warrants, in all cases in which he shall assist the said sheriff in the collection of same by the discovery of parties owning the same.

"Said J. P. Whittinghill agrees to faithfully and promptly proceed with the discharge of said duties, and the making of said investigations, and to report his acts monthly to the county treasurer and county clerk.

"The county clerk, on behalf of said county, will cause to be printed suitable notices and stationery, and shall furnish postage necessary in the making of said investigations, to the sheriff's office, to be used by said sheriff and said J. P. Whittinghill in the assisting of him in the discharge of the aforesaid duties.

"In testimony whereof, we have hereunto set our hands this September 7, 1915, by the board of commissioners in regular session."

On March 1, 1916, Whittinghill filed with the county clerk his claim against Woodward county for compensation for services rendered under the contract, which was by the board of county commissioners disallowed. From this action of the county commissioners rejecting his claim, he appealed to the district court of Woodward county. The district court sustained a general demurrer filed by the defendants to the claim and demand of the plaintiff, and from the judgment of the court sustaining said demurrer plaintiff brings the case here for review.

The case presents but one question for determination by this court, namely: Is the contract as herein set out one which the county commissioners had power, under the law, to make? The statutes of this state make it the duty of the several county treasurers and sheriffs to collect delinquent personal taxes. Sections 7392 to 7394, inclusive, Revised Laws 1910, and § 7395, Revised Laws 1910, as amended by chapter 192, Session Laws of 1913. These statutes are mandatory. They clearly prescribe the method to be followed by each officer in order to enforce the collection of such delinquent taxes, and provide severe penalties for the failure, neglect, or refusal of such officer to perform his duties thereunder. The law in this jurisdiction seems to be well settled that county commissioners, however necessary a thing may seem to be, have no power, in the absence of express statutory authority, to contract with, employ, or pay a private individual to do a thing, or perform a duty, which the law imposes on a public officer. *Logan County v. Jones*, 4 Okla. 341, 51 Pac. 565; *Anderson v. Grant County*, 44 Okla. 165, 143 Pac. 1145; *Baker v. Okmulgee County*, 48 Okla. 737, 150 Pac. 714; *News-Dispatch Printing & Auditing Co. v. Grady County*, 61 Okla. 259, 161 Pac. 207; *Jackson v. Garvin County*, — Okla. —, 167 Pac. 227. And as the law contained in the statutes cited makes it the duty

of the county treasurer and the sheriff to take all the needful steps to enforce the collection of delinquent personal taxes, and as there is no express statutory authority for the county commissioners to contract with another to assist these officers, or either of them, in the performance of this duty, it follows that the contract made by the county commissioners of Woodward county with the plaintiff is ultra vires and void.

But it is contended by the plaintiff that his employment began where the duties imposed by law upon the county treasurer and sheriff ended; that they had done everything required of them by law, and, in fact, had done everything that they possibly could do to collect the delinquent personal taxes and had failed; and that there was no duty imposed by law upon these officers, or upon any other person, to do the things which plaintiff was employed to do. They further contend that, under these circumstances, the county commissioners had implied authority to employ the plaintiff and to pay him for his services. With these contentions we cannot agree. The statutes governing the collection of delinquent personal taxes, cited *supra*, make it the imperative duty of the county treasurer, within thirty days after such taxes become delinquent, to issue warrants commanding the sheriff to levy the amount of such unpaid taxes, with costs, etc., and it is made the imperative duty of the sheriff, on receipt of such warrant, to levy the same upon the property of the taxpayer and sell the same in the manner and form as provided for the sale of personal property on execution. It is further made the duty of the sheriff, in making return of delinquent tax warrants to the treasurer, to note in the return the county to which the delinquent taxpayer may have removed, with the date of his removal, or the county in which he resides, if he shall be able to ascertain such facts, and, as to such facts, he is required to make diligent

inquiry. It is further made the imperative duty of the county treasurer, when tax warrants are returned uncollected, to issue alias warrants to the sheriff of his county, or to the sheriff of any other county, and it then becomes the imperative duty of such sheriff to collect the delinquent tax, together with all accrued costs and penalties and his own costs, and to this end he is directed to levy the same upon any property, real or personal, of the delinquent taxpayer, and to advertise and sell the same as upon execution. It is further made the imperative duty of the county treasurer to bring suit against any person or corporation owing delinquent taxes, where there is no tangible property upon which the tax warrant against such person or corporation can be levied, for the recovery of such taxes. It seems to us that the legislature attempted to provide by these statutes a positive, adequate, and complete method for collecting delinquent personal taxes, and that the duty of collecting them was placed on the two county officers named; to wit, the county treasurer and the sheriff.

The contention of plaintiff that his employment began where the duties imposed by law upon the county treasurer and the sheriff ended appears to us to be untenable in the following respects: First, the duties placed on these officers end only when the taxes are collected and are converted into the treasury; second, the contract made by the county commissioners with plaintiff shows that plaintiff was to be compensated out of the amounts col-

lected on alias tax warrants, when the law makes it the duty of the sheriff to collect the same; third, the contract and claim sued on show that the plaintiff seeks recovery for assisting the sheriff in the discovery of delinquent taxpayers and their property liable for taxes, when the law makes it the duty of the sheriff to find the delinquent taxpayer and to levy on and sell his property in order to collect the taxes for which he is delinquent; fourth, the contract and claim sued on show that the plaintiff seeks recovery merely for assisting the sheriff in the performance of his duties. The duties of the sheriff had not ended, else he would not have required any assistance in order to completely perform them. It necessarily follows that the county commissioners had no implied authority to employ the plaintiff and pay him for his services. Office—hiring
assistants—
tax ferret.

For, if the statutes make it the duty of the county treasurer and the sheriff to do the very things which the plaintiff claims he was employed to do, certainly there could not be any implied power or authority in the county commissioners to contract with the plaintiff to do those things. *News-Dispatch Printing & Auditing Co. v. Grady County*, 61 Okla. 259, 161 Pac. 207; *Chase v. Boulder County*, 37 Colo. 268, 86 Pac. 1011, 11 Ann. Cas. 483.

These views lead to the conclusion that the District Court of Woodward County committed no error in sustaining the demurrer to plaintiff's claim and demand, and its judgment in so doing is therefore affirmed.

ANNOTATION.

Authority of county to employ tax ferret.

A county has no power except what is expressly given or necessarily implied from that which is expressly conferred. The question whether it may employ a tax ferret, therefore, depends upon the interpretation of the statutes upon which its power is al-

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leged to depend. If the power is expressly given (*Re Morgan* (1904) 125 Iowa, 247, 101 N. W. 127; *State ex rel. West v. McCafferty* (1909) 25 Okla. 2, L.R.A.1915A, 639, 105 Pac. 992), of course there is no reason for further inquiry; but in most instances the

question is made to depend upon the language of the statutes conferring general powers, or the inferences to be drawn from such language. Assuming that the statute is broad enough to raise the inference that the power exists if its exercise is necessary to the welfare of the county, the majority of the cases have turned upon the further question whether or not the duty to search out omitted property has been imposed on other officials; the courts uniformly holding that if it has been so imposed, the county commissioners cannot employ a tax ferret to perform the duty.

California.—House v. Los Angeles County (1894) 104 Cal. 73, 37 Pac. 796.

Colorado.—Chase v. Boulder County (1906) 37 Colo. 268, 86 Pac. 1011, 11 Ann. Cas. 483.

Illinois.—Stevens v. Henry County (1905) 218 Ill. 468, 4 L.R.A.(N.S.) 339, 75 N. E. 1024, 4 Ann. Cas. 136; Campbell v. Workman (1906) 124 Ill. App. 404; Gannaway v. McFall (1903) 109 Ill. App. 23; People ex rel. Oglevee v. Smith (1906) 130 Ill. App. 407.

Indiana.—Ft. Wayne v. Lehr (1882) 88 Ind. 62; Miller v. Embree (1882) 88 Ind. 133; State ex rel. Workman v. Goldthait (1909) 172 Ind. 210, 87 N. E. 133, 19 Ann. Cas. 737; Workman v. Bent (1909) 45 Ind. App. 75, 90 N. E. 85.

Kansas.—State ex rel. Coleman v. Dickinson County (State ex rel. Coleman v. Fry) (1908) 77 Kan. 540, 16 L.R.A.(N.S.) 476, 95 Pac. 392.

Nebraska.—Platte County v. Gerard (1882) 12 Neb. 244, 11 N. W. 298.

New Mexico.—State ex rel. Miera v. Field (1918) 24 N. M. 168, 172 Pac. 1136.

North Dakota.—Storey v. Murphy (1899) 9 N. D. 115, 81 N. W. 23.

Oklahoma.—WHITTINGHILL v. WOODWARD COUNTY (reported herewith) ante, 910.

Oregon.—Burness v. Multnomah County (1900) 37 Or. 460, 60 Pac. 1005.

South Dakota.—Pierson v. Minnehaha County (1912) 28 S. D. 534, 38 L.R.A.(N.S.) 261, 134 N. W. 212.

A county authorized to levy taxes

has no power to make a special contract for the collection where, by the statute, the whole course of procedure, from the levy of the tax to its collection, is confided to certain officers designated by the statute, whose duties, and the time and manner of their discharge, are specified by the law. House v. Los Angeles County (Cal.) supra. In this case, however, the agent was employed to effect a redemption of land sold for taxes, and the court says that, under the law, the owner may redeem or not, as he chooses. Further it says: "Every step in the process is defined, and the officer or person by whom it is to be taken is designated. Nothing is left to the supervisors to do, or to cause to be done, except to see to it that the officers do their duty as it is nominated in the statute. Having no authority to act in the premises, and there being no right given by law to authorize them to appoint an agent who was or could be authorized to act, the attempted appointment by the resolution set out in the complaint was ultra vires, in the extreme sense of the term. What could the respondent possibly do under such an appointment? Simply nothing. He could not collect redemption money, or receipt for it. He could not, as the agent of the county, give notice to the owners of applications on the part of the state to procure deeds to lands purchased by it. This right or duty belonged to the state, and could only be exercised by it. We are of the opinion that the board of supervisors, in the absence of positive law authorizing it so to do, cannot, in any case, appoint an agent to exercise powers which it cannot itself exercise. . . . We do not, however, base our decision upon the ground that the duties devolving upon respondent are of such a character as called for the exercise of discretion and judgment, but upon the broader ground that, the statute having confided these duties to the officers specially designated by law for their discharge, the supervisors have no authority, express or implied, in the premises, and hence that the con-

tract was beyond the jurisdiction conferred upon the board."

Where, by statute, the duty of assessing and collecting taxes is upon county assessors and treasurers, statutory authority to the board of commissioners to exercise the power of the county as a body politic and make all contracts in relation to the concerns necessary to the corporate powers, and have the management of the business and concerns of the county, does not authorize the board to contract with an individual to discover and report to the board all property that, for any reason, has been omitted from taxation in the county. *Chase v. Boulder County* (1906) 37 Colo. 268, 86 Pac. 1011, 11 Ann. Cas. 483. The court says: "If the power to do the very thing which this contract attempts to give to plaintiffs has been by statute conferred upon other public officers, as it is altogether plain has been done, certainly this negatives the existence of an implied power in the board of commissioners to do that thing. And since the express power to discover omitted unassessed property resides in the county assessor and county treasurer, it is much easier, by construction, to spell out of the statutes conferring the power the corresponding duty of discovery, by which only the express power is of any value, than it is to say that it is the implied duty of the county board, as a corporate body, to discover omitted property, when no express power whatever has been given to the county, in its corporate capacity, with respect to assessing or collecting taxes."

Statutory authority to make all contracts and do all other acts in relation to the property and concerns of the county necessary to its corporate powers does not include power to employ a tax ferret where the board has no power over the acts of the officials charged with the assessment and collection of taxes, although it is not the duty of such officials to ferret out omitted taxes. *Stevens v. Henry County* (1905) 218 Ill. 468, 4 L.R.A. (N.S.) 339, 75 N. E. 1024, 4 Ann. Cas. 136. The court says it has not been pointed

out, nor do we think it can be, that the assessment of property for taxation, either omitted or otherwise, is the business or concern of a county as such. Further it says that while it is true that unpaid taxes are an asset of the county, the taxes that are to arise upon an assessment not made cannot be said to be an asset of any sort, and unless it can be said that the matter of assessment is a concern of the county, it is manifest that the contract under consideration cannot be sustained. The court says it has read the Indiana cases and does not agree with their reasoning further than as it is applied to the powers under the Indiana statute; that under the Illinois statute the duty of assessing omitted property is expressly imposed upon the board of review. Further the court says: "We do not yield our consent to the proposition or contention that no officer or body of officers is charged with the duty of hunting and assessing omitted property, but take the view that that duty is cast upon the board of review; and, if its members refuse to perform it, they could be compelled to do so by action at law, and would be guilty of misfeasance in office if they had knowledge and failed to do so. The statute having designated the proper officers for the discharge of this duty, and having charged them therewith, and provided for the compensation they shall receive, we do not think the county, in the absence of any specific grant, had power to enter into the contract."

In *Gannaway v. McFall* (1903) 109 Ill. App. 23, the court said: "By the statute of this state the legislature has prescribed who the assessing officers shall be, defined their duties, and provided in what manner they shall be elected and appointed, prescribed their qualifications and compensation, and when such officers have been elected or appointed and qualified they become public officers, and are responsible to the law as such for their conduct. . . . The legislature has not yet authorized the performance of official duties by private persons who have no other incentive to their faithful discharge than to in-

crease the amount of income to be derived therefrom."

Where the statute imposes upon the treasurer the duty of collecting taxes, the county commissioners can make no allowance for assistance in making such collection. *Miller v. Embree* (1882) 88 Ind. 133.

Where the statute imposes upon the county treasurer the duty of collecting taxes, and authorizes him to appoint deputies, the common council of a city has no authority to employ a person to assist in collecting the delinquent taxes. *Ft. Wayne v. Lehr* (1882) 88 Ind. 62.

A contract to pay attorneys for services in the collection of omitted taxes is invalid where the statute makes the district attorney the legal adviser of the county commissioners. *Platte County v. Gerrard* (1882) 12 Neb. 244, 11 N. W. 298.

Where the statute places the duty of preparing the assessment role upon a county official, the county commissioners cannot employ another person to do it. *State ex rel. Miera v. Field* (1918) 24 N. M. 168, 172 Pac. 1136.

A contract with a special tax collector which attempts to interfere with the duties of the county clerk by stipulating how and from what date delinquent tax lists shall be made is invalid. *Burness v. Multnomah County* (1900) 37 Or. 460, 60 Pac. 1005.

In *Pierson v. Minnehaha County* (1912) 28 S. D. 534, 38 L.R.A. (N.S.) 261, 134 N. W. 212, the court said that the statute providing that any assessor, auditor, board of review, or board of equalization who shall, by means of investigation, ascertain that any person has not listed all his property for taxation, shall cause it to be listed and shall share in the penalty for omission, gave the board of county commissioners no authority to employ a ferret, and that the only persons authorized to receive such compensation were the persons named.

The county commissioners cannot employ special council to assist in tax proceedings where the statute has vested in the district judge the discretion to appoint such council in impor-

tant matters. *Storey v. Murphy* (1899) 9 N. D. 115, 81 N. W. 23.

Conversely, if the duty is not imposed upon public officials, the county may, under its general powers over county affairs, employ a tax ferret.

Indiana.—*Wabash County v. Workman* (1916) 186 Ind. 280, 116 N. E. 83; *Richmond v. Dickinson* (1900) 155 Ind. 345, 58 N. E. 260; *Fleener v. Litsey* (1903) 30 Ind. App. 399, 66 N. E. 82; *Richmond v. Clifford* (1914) 182 Ind. 17, 103 N. E. 789, 105 N. E. 385; *McCaslin v. Greencastle* (1914) 56 Ind. App. 54, 104 N. E. 871.

Iowa.—*Wilhelm v. Cedar County* (1878) 50 Iowa, 254; *Disbrow v. Cass County* (1903) 119 Iowa, 538, 93 N. W. 585; *Shinn v. Cunningham* (1903) 120 Iowa, 383, 94 N. W. 941.

Texas.—*Von Rosenberg v. Lovett* (1915) — Tex. Civ. App. —, 173 S. W. 509.

Where the duty of the county officer is limited to search of county records for omitted property, the commissioners may make a valid contract with another person to search for such property outside such records. *Wabash County v. Workman* (1916) 186 Ind. 280, 116 N. E. 83, setting aside on rehearing (1913) — Ind. —, 103 N. E. 99. The court says that when such contracts do not attempt to obligate the county to pay others for services which the county officials are required to perform, the board may enter into such contracts as relate to matters indispensable to public necessity.

Where the law does not impose upon city tax officers the duty to hunt for omitted property, the city may contract with another person to ferret out such property. *Richmond v. Dickinson* (1900) 155 Ind. 345, 58 N. E. 260, overruling *Vandercook v. Williams* (1885) 106 Ind. 345, 1 N. E. 619, 8 N. E. 113, where the court, in holding void a contract with a county official to search for omitted property, stated that the law imposed the duty upon the county auditor to perform such service.

The *Richmond Case* was followed in *Fleener v. Litsey* (1903) 30 Ind. App. 399, 66 N. E. 82, upon the question of the validity of the contract by a coun-

ty, the court saying that, in the matter of taxation, the city clerk sustains the same relation to the city as the county auditor does to the county. The law does not lay upon the taxing officers the duty of hunting for secreted and omitted property.

Tax ferrets may be employed if the duty of discovering omitted property is not imposed by statute upon any public official. *Richmond v. Clifford* (1914) 182 Ind. 17, 103 N. E. 789, 105 N. E. 885.

In *Wilhelm v. Cedar County* (1878) 50 Iowa, 254, where the employment was to aid in the collection of taxes which could not be collected in the regular way, the court says the duty of the treasurer ends with receiving taxes voluntarily paid in the regular way. Further, that because the statute does not expressly authorize the board to employ a special agent to assist in the collection of taxes uncollectable by the treasurer in the discharge of his duty, it does not follow that they may not have the implied power to do so.

Where, by the statute, the board of supervisors have the care and management of the property and business of the counties, and the duty of searching out omitted property is not imposed upon any official, the board has authority to employ a tax ferret. *Disbrow v. Cass County* (1903) 119 Iowa, 538, 93 N. W. 585. The court says: "We do not doubt the power of the county, through its board of supervisors, to see that all property subject to taxation therein is made to share its just proportion of the public burdens; and, when such property is omitted from the assessment rolls, it is the plain duty of the board to take such means as it shall deem necessary to discover the same, and to recover the amount it should have been taxed. It is property or money to which the county is entitled, and for the purpose of uncovering and searching out the property so that it may be taxed, the board clearly has the right to employ an agent or attorney."

If the duty of discovering omitted taxes is not placed upon the county

officials, the commissioners may contract with another person for performance of such duty. The power of the commissioners was implied from the general statutory duty to receive the assessment list for inspection, correction, equalization, and approval, the court saying the statute makes it their duty to have the books correct. So, information with reference to unrendered property is necessary to enable them to perform this duty, and if no other means has been provided by law to enable them to obtain such information, we believe that they have the implied power to employ someone to ferret out and report the personal property which would otherwise escape taxation. The power was also implied from the duty of the board "to supervise the affairs" of the county. *Von Rosenberg v. Lovett* (1915) — Tex. Civ. App. —, 173 S. W. 508.

The majority of the courts which have been called upon to construe statutes from which the power to employ tax ferrets was sought to be implied have held that the conferring of general power upon the county commissioners over the affairs of the county would imply such authority. Thus, under a statute making the county court the general financial or business agent of the county, charged with the care and management of its funds, it may adopt such means as, in its judgment, may be proper or expedient to assist a county officer in the discharge of his duties, and it may therefore employ a person to collect the delinquent taxes which the tax collector has been unable to collect. *State ex rel. Herren v. Hall* (1900) 37 Or. 479, 63 Pac. 13.

In *Martin v. Whitman County* (1889) 1 Wash. 533, 20 Pac. 599, the court held that it was the duty of the county commissioners, which were by statute given the management of the county funds and business, to employ such persons and take such measures as, in their judgment, would best accomplish the end, and that therefore a contract with one to make a list of the delinquent taxes in the county for a percentage of the amounts collected was valid.

In *Clarke v. State* (1917) 187 Ind. 276, 117 N. E. 965, in upholding the contract, the court says the board has power to contract to pay for discovering and furnishing the county treasurer information leading to the collection of delinquent or dropped taxes, provided, first, the contract was not with a county officer whose duty it was to discover such information, or with a deputy of such officer; second, an indispensable public necessity existed for the making of such contract. The court further says that, under the Indiana statutes, officers have no duty to search records of their predecessors in office, or perform uncompleted duties of their predecessors.

In *Burnett v. Markley* (1893) 23 Or. 436, 31 Pac. 1050, where the contract was for making out a description of real estate for tax rolls, and copying the list onto books for use of the assessors, the court says that since the county court is expressly charged with the general care and management of the county property, funds, and business, it may take such measures to secure a full, complete, and accurate list of all the assessable property in the county for the use of the assessors as, in its judgment, may seem advisable or necessary. The court further says: "It is the 'business' of the county, through its officers and agents, to see that all the property within the county, liable to assessment and taxation, is placed upon the assessment roll, so that the burdens of government may fall in like proportion upon all; and it is a matter of common knowledge that, under our present system of listing and assessing property, it is practically impossible for the assessor to list and assess all the property in his county without some such aid as was to be provided by the contract in question here. There was no attempt by the county court by this contract to usurp or interfere with the duties of the assessor, but, on the other hand, the object was to provide a present ownership list, to assist him in the discharge of the duties of his office, and enable him to list and as-

sess a large amount of real estate which had theretofore escaped taxation."

But, in declaring that the statutory authority of county commissioners to have general charge and supervision of the county affairs, and general control of its finances, did not imply authority to employ a tax ferret, the court says, in *Grannis v. Blue Earth County* (1900) 81 Minn. 55, 83 N. W. 495, that the power of taxation exists exclusively in the state, and, with respect to the levying, assessment, and collection of taxes, counties, as such, have no authority whatever. The legislature has provided officers whose duty it is to levy all taxes, officers to cause all property to be properly assessed and included upon the tax rolls, and officers for the collection of the taxes. The county commissioners, as agents and officers of the county, have no authority or control over any of these officials with respect to the performance of their duties. The county is not charged with the duty of seeing to it that all property is assessed and placed upon the tax rolls. The matter of unearthing and discovering property which has escaped taxation is not only not necessary to the exercise of the corporate powers of the county, but is beyond its express or implied authority.

In *Brown v. State* (1906) 73 Kan. 69, 84 Pac. 549, the court relied on the *Grannis Case* in holding invalid a contract for publishing a list of taxpayers.

In *State ex rel. Workman v. Goldthait* (1909) 172 Ind. 210, 187 N. E. 133, 19 Ann. Cas. 737, and *State ex rel. Knobloch v. Parks* (1907) 169 Ind. 93, 81 N. E. 76, the contract was held invalid because no appropriation had been made to meet the necessary expenses, as required by statute.

In *Wayne County v. Dickinson* (1899) 153 Ind. 682, 53 N. E. 929, an injunction to prevent the payment of a claim under a tax ferret contract was refused because of laches and a plain remedy at law.

H. P. F.

WILLIAM R. WINNER, Appt.,
v.

MAE WINNER, Respt.

Wisconsin Supreme Court — May 4, 1920.

(— Wis. —, 177 N. W. 680.)

Marriage — annulment — antenuptial pregnancy — fraudulent representations.

A man who had illicit relations with his betrothed wife before marriage is not debarred from relief under a statute authorizing annulment of marriage for fraud, where he is induced to enter into the marriage by the assurance of the woman that he is the cause of her pregnancy, which is due to another, on the ground that he did not come with clean hands, or that he had no right to rely on her statements.

[See note on this question beginning on page 931.]

APPEAL by plaintiff from a judgment of the Circuit Court for Jackson County (O'Neill, J.) denying him relief in an action brought to annul a marriage for alleged fraud of defendant.. *Reversed.*

Statement by Vinje, J.:

Action to annul a marriage on the ground of fraud. There is no dispute about the facts. About the 23d or 24th of October, 1918, plaintiff, twenty-seven years of age, had sexual intercourse with the defendant, eighteen years of age. At that time they were engaged and intended to be married the following July. Later defendant advised him she was pregnant as the result of the intercourse with him, and defendant, relying upon such statement, married her February 6, 1919. Five months and fourteen days from plaintiff's first intercourse with defendant, and on April 7, 1917, she gave birth to a fully developed full-term child. Plaintiff was in the Army and had no access to defendant until a few days prior to their first intercourse, and the trial court found that plaintiff was not the father of defendant's child. After the birth of the child, the plaintiff refused to cohabit with defendant or to support her, and sent her and the child back to her parents.

The trial court held that plaintiff was not entitled to an annulment of the marriage, and, from a judgment entered accordingly, he appealed.

Messrs. G. M. Perry and H. M. Perry for appellant.

Mr. L. Olson Ellis for respondent.

Vinje, J., delivered the opinion of the court:

It appears from the evidence that plaintiff and defendant first became acquainted in July, 1917, engaged in August, 1918, and expected to be married in July, 1919. On the 16th day of October, 1918, plaintiff returned home from Army service to attend his brother's funeral, and it was during his stay of a couple of weeks at home that he had intercourse with the defendant; he claims at her solicitation or advances, and she practically admits that. Both parties had been residents of Jackson county since birth, but whether near neighbors or not does not appear.

The trial court was of the opinion that under the rule of *Varney v. Varney*, 52 Wis. 120, 38 Am. Rep. 726, 8 N. W. 739, and foreign cases hereinafter referred to, plaintiff was not entitled to a decree of annulment of the marriage, and dismissed the complaint upon the merits. Its conclusion of law was: "That as plaintiff was criminally intimate with the defendant before marriage,

he does not come into court with clean hands, and the court will not grant the relief prayed for because of such unlawful sexual intercourse."

Section 2351, Stat. 1919, provides that "a marriage may be annulled for any of the following causes existing at the time of the marriage:

(4) Fraud, force or coercion, at the suit of the innocent and injured party, unless the marriage has been confirmed by the acts of the injured party."

So we have the question presented whether the marriage should be annulled because of the fraud of the defendant in concealing the fact that her pregnancy was by another man than plaintiff, and in assuring him and causing him to believe that he was the cause thereof. No court, so far as our examination of cases has gone, has denied relief on the ground that plaintiff has not come into court with clean hands because of his illicit intercourse with defendant before marriage except the New Jersey court in *Seilheimer v. Seilheimer*, 40 N. J. Eq. 412, 2 Atl. 376, which bases its decision partly on that ground and partly on the ground of the confirmation after the marriage and after the discovery of the fraud. Such intercourse is a mere misdemeanor, and, as to that, both parties are usually equally blamable. In this case the defendant certainly as much as the plaintiff, because she admits she invited it. But the illicit intercourse is not the gravamen of the action. The prior pregnancy and the concealment thereof constitute the gist of the complaint, and as to those acts the injured plaintiff is wholly innocent. So it is not a case where the parties are in *pari delicto*, and must be refused relief on that ground. Neither complains of the illicit intercourse between them, and his sharing therein ought not to render

Marriage—
annulment—
antenuptial
pregnancy—
fraudulent
representations.

him a judicial out-
cast to the extent
of denying him re-
lief from one of the
worst frauds that
can be imposed upon anyone.

Where relief has been denied in such cases, meaning cases where the woman has had illicit intercourse with her husband before marriage, but, without his knowledge, has been pregnant by another man at the time of her marriage, it has been on the ground that, by reason of his illicit intercourse with the woman before marriage, plaintiff has been apprised of her easy virtue, and he has been put upon inquiry relative thereto, and, failing to make such inquiry, he has been held negligent, and has foreclosed himself from saying that he believed her representations that he was the cause of the pregnancy. Such was the case in *Foss v. Foss*, 12 Allen, 26,—the case that has led to the denial of relief in many cases where the facts were quite different, and which later cases would probably have been differently decided had the relation between the facts and the ground of the decision in the *Foss* Case been clearly perceived. It is there stated that "after a very brief acquaintance with the defendant, during which he had visited her only two or three times, he had carnal knowledge of her person; that this took place between two and three months prior to the solemnization of the marriage; that he well knew before the execution of the contract by the marriage that she was pregnant with child, but was told by her that she was with child by him, and that he did not know or suspect that she had had sexual intercourse with any other man." 12 Allen, 29.

The court there says: "The difficulty is not that adequate cause for a decree of nullity is not set forth in the libel, but that the evidence entirely fails to support the essential allegations on which a sentence annulling the marriage for the cause set forth must be based." 12 Allen, 27.

The failure of proof consisted in failing to satisfy the court under the facts in that case that plaintiff had a right to rely upon representations of defendant that she was with child by him. The facts in that case were

that he had known her but a short time; that at their second or third meeting he had sexual intercourse with her. It does not appear that they were engaged when the intercourse took place. Under such a state of facts, the court might well reach the conclusion that he ought not to rely upon her statements that she was pregnant by him. But in the case at bar the parties had known each other for years, were engaged to be married, and had set the month of the marriage date. To say that under such circumstances the man has no right to rely upon the woman's statements that he is the father of the child she is bearing, and that he must make inquiry elsewhere as to her chastity, is to negative all virtue, all truthfulness, and all decency in every woman that may have been imprudent enough to anticipate with her lover the rights of the marriage relation. Such a lapse from good morals should not be held destructive of every ethical instinct of the woman, and render her unworthy of belief as to assertions fraught with such serious import, and whose truth she alone knows. It does not follow that because a woman has consented to, or even invited, illicit relations with her lover, whom she shortly expects to marry, that she has in the past been guilty of like conduct with others. Our faith in womanhood leads us to the conclusion that the former does not necessarily or generally imply the latter. Nor does such delinquency destroy integrity of character to the extent that truthfulness necessarily goes with it. Plaintiff had a right to rely upon the representations made to him by the defendant that he was the father of the child. Besides, what inquiry could a decent, honorable man make under such circumstances? The Massachusetts court suggests three lines of conduct: First, inquiry in the neighborhood where the woman lives; second, a medical examination; or, third, waiting till the birth of the child to ascertain the fact of paternity. We respectfully suggest

that neither line of conduct befits an honorable man, and would not be resorted to by the average man. To do so would be at once to besmirch the reputation of the woman he intended to marry. He would conclusively prove his unbelief in her veracity; he would show to others that he had no faith in her chastity, and would blacken her reputation as to that in the eyes of all to whom inquiries were directed; and, if he awaited the birth of the child, he might bastardize his own offspring, and bring added disgrace to himself and wife. No right-minded man guilty of having wronged a woman, or sharing a wrong with her, would so act. He would do as plaintiff did in this case, marry her. That is the only honorable reparation possible,—the only method of legitimizing the offspring which he believes to be his, and of saving the honor of the woman he has promised to marry. The act of marriage in such a case is not the result of negligent credulity, but of honorable motives to repair, as far as possible, wrongs inflicted or shared by him. Such conduct should be encouraged, to the end that lesser wrongs be remedied, instead of being followed by greater ones.

On the other hand, the concealment by the woman of the paternity of her child is a fault so grievous that there is no excuse or palliation for it. By the fraud she foists upon her husband a spurious offspring which he must acknowledge as his, knowing it not to be. He must nurture and maintain it and invest it with all the rights of legitimate children, including that of inheritance. Such a fraud is vital, and goes to the essentials of the marriage relation. It is true, as stated in *Varney v. Varney*, 52 Wis. 120, 38 Am. Rep. 726, 8 N. W. 739, that a man may be compelled to accept an unchaste wife, on the ground that there is no warranty as to health, wealth, temper, character, or previous chastity; but that does not go to the extent of holding that a husband must accept spurious issue.

The marriage contract implies that the woman is in present condition to bear her husband children; at least, so far as she knows. In such a case as we have, she knows she cannot till the spurious issue is born. It has been held that a spouse infected before marriage with a venereal disease commits such a fraud upon the other, who is not aware of it, as to warrant an annulment of the marriage. *C. v. C.* 158 Wis. 305, 5 A.L.R. 1013, 148 N. W. 865. The carrying and the concealment of a spurious issue must be considered at least an equal fraud. The opportunity of a designing, pregnant woman to choose her husband willy-nilly need only be mentioned to be appreciated, if no relief is to be had from conduct such as plaintiff was guilty of in this case. If she is successful in seducing a man whom she desires to become the putative father of her bastard child, she can practically compel him to become such,—especially if he be endowed with the instincts of true manhood.

An examination of some of the cases bearing upon the question for determination will disclose in most of them material facts different from those before us. Thus, in *Varney v. Varney*, supra, the woman had given birth to a child which was dead before marriage. In *Sylvester v. Sylvester*, 180 Mich. 512, 147 N. W. 454, the court could not agree upon the material facts; but, whatever they were as to illicit intercourse between the parties before marriage, there was no question of the support of a spurious issue, owing to the wife's miscarriage. The case of *Gárd v. Gard*, 204 Mich. 255, post, 923, 169 N. W. 908, has settled the doctrine in that state in favor of annulment under the facts such as in the case at bar. In *Bryant v. Bryant*, 171 N. C. 746, L.R.A. 1916E, 648, 88 S. E. 147, defendant induced plaintiff to marry her by

claiming she was pregnant by him when she was not pregnant at all, and annulment was denied. The same state of facts was present in *Fairchild v. Fairchild*, 43 N. J. Eq. 477, 11 Atl. 426, and the court refused to annul the marriage. In *Di Lorenzo v. Di Lorenzo*, 174 N. Y. 467, 63 L.R.A. 92, 95 Am. St. Rep. 609, 67 N. E. 63, defendant claimed she had given birth to a child of which plaintiff was the father during his absence from the state, and exhibited to him a child which was neither his nor hers. Annulment granted. In Iowa a statute provided that, if a woman was pregnant by another without the knowledge of the man she marries, he is entitled to annulment of the marriage upon discovery of the fact. Held, the fact that he had illicit intercourse with her before marriage did not debar him from the benefit of the statute. *Wallace v. Wallace*, 137 Iowa, 37, 14 L.R.A.(N.S.) 544, 126 Am. St. Rep. 253, 114 N. W. 527, 15 Ann. Cas. 761. The Massachusetts court has steadfastly adhered to the ruling and the ground thereof stated in *Foss v. Foss*, 12 Allen, 26. See *Crehore v. Crehore*, 97 Mass. 330, 93 Am. Dec. 98, and *Safford v. Safford*, 224 Mass. 392, L.R.A.1916F, 526, 113 N. E. 181. For valuable notes on this subject, see 18 L.R.A. 375, and L.R.A.1916E, 650.

Judgment reversed, and cause remanded, with directions to grant the divorce as prayed for in the complaint.

Winslow, Ch. J., and Kerwin, J., took no part.

NOTE.

The right to annulment of marriage induced by false claim that husband was the cause of existing pregnancy is the subject of the annotation following *GARD v. GARD*, post, 931.

JOHN JAY GARD
v.
MARGARET G. GARD, Appt.

Michigan Supreme Court — December 27, 1918.

(204 Mich. 255, 169 N. W. 908.)

Marriage — annulment — fraudulent representations.

1. A man is entitled to annulment of a marriage into which he enters because of the fraudulent representations by the woman that the child of which she is pregnant is his, although she had informed him that she had sustained illicit relations with another.

[See note on this question beginning on page 981.]

Appeal — counsel fees — allowance.

2. A wife who appeals in good faith from a decree annulling her marriage because procured by her false representations of pregnancy, when the

question is an open one in the state, may be allowed counsel fees, although the decree is affirmed.

[See 1 R. C. L. 918; see notes in 4 A.L.R. 926, 9 A.L.R. 1222.]

APPEAL by defendant from a decree of the Circuit Court for Berrien County in favor of plaintiff in a suit to annul a marriage alleged to have been procured by fraud. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Gore & Harvey for appellant.

Messrs. O'Hara & O'Hara, for appellee:

There can be no question in this state of the power of the court to decree an annulment of a marriage for fraud.

Harrison v. Harrison, 94 Mich. 559, 34 Am. St. Rep. 364, 54 N. W. 275; Di Lorenzo v. Di Lorenzo, 174 N. Y. 467, 63 L.R.A. 92, 95 Am. St. Rep. 609, 67 N. E. 63.

Prior intercourse is not a bar to the annulment of a marriage procured by the false representation of the woman to the man, that he was responsible for her pregnant condition, when she was, in fact, pregnant by another, he having relied upon this false representation, and having ceased to cohabit with her upon discovery of the fraud.

Sissung v. Sissung, 65 Mich. 163, 31 N. W. 770; Lyman v. Lyman, 90 Conn. 399, L.R.A.1916E, 643, 97 Atl. 312; Wallace v. Wallace, 137 Iowa, 37, 14 L.R.A.(N.S.) 544, 126 Am. St. Rep. 253, 114 N. W. 527, 15 Ann. Cas. 761; Scott v. Shufeldt, 5 Paige, 43; Di Lorenzo v. Di Lorenzo, supra.

Fellows, J., delivered the opinion of the court:

Plaintiff, a young farmer about

twenty-nine years old, lives in Berrien county. Defendant, a woman thirty-one years old, resided in Chicago prior to her marriage to plaintiff. Plaintiff files this bill to annul the marriage between the parties, on the ground of fraud in its procurement. Defendant denies the fraud, and, claiming the benefit of a cross bill, asks for a decree of divorce. The prayer of plaintiff's bill was granted, and defendant appeals.

Without detailing the testimony, it will suffice to state that, from a careful perusal of this record, we are convinced that the following facts are established beyond peradventure: (1) That the parties were married February 17, 1916; (2) that they had sustained illicit relations prior to marriage; (3) that, the day before the marriage, defendant came from Chicago to St. Joseph, in this state, there met plaintiff by appointment, and there falsely represented that she was pregnant by plaintiff, which representation was believed by plaintiff,

who married her to, so far as possible, repair his wrong; (4) that defendant was delivered of a full-term child March 6, 1916; (5) that said child was not begotten by plaintiff, but was the child of another man, who was in the Philippines at the time defendant charged plaintiff with its paternity, and that defendant well knew this to be true; (6) that upon learning that the child was a full-term child, and could not be his, plaintiff repudiated defendant and the spurious offspring, and has not since lived or cohabited with her.

We therefore have before us for solution the question of whether a bill will lie to annul a marriage procured by the false representation of the wife before marriage that she is pregnant by the man she marries, which misrepresentation is known by her to be untrue, but is believed by the husband, and the marriage relation is contracted in such belief, the parties theretofore having sustained illicit relations, when it is established beyond question, as matter of fact, that the child was begotten by a stranger. In *Sissung v. Sissung*, 65 Mich. 168, 31 N. W. 770, this court, by an equal division, sustained such a bill. *Sylvester v. Sylvester*, 180 Mich. 512, 147 N. W. 454, was also affirmed by an equally divided court; the court was not in accord upon the facts in that case. The precise problem before us must therefore be regarded as one not heretofore solved by this court. It has arisen in other jurisdictions, and a want of harmony in these decisions, directly and by analogy applicable, is at once apparent to one who examines the cases.

In the early case of *Reynolds v. Reynolds*, 3 Allen, 605, a case similar in principle to *Harrison v. Harrison*, 94 Mich. 559, 34 Am. St. Rep. 364, 54 N. W. 275, the libellant was induced to enter the marriage upon the representation that the woman was a chaste and virtuous woman, when, as matter of fact, she was pregnant of another. He had had no illicit relations with her. The court, upon

that state of facts, speaking through Chief Justice Bigelow, said:

"As has been already stated, one of the leading and most important objects of the institution of marriage under our laws is the procreation of children, who shall with certainty be known by their parents as the pure offspring of their union. A husband has a right to require that his wife shall not bear to his bed aliens to his blood and lineage. This is implied in the very nature of the contract of marriage. . . .

"A man, therefore, who has contracted a marriage with a woman under such circumstances, if he could not obtain a divorce on the ground of fraud, would be subjected to the painful alternative of disowning the child, and thereby publishing to the world the shame of her who was still to remain his wife, or suffer the presumption of legitimacy to stand, and admit the child of another to share in his bounty and receive support in like manner as his own legitimate children. There is no sound rule of law or consideration of policy which requires that a marriage procured by false statements or representations, and attended with such results upon an innocent party, should be held valid and binding on him."

The court, however, did not have before it the precise question here involved, viz., what rule should be applied if the relations of the parties had been illicit prior to the marriage, and expressly reserved that question. In *Foss v. Foss*, 12 Allen, 26, however, that question arose. This case is quite frequently cited as authority for denying relief, and is a leading case upon the subject. An examination of this case leads to the conclusion that the court was impressed that, under the circumstances, the libellant was not as vigilant as he should have been in ascertaining before marriage whether her representations were true. It is said: "He took no steps to ascertain the truth of her statements concerning the paternity of the child, but, relying solely on her assurances on

that subject, he entered into the contract of marriage. It seems to us that, on these facts, he was guilty of blind credulity, from the consequences of which the law will not relieve him. His knowledge of the respondent's unchastity, and of her actual pregnancy, was sufficient to put a reasonable man on his inquiry."

It was followed in *Crehore v. Crehore*, 97 Mass. 330, 93 Am. Dec. 98, the opinion in which case, in full, is as follows: "The facts show that the libellant had full knowledge that the libellee was unchaste before he entered into the marriage contract, and was thereby put on his guard, so that he cannot allege that he was induced to contract the marriage by such fraud and deceit on the part of the libellee as will enable him to avoid the contract," and *Foss v. Foss* is cited as authority for the holding.

In the late case of *Safford v. Safford*, 224 Mass. 392, L.R.A.1916F, 526, 113 N. E. 181, the same question again arose, and again, upon the authority of *Foss v. Foss*, the relief was denied, the court, among other things, saying: "In view of the undisputed facts, as disclosed by the record, it seems plain that he is not entitled to a decree declaring the marriage void in the absence of evidence to show that he made any inquiry or investigation to ascertain the truth of her statement that he was the father of the child."

These holdings of the Massachusetts court are not as persuasive to us as the holdings of that court usually are, due to the fact that this court has repeatedly held, in cases involving fraud, that it does not lie with one charged with fraud, who assumes to have knowledge of a subject of which another may well be ignorant, to claim that such other should have used greater diligence to discover the fraud,—should have been more vigilant, less credulous. *Eaton v. Winnie*, 20 Mich. 156, 4 Am. Rep. 377; *Smith v. McDonald*, 139 Mich. 225, 102 N. W. 738; *Yanelli v. Littlejohn*, 172 Mich. 91, 137 N. W. 723; *Lewis v. Jacobs*, 153 Mich. 664, 117 N. W. 325; *Smith v. Werkheiser*,

152 Mich. 177, 15 L.R.A.(N.S.) 1092, 125 Am. St. Rep. 406, 115 N. W. 964; *John Schweyer & Co. v. Mellon*, 196 Mich. 590, 162 N. W. 1006; *Johnson v. Campbell*, 199 Mich. 186, 165 N. W. 823.

In *Carris v. Carris*, 24 N. J. Eq. 516, the New Jersey court had before it a case upon the facts similar to *Reynolds v. Reynolds*, supra, and it was disposed of in the same manner, the court saying: "The fraud charged in this case is extraordinary, peculiar, and of the most flagrant character, entering into the very essence of the contract, and, if allowed to succeed, either compelling the husband to disown the child for his own protection, or imposing upon him the necessity of recognizing and maintaining the fruit of his wife's defilement by another, and having it partake of his inheritance. In either event, shame and entire alienation are the inevitable consequences. Surely, there can be no good policy in such action as will either compel parties to live together under these circumstances, having only the shadow of marriage, or compel them, as would be more likely, to live totally separated, a continual annoyance to each other, and a source of the greatest unhappiness. If the contract is repudiated as soon as the fraud is discovered, so that there is no acquiescence in it, good morals and the protection of the integrity of the marriage relation require that an innocent man should be relieved from so great a fraud."

In *Seilheimer v. Seilheimer*, 40 N. J. Eq. 412, 2 Atl. 376, and *Fairchild v. Fairchild*, 43 N. J. Eq. 473, 11 Atl. 426, that court had before it the question here involved. In both cases the parties had sustained illicit relations before marriage, and in both cases the woman had represented that she was pregnant by the man induced to marry her when in fact she was pregnant by another. In both cases the relief was denied. Both cases seem to go upon the theory that the parties were in pari

delicto and must abide the consequences.

The forceful language of Mr. Justice Field, then a member of the supreme court of California, and later justice of the Supreme Court of the United States, in the case of *Baker v. Baker*, 13 Cal. 87, may well be considered. He said: "A woman, to be marriageable, must, at the time, be able to bear children to her husband, and a representation to this effect is implied in the very nature of the contract. A woman who has been pregnant over four months by a stranger is not at the time in a condition to bear children to her husband, and the representation in this instance was false and fraudulent. The second purpose of matrimony is the promotion of the happiness of the parties by the society of each other; and to its existence, with a man of honor, the purity of the wife is essential. Its absence under such circumstances as necessarily to attract attention must not only tend directly to the destruction of his happiness, but to entail humiliation and degradation upon himself and family. We can conceive no torture more terrible to a right-minded and upright man than a union with a woman whose person has been defiled by a stranger, and the living witness of whose defilement he is legally compelled to recognize as his own offspring, as the bearer of his name, and the heir of his estate; and that, too, with the silent, if not expressed, contempt of the community."

Later, however, the supreme court of California in *Franke v. Franke* had before it a case where illicit relations had been indulged in prior to the marriage. The wife was pregnant of another at the time of the marriage. The opinion is not reported in the official reports of the court (see 96 Cal. xvii.), but is found in 18 L.R.A. 375, 3 Cal. Unrep. 656, 31 Pac. 571. An examination of the opinion discloses that the husband was a man of forty years, father of five children by a former wife, who claimed he was seduced by a seven-

teen-year-old girl, daughter of a neighbor, and who married the girl to avoid a lawsuit, and rather than "give money away," and with the further assurance from the attorney of the girl that, if the birth of the child did not correspond with "plaintiff's reckoning," he would get him free "without a cent." Under these facts the relief was denied.

Let us now turn to the North Carolina cases. The case of *Scroggins v. Scroggins*, 14 N. C. (3 Dev. L.) 535, is a much-cited case. It was written in 1832, when that court was made up of Henderson, Ruffin, and Daniel, and the great learning of these eminent jurists entitle it to more than ordinary consideration. In that case the child born to the woman was a mulatto, and could not have been begotten by the husband; the birth occurred about five months after the marriage; the relief was denied. But the force of the opinion is minimized, if not entirely negatived, by the case which follows it in the same volume, that of *Barden v. Barden*, 14 N. C. (3 Dev. L.) 548, decided at the same term. In that case the man was induced to marry a woman, with whom he had been intimate, upon the representation that a child she had was his. The child was the offspring of a negro, and the relief was granted. By way of explanation it was said that the case was a concession to the "deep-rooted prejudices" of the community on the subject. It may be well to understand the legislative policy of that state upon the subject of marriage and divorce at the time the *Scroggins* Case was written. An examination of the legislation of the state indicates a strong inclination to regard the marriage relation as indissoluble. The Act of 1827, before the court in the *Scroggins* Case, contained some general language considered fully by Mr. Justice Ruffin, but specifically enumerated but two grounds of divorce, being the same grounds found in the Act of 1814, viz.: (1) Impotency at the time of the marriage and still continuing, and (2) separation by

one party from the other and living in state of adultery. That the legislative policy was deliberate and fixed is evidenced by the further fact that, although the court called attention of the legislature to the construction put upon the added general words of the Act of 1827, no change was made for nearly half a century, and it was not until 1871 that adultery, unless amounting to lewd and lascivious cohabitation, was made grounds of divorce. That the courts followed the legislative policy is evidenced by the case of *Moss v. Moss*, 24 N. C. (2 Ired. L.) 55, where the court declined to dissolve the marriage, even though the wife was living in open adultery with another; the court basing its decision on the ground that the husband had, without cause, driven the wife from his home without providing for her support, and had thereby submitted her to the temptations to which her weakness and necessities exposed her. Indeed, in the *Scroggins Case* it clearly appears that the court viewed the rules of the ecclesiastical law as preferable to the common law, as it was expressly stated that "there is no member of the court who is not strongly impressed with the conviction that divorces ought in no case to be allowed but in that already mentioned [impotency] and near consanguinity." It was in this atmosphere that *Scroggins v. Scroggins* was written. The North Carolina court has followed it, but not without dissent. See *Long v. Long*, 77 N. C. 304, 24 Am. Rep. 449; *Bryant v. Bryant*, 171 N. C. 746, L.R.A. 1916E, 648, 88 S. E. 147. Whether the legislative policy of that state is better than the legislative policy of this state is a question upon which publicists may differ, but it is not a question for our solution.

In *Scott v. Shufeldt*, 5 Paige, 43, the marriage was procured on the representation that the child was the child of the husband. Both the husband and wife were white. The child was a mulatto, and could not have been begotten by the husband. It was held that, if the husband

married in the belief that the child was his, the marriage should be annulled on the grounds of fraud.

Three courts of last resort have recently spoken on this subject with definiteness and precision, upon facts substantially on all fours with the instant case. *Lyman v. Lyman*, 90 Conn. 399, L.R.A. 1916E, 643, 97 Atl. 312; *Di Lorenzo v. Di Lorenzo*, 174 N. Y. 467, 63 L.R.A. 92, 95 Am. St. Rep. 609, 67 N. E. 63; *Wallace v. Wallace*, 137 Iowa, 37, 14 L.R.A. (N.S.) 544, 126 Am. St. Rep. 253, 114 N. W. 527, 15 Ann. Cas. 761. In two of these cases the opinion by Mr. Justice Morse, concurred in by Mr. Justice Campbell in *Sissung v. Sissung*, 65 Mich. 168, 31 N. W. 770, is expressly approved. In *Lyman v. Lyman*, *supra*, the court, after quoting from that opinion, says:

"We can conceive of few graver frauds than this, nor one which, if successful, is attended with more serious results; and we can see no good reason why, if the essentials of a fraud, as respects the representations by the one party, and the reasonable reliance thereon and action induced thereby by the other, are present, the one thus defrauded should be compelled to endure in silence the situation which has thus been brought upon him, with all the consequences that it entails, and all by reason of his efforts to play the manly part and repair his supposed wrong to the best of his ability. That seems to us to be imposing a grievous punishment for a purely laudable action. The punishment attaches to the marriage, and not to the earlier impropriety, and subjects a man to penalties for an act which had in it no semblance of wrongdoing, either legal or moral.

"In view of the new trial which must be ordered and the prominence which has been given to the opinion in *Foss v. Foss*, 12 Allen, 26, and to the subordinate propositions it advances, we ought to add that we are unable to agree with that case in all of its subordinate propositions, or with its ultimate conclusion as to the duty, in the matter of independent

and searching investigation, of a man in the position that Foss and this plaintiff found themselves when the partners in their illicit relations made to them the representations they did as to their pregnancy and the paternity of their children before being justified in accepting those representations as true and acting upon them."

In *Di Lorenzo v. Di Lorenzo*, 174 N. Y. 467, 63 L.R.A. 92, 95 Am. St. Rep. 609, 67 N. E. 63, the facts do not as fully appear as they do in the report of the case in the appellate division (see 71 App. Div. 509, 75 N. Y. Supp. 878). From the facts it appears that defendant's equities were much greater than in the instant case. In the unanimous opinion of the court of appeals it was said: "In this case the representation of the defendant was as to a fact, except for the truth of which the necessary consent of the plaintiff would not have been obtained to the marriage. It was designed to create a state of mind in the plaintiff the operation of which would be to yield a consent to marry the defendant, in the belief that he was rectifying a great wrong. The minds of the parties did not meet upon a common basis of operation. The artifice was such as to deceive a reasonably prudent person, and to appeal to his sense of honor and of duty. The plaintiff had a right to rely upon the defendant's statement of a fact the truth of which was known to her and unknown to him, and he was under no obligation to verify a statement to the truth of which she had pledged herself. It was a gross fraud, and, upon reason as upon authority, I think it afforded a sufficient ground for a decree annulling the marriage contract. The jurisdiction of a court of equity to annul a marriage for fraud in obtaining it was early asserted in this state by the court of chancery, at a time when the limited powers of courts of law were inadequate for the purpose. This jurisdiction was expressly rested upon the general power to vacate contracts in all

cases where they had been procured by fraud. From this general jurisdiction of equity a contract of marriage was not regarded as being excepted when the assent to it was the result of artifice or of gross fraud."

In the case of *Wallace v. Wallace*, supra, the supreme court of Iowa, speaking through Chief Justice Ladd, and considering the claim that prior relations barred the relief, said: "But this would leave the unsophisticated and unwary without protection, and condemn him who, with the best of motives, undertakes reparation for his supposed victim, and compel him to suffer the consequences and burden of her deception. If the proof be of that character exacted in such cases, there can be no objection on grounds of public policy to granting a decree of divorce whenever it is made to appear that the wife, at the time of her marriage, was pregnant by another than her husband, of which fact he was unaware. As said by Morse, J., in the Michigan case: 'The essence of the marriage contract is wanting when the woman, at the time of its consummation, is bearing in her womb knowingly the fruit of her illicit intercourse with a stranger; and the result is the same whether the husband is ignorant of her pregnancy, and believes her chaste, or is cognizant of her condition, but has been led to believe the child is his.'"

The court then considers the rule permitting proof as to illegitimacy of children born in lawful wedlock,—a rule this court has recognized, at the same time holding that the proof must be convincing (*People v. Case*, 171 Mich. 282, 137 N. W. 55),—and continues: "Inquiry is permitted into the parentage of children born in wedlock, and inquiries into the paternity of a child begotten prior thereto can be fraught with no greater danger to the parties interested, to society, or the state. On the contrary, it may operate to shield the confiding, who, though guilty of moral wrong, has not violated the law, and has acted

with the best of motives in entering into the marital relation, induced by deception and fraud. Because of this he ought not to be condemned to consort with her whose dupe and victim he is proved to be during life, and to bear the burden of supporting her spurious offspring."

We have considered the decisions of the various states to which our attention has been challenged in the briefs, together with such as our time for independent research would permit, where the question has been presented with any degree of frequency or considered at length. Many other cases, bearing either directly or indirectly on the subject, have also been examined, among them being *Morris v. Morris*, Wright (Ohio) 630; *Hoffman v. Hoffman*, 30 Pa. 417; *Todd v. Todd*, 149 Pa. 60, 17 L.R.A. 320, 24 Atl. 128; *Allen's Appeal*, 99 Pa. 196, 44 Am. Rep. 101; *Ritter v. Ritter*, 5 Blackf. 81; *Steele v. Steele*, 96 Ky. 382, 29 S. W. 17.

We are persuaded that we should adopt the doctrine advanced by Justices Morse and Campbell in *Sissung v. Sissung*, supra, and the three recent cases heretofore adverted to. That this plaintiff has been defrauded, deceived, and tricked into this marriage we entertain no doubt. It is intolerable to believe that he should be compelled to continue through life as the husband of defendant, caring for, as his own, this bastard child of another, with its constant reminder of his wife's perfidy before marriage, because, in attempting to right a supposed wrong, he entered into the contract of marriage. That a man may have a true parental affection for the child that sprang from his own loins, even though conceived before marriage, is natural; but that he should have such affection for one that sprang from the loins of another man, and was foisted upon him by a designing woman, is unbelievable. It has been said in many of the cases cited that one of the great purposes of marriage is procreation. It is evident that a wife pregnant by another cannot carry out that purpose, and

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hence that purpose of marriage must fail. All true, but there are other purposes of marriage beyond the perpetuation of the species. One of the purposes is the maintenance of the sacred institution called home. It has been said that there are three parties to the contract of marriage,—the two contracting parties and the public. Can it be that a wise public policy requires, in the name of home, the maintenance by the husband of an establishment presided over by one who has deceived him as to the paternity of the little one who daily sits at his board, who bears his name, who will, in the absence of testamentary disposition, inherit his property,—the offspring of another, a stranger to his blood? Most assuredly not. We do not palliate plaintiff's infraction of the moral code. Society will visit its penalties upon him. We are not the keepers of his conscience or the censors of his morals. We can only administer the law, imposing penalties only that are imposed by the law, granting relief only as the law affords relief. Under the law this plaintiff is entitled to be relieved from this contract of marriage, procured by fraud, and a fraud well calculated to deceive under all the facts in the case, and which did deceive the plaintiff, and caused him to do the only thing an honorable man could do after his transgression of the moral code, with its supposed result.

We do not overlook the claim most earnestly pressed by defendant's counsel at the argument and in the brief, that, during the acquaintance of the parties, defendant informed plaintiff that she had had intercourse with another. It is urged that this should have prompted more vigilance on the part of plaintiff. We have already called attention to the holdings of this court upon this subject, and certain facts to which we shall presently refer will demonstrate that the circumstances would readily prompt a

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fraudulent representations.

reasonably prudent man to believe defendant's claim as to the paternity of the child. If plaintiff was seeking annulment of the marriage on the sole grounds of want of chastity of his wife, he could not successfully assert he had been defrauded if he had knowledge on the subject before the marriage. Nor, under the authorities, could he assert her want of chastity as grounds for annulment, where he himself had been a party to her unchaste conduct. The gist of the action here, the right to relief, is based upon the ground that she has falsely represented herself to be pregnant by plaintiff, when, as matter of fact, she was pregnant by another. As was said by the supreme court of Texas in *McCulloch v. McCulloch*, 69 Tex. 682, 5 Am. St. Rep. 96, 7 S. W. 593: "It is settled law that the husband cannot have the marriage annulled because the wife was with child by him at the date of the marriage. If a condition of pregnancy at that time is, under any circumstances, an impediment to marriage, it must be because it will impose upon the husband a spurious offspring."

The plaintiff might have been willing to protect the woman with whom he had been intimate, and who he supposed was pregnant by him, even though she had been unchaste before he ever saw her; but, at the same time, no right-thinking man would be willing to take as wife a woman pregnant by another.

Nor do we overlook defendant's claim, made in her testimony, that plaintiff had agreed to marry her, and that the marriage took place pursuant to that agreement, rather than as a result of fraudulent statements. While she testifies that he spoke to her of love and "all that stuff," and it is admitted that he addressed her in his letters as "My dear Margaret," it is a significant fact that none of the letters passing between them were preserved by either party. Their correspondence seems to have been somewhat desultory, their meetings and illicit relations infrequent, until the occasion

when defendant claims the child was begotten, and which must have been some time after she became pregnant, if the child was a full-term child, as testified to by the physicians, and as we believe it was. On July 17, 1915, defendant came over from Chicago. She telephoned plaintiff, and he came down and met her at the hotel. It is admitted by both that they sustained illicit relations that evening. Shortly thereafter they went on a camping trip together at Stevensville, near the lake. Here they lived together in a tent for about a week, without chaperon, and apparently without restraint. Defendant was then pregnant by another man. She returned to Chicago, and there is no testimony from her or anyone else that she ever claimed plaintiff was the father of her child until the occasion of her trip to St. Joseph, the following February, which was about three weeks before her confinement. In view of the relations of the parties during the previous summer, it is not to be wondered that plaintiff accepted at par defendant's claim that he was the father of her unborn child, and married her the following day, to, so far as possible, right the wrong he supposed he had inflicted upon defendant, and to give his name to the child he supposed to be his. We are satisfied that there was no promise of marriage, no thought of marriage, between them until this February meeting. Defendant's claim in this regard does not ring true.

It follows from what we have said that the decree of the court below must be affirmed. The appeal has been prosecuted in the utmost of good faith. The question was an open one in this state. Defendant had the right to take the judgment of this court upon it. An allowance of \$200 for her attorney's fees will be made. *Frith v. Frith*, 18 Ga. 273, 63 Am. Dec. 289. The calendar entries in the record indicate that the cost of transcript

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allowance.

and printing the record has already brought up on the settlement of the been provided for. If not, it may be decree.

ANNOTATION.

Right to annulment of marriage induced by false claim that husband was cause of existing pregnancy.

There are few decisions which are so contrary to public policy as those which have denied relief in this class of cases. The facts of a particular case may make denial of relief just, but, as a rule, the perpetration of such a fraud as this should be followed by divorce or annulment of marriage, whichever remedy is provided by the local practice. There is an occasional exception to the rule that all women are chaste, and when such an exception occurs, and a too free manner of life has resulted in pregnancy, no rule could be devised more beneficial to one suffering from the error of her ways than that which denies relief to one whom she succeeds in defrauding into marriage with her. It is not always impossible to find a man of desirable fortune, family, or industry, who may be seduced by proper arts and inducements into criminal relations with a fairly attractive female, and, if the rule is that success in such an undertaking is attended with freedom from danger of annulment or divorce, the avenue of escape for the unfortunate or designing woman is made wide and smooth, and the penalties of unchastity are greatly mitigated. On the other hand, notwithstanding the philosophical advice read to the victims of such a fraud in some of the earlier cases, to forget bygones and make the best of the situation, however bad, one's knowledge of human nature must be very limited if he believes that any family which would be a credit to society or the state can exist after the man discovers that he has been victimized to furnish the woman a way out of her difficulties. What man with any of the qualities which make desirable citizens can treat as a wife a woman whom he knows has traded upon his better nature to shield herself from the conse-

quences of her unchastity with other men? The case is not one of repairing a wrong for which he is responsible, and however much his moral fault may be condemned, there is neither justice nor equity in permitting the fraud of the woman seeking to extricate herself from an unfortunate predicament, to wreck his life, as being compelled to continue as her husband would do.

Of the cases which have had the question up squarely for decision, the earlier ones very uniformly denied relief, but the later ones have, with almost equal uniformity, granted it, until now the numerical weight of authority as well as of reason is in favor of granting it. The cases which have granted it are:

Connecticut. — *Lyman v. Lyman* (1916) 90 Conn. 399, L.R.A.1916E, 648, 97 Atl. 312.

Iowa. — *Wallace v. Wallace* (1908) 137 Iowa, 37, 14 L.R.A.(N.S.) 544, 126 Am. St. Rep. 253, 114 N. W. 527, 15 Ann. Cas. 761.

Michigan. — *GARD v. GARD* (reported herewith) ante, 923.

Missouri. — *Ritayik v. Ritayik* (1919) 202 Mo. App. 74, 213 S. W. 883.

New York. — *Scott v. Shufeldt* (1835) 5 Paige, 43.

North Carolina. — *Bryant v. Bryant* (1916) 171 N. C. 746, L.R.A.1916E, 648, 88 S. E. 147; *Barden v. Barden* (1832) 14 N. C. (8 Dev. L.) 548.

Wisconsin. — *WINNER v. WINNER* (reported herewith) ante, 919.

Contra:

California. — *Franke v. Franke* (1892) 3 Cal. Unrep. 656, 18 L.R.A. 375, 31 Pac. 571.

Massachusetts. — *Foss v. Foss* (1866) 12 Allen, 26; *Safford v. Safford* (1916) 224 Mass. 392, L.R.A.1916F, 526, 113 N. E. 181.

New Jersey. — *States v. States* (1883) 37 N. J. Eq. 197.

Pennsylvania. — *Bartholomew v. Bartholomew* (1893) 14 Pa. Co. Ct. 230.

In *Wallace v. Wallace* (Iowa), *supra*, there was an affidavit of the wife, alleging that, having become pregnant by another, she induced plaintiff to have sexual relations with her, and then made him believe that he was the cause of her condition, and the court said that if the affidavit was admissible, it may be conceded that the decree granting the divorce should be affirmed. The court held that illicit relations of the husband with his wife before marriage are not a bar to the remedy created by the statute which gives the husband a right to a divorce in case his wife was, at the time of marriage, without his knowledge, pregnant by another.

Without discussion, except of the facts, the Missouri court of appeals in *Ritayik v. Ritayik* (Mo.) *supra*, granted a divorce to a man who married a woman because of her assertion that she was pregnant by him, when examination immediately afterwards, by a physician, disclosed the fact that she had become pregnant several months before she became acquainted with the plaintiff.

Premarital incontinence of the parties will not prevent a man who is deceived by the statement of the woman that she is pregnant by him, when in fact another is the cause of the pregnancy, from securing a divorce, under a statute allowing divorce for fraudulent contract, if he acted in the matter as a reasonable man might be expected to do. *Lyman v. Lyman* (Conn.) *supra*. The court, after considering the cases upon the subject, and the four grounds which they had advanced for denying relief, says: "We can conceive of few graver frauds than this, nor one which, if successful, is attended with more serious results; and we can see no good reason why, if the essentials of a fraud, as respects the representations by the one party and the reasonable reliance thereon and action induced thereby by the other, are present, the one thus defrauded

should be compelled to endure in silence the situation which has thus been brought upon him, with all the consequences that it entails, and all by reason of his efforts to play the manly part and repair his supposed wrong to the best of his ability. That seems to us to be imposing a grievous punishment for a purely laudable action. The punishment attaches to the marriage, and not to the earlier impropriety, and subjects a man to penalties for an act which had in it no semblance of wrongdoing, either legal or moral." And the court further says with respect to the interest of society in the matter: "Certainly, neither society nor the state representing it can have an interest favorable to the successful perpetration of a fraud, or the perpetuation of the normal consequences of one like this, which do not end with the marriage tie, but involve matters of presumptive paternity, the obligations which go with paternity, and the right of succession to property."

In *Scott v. Shufeldt* (1835) 5 Paige (N. Y.) 43, where a white mother charged a white man in a bastardy proceeding, with being the father of her child, and he married her, and, upon discovering the child was a mulatto, brought an action to annul the marriage, the chancellor said that if he knew the child could not be his, he could have no relief; but if the mother, at the time she charged him as the putative father, and induced him to marry her, under the supposition that the child might possibly be his, knowing that it was not his child, but that it was the child of a negro, she was not only guilty of perjury, but she also intentionally defrauded the complainant in such manner as to authorize the court to declare the marriage contract a nullity.

In *Barden v. Barden* (1832) 14 N. C. (3 Dev. L.) 548, where plaintiff was led to believe that the child, which also proved to be black, and was born before marriage, was his, the majority of the court held that that distinguished the case from the *Scroggins Case* (1832) 14 N. C. (3 Dev. L.) 535, *infra*, and that he was entitled to re-

lief. Ruffin, J., who delivered the opinion in the Scroggins Case, and who did not fully concur in the Barden Case, says it is thought by the majority of the court that when a man has acted in good faith, with a design on his part to repair the injury done to the female whom he supposes to be the reluctant victim of his own solicitations, which a strong and exclusive affection for him made her unable finally to resist, advantage should not be taken of his confidence and noble purpose of action to draw him on by false tokens and artful devices of this sort. The decision is expressly put upon the ground that he was induced by false representations and active means to believe that the child was his, and that he did not and could not ascertain the truth. It is further said that this is a concession to the deep-rooted and virtuous prejudices of the community upon this subject.

It is not ground for divorce by the North Carolina statutes if the man learns after marriage that the wife, at the time of marriage, was pregnant by another man, of which the husband was ignorant. But the court held in *Bryant v. Bryant* (1916) 171 N. C. 746, L.R.A.1916E, 648, 88 S. E. 147, that mere false statements of pregnancy which induced marriage were not within the statute, and were not ground for relief.

In *WINNER v. WINNER* (reported herewith) ante, 919, after stating that the man's delinquency ought not to render him a judicial outcast to the extent of denying him relief from fraud, the court emphasizes the opportunity of a designing, pregnant woman to choose her husband willy-nilly.

Some cases so closely involve the rule laid down in the above cases that they may be referred to here.

In *Di Lorenzo v. Di Lorenzo* (1908) 174 N. Y. 467, 63 L.R.A. 92, 95 Am. St. Rep. 609, 67 N. E. 63, the court held that the securing of a marriage by the presentation of a spurious child which was alleged to be the plaintiff's was such fraud as to annul the marriage. The court, after referring to the fact that cases which seemed to hold a different doctrine had been cited, says:

It is sufficient that we rely upon the plain provisions of our statute, and upon the application to the case of a contract of marriage of those salutary and fundamental rules which are applicable to contracts generally when determining their validity. If the plaintiff proves to the satisfaction of the court that, through misrepresentations of some fact which was an essential element in the giving of his consent to the contract of marriage, and which was of such a nature as to deceive an ordinarily prudent person, he has been victimized, the court is empowered to annul the marriage. The court thereby reversed the appellate division (1902) 71 App. Div. 509, 75 N. Y. Supp. 878, which took the position that plaintiff knew facts which should have put him on guard, saying: "He says that, rather than marry her, he was willing to pay her money; and, if the actual birth of the child was material to the contract, he had full opportunity to inquire into the facts."

In *Sissung v. Sissung* (1887) 65 Mich. 168, 31 N. W. 770, where the overruling of a general demurrer was affirmed by a divided court, the judges in favor of granting the divorce said that each case is governed more or less by its own circumstances; and in the cases holding the contrary doctrine, a belief seems to have pervaded the courts that the complainant had been guilty of such moral wrong, or statutory crime, by his intercourse with defendant before marriage, as to preclude him from equitable relief, or that he had not shown to the satisfaction of the court that the child was not his, and that defendant knew that the charge against him was false. And these judges thought that the facts in that case showed that plaintiff was defrauded by a designing woman, while the judges favoring the denial of the divorce took the view that plaintiff was not deceived, but contracted the marriage merely to shield himself from the consequences of the violated law. The position of the former judges is that the fault of complainant in sinning against the moral law does not entitle him to be deceived and defrauded in this manner. The judge

writing the opinion says: It seems to me that the fraud in this case is a more potent reason for a nullification of the marriage ceremony than it would be in a case where the man was ignorant of the pregnancy. In such a case, the woman makes no representation except as a concealment of her condition may tend in that direction; but here, a false statement is made, and an appeal brought directly to the better and kindlier nature of the man, who, moved thereby, undertakes to make restitution for his supposed wrong, and, in so doing, falls easily into the trap laid for him by a wanton and designing woman.

The cases which have absolutely denied relief where the exact question was involved are comparatively few.

In *States v. States* (1883) 37 N. J. Eq. 197, the divorce was denied where plaintiff alleged that he was induced by a pregnant woman to have intercourse with her, and then married her because she said he was responsible for her condition. The court said: "Can a man who has been guilty of one of the grossest acts of immorality expect any court to undo the toils which envelop him because of such immorality? Would any court, after listening to his confession, be justified in dissolving his fetters? I think not. He transgressed; and this transgression blinded him; otherwise, too, he would have been free from importunities to marry, and from all false statements as to his liability. Then why should he have been deceived by her entreaties or representations? He knew of her dishonor; he knew as well that she would deceive. He had participated with her in crime. Why, then, should he be surprised by her falsehoods? She advertised her infidelity as well as her unchastity."

In *Foss v. Foss* (1866) 12 Allen (Mass.) 26, where relief was denied, it appeared that the man, after a very brief acquaintance with the woman, had intercourse with her, and married her three months afterwards on the representation that she was pregnant by him. The court said that if it appears that he had the means of ascertaining the falsity of the statement

made to him, or if the nature of the transaction and the circumstances attending it were such as to put a reasonable person on inquiry, the presumption of deceit arising from proof of the fraud will be repelled, and the person will be left to bear the consequences of his own want of due diligence and caution. The rule was applied in that case by stating that the man married the woman whom he knew to be unchaste and pregnant without taking any steps to ascertain the truth of her statement concerning the paternity of her child, which he might have done by a medical examination, or a delay of the marriage. The court said on these facts he was guilty of a blind credulity, from the consequences of which the law will not relieve him.

So, the marriage of an immature youth will not be annulled because of the false statement of the woman that he was the cause of her pregnancy, if he entered into it against the advice of his parents not to do so until time should tell whether or not he was the father of the child. *Safford v. Safford* (1916) 224 Mass. 392, L.R.A.1916F, 526, 113 N. E. 181. The court says that it had been decided by it that a contract of marriage would not be set aside upon application by a husband upon the ground of fraud, where it appeared that he relied solely upon statements of the libellee, and took no steps to determine their truth or falsity. It further says that the fact that he had full knowledge of her unchastity was sufficient to put him on his guard, and to cause him to take some steps to ascertain the truth or falsity of the charge made by her concerning her condition.

But in *Smith v. Smith* (1898) 171 Mass. 404, 41 L.R.A. 800, 68 Am. St. Rep. 440, 50 N. E. 933, which was a case involving the concealment of venereal disease, the court, in speaking of concealed pregnancy, says: In such case the woman is in such condition that she could not properly assume the duties of wifehood. The deception was in regard to facts essential to the very existence of the marriage relation. Her condition in refer-

ence to the objects of marriage is somewhat analogous to impotency, which, without reference to fraud, is always held to be a ground for a decree of nullity. The court thus seems to commit itself to the position that concealed pregnancy is a ground for divorce or annulment if the fraud consisted merely of concealment, but if the husband has been guilty of immorality, so that he places himself in a position to be victimized by active fraud, he must be denied relief.

In *Bartholomew v. Bartholomew* (1893) 14 Pa. Co. Ct. 230, the court regarded the *Hoffman Case* (1858) 30 Pa. 417, *infra*, as settling the rule in Pennsylvania that no relief could be rendered to the defrauded husband, but an examination of the *Hoffman Case* will show that it does not go to the extent attributed to it in the *Bartholomew Case*.

The latest state to adopt the rule denying relief is California. A reference to the authorities on which the court relies will show that the foundation of the decision is not very firm. The case referred to is *Franke v. Franke* (1892) 3 Cal. Unrep. 656, 18 L.R.A. 375, 31 Pac. 571, where the court, in considering whether or not a statute permitting a marriage to be annulled on the ground that the consent of either party was obtained by fraud would permit annulment of a marriage induced by fraudulent representations of a pregnant woman that the one whom she induced to marry her was the father of the child, had before it a state of facts where a man forty years old had for several months maintained illicit relations with a young girl whom he had no reason to suppose was chaste, and whom he married merely to avoid making a payment to settle a suit at a time when he doubted her statement as to his being the father. And the court says that under such statutes it has been held almost uniformly that, where a man marries a woman whom he has debauched before marriage, and whom he knew to be pregnant with child at the time of marriage, the marriage will not be annulled on the ground that he was deceived by the false as-

surances of the wife before marriage that he was the father of the child, and that she had been chaste with all other men. Having experienced and participated in her incontinence before marriage, he is thereby sufficiently apprised of her want of chastity to deprive him of the right to complain that he was deceived by her false assurances that he was the only participant in her illicit intercourse. The court, after referring to the cases where the child proved to be a negro, says that possibly other extremely hard cases may occur sufficiently distinguishable from the cases cited in support of the rule to justify additional exceptions to the rule, but such cases need not be anticipated, and this case certainly is not one of them. The only case strictly in point which is cited by the court in support of its ruling is the *Foss Case* (*Mass.*) *supra*. The other cases were *Reynolds v. Reynolds* (1862) 3 Allen (*Mass.*) 609, and *Varney v. Varney* (1881) 52 Wis. 120, 38 Am. Rep. 726, 8 N. W. 739, which were merely cases of concealed pregnancy; *Crehore v. Crehore* (1867) 97 Mass. 330, 93 Am. Dec. 93, where the marriage was entered upon in reliance on the woman's assurance that she was not pregnant.

Long v. Long (1877) 77 N. C. 304, 24 Am. Rep. 449, where the court proceeded upon the theory that plaintiff himself was the father of the child.

Seilheimer v. Seilheimer (1885) 40 N. J. Eq. 412, 2 Atl. 376, where the pregnancy was concealed, and the court denied relief on the ground that plaintiff had himself had illicit relations with his wife before marriage. The court said: The man who, with knowledge of his wife's unchastity in her relations with him, takes her as wife, should be held, both on the ground of good morality and sound policy, to have accepted all the risks; and concluded that he should be denied relief in the case because of his own immorality. The court further says: It may be that it would be entirely just to declare, in a case where it was shown that a pregnant woman, conscious of her condition, had lured a man into having intercourse with

her for the very purpose of compelling him to marry her, and thus place him in a position where he would be compelled to perform the duties of father towards her offspring, that, if she succeeded, her husband would be entitled to have the marriage annulled on the ground that she had induced him to commit the wrong as a means by which she could make her fraudulent purpose effectual against him.

Carris v. Carris (1873) 24 N. J. Eq. 516, which was a case of concealed antenuptial pregnancy, where the husband had had no intercourse with the wife before marriage, and which contains a dictum to the effect that mere mistake of the husband as to the paternity of a child born after marriage, but begotten before by another, where he himself had been guilty of criminal lewdness towards his wife before marriage, is not sufficient to entitle him to relief. The argument employed by the court in granting the relief in this case, however, applies equally to a case where the marriage is induced by false representations as to the paternity of the child. The court says that fraud enters into the very essence of the contract, and, if allowed to succeed, either compels the husband to disown the child for his own protection, or imposes upon him the necessity of recognizing and maintaining the fruit of his wife's defilement by another, and having it partake of his inheritance. In either event, shame and entire alienation are the inevitable consequences. Surely there can be no good policy in such action as will either compel parties to live together under these circumstances, having only the shadow of marriage, or compel them, as will be more likely, to live totally separated, a continual annoyance to each other, and a source of the greatest unhappiness.

Scroggins v. Scroggins (1832) 14 N. C. (8 Dev. L.) 535, where relief was denied, although there was concealed pregnancy of a mulatto child, the opinion laid down as the basis of the decision the doctrine that the evils which might grow out of dissensions in the marital relation were in great measure avoided by the principle of law that

the absolute union created by marriage is indissoluble. The court says: There is no safe rule but that persons who marry agree to take each other as they are. The safer, more politic, and more humane principle is to make it to his interest to conceal the fault, as well as hers, and, by uniting their interests, to induce both to look forward to future proprieties, and be blind to what is past. But, in finally disposing of the case, the court states that her condition was such that he must have known of her pregnancy at the time of marriage, and the court presumed from that fact his own illicit relations with her at the time of marriage, and held that, under the rule of condonation, he was not entitled to relief. The court says: We think him criminally accessory to his own dishonor in marrying a woman whom he knew to be lewd, or by continuing his cohabitation after he must have known it. He now asks to be freed from his bonds because the infamy of his wife has become notorious, though he could reconcile himself in secret to the crime which makes her infamous.

In the *Franke Case* (1892) 3 Cal. Unrep. 656, 18 L.R.A. 375, 31 Pac. 571, some reliance was placed upon the position taken in *Baker v. Baker* (1859) 13 Cal. 87, as set out in *GARD v. GARD* (reported herewith) ante, 923, to the effect that a pregnant woman was not marriageable; but the court held that the ground of physical incompetence which the statute made a ground of annulment of the marriage consists solely of such physical defect or incurable disease existing at the time of the marriage as will prevent sexual coition.

In addition to the cases directly denying relief, there are dicta in several cases which recognize that rule as a sound one.

In *Richards v. Richards* (1896) 19 Pa. Co. Ct. 322, where the claim of pregnancy proved to be entirely false, the court refers to the *Hoffman Case*, as settling the law that no relief could be had in case of marriage induced by fraudulent representations that the husband was the cause of the wife's pregnancy.

In *Young v. Young* (1910) — Tex. Civ. App. —, 127 S. W. 898, the court, in ruling that inducing marriage by false representations of pregnancy was not a ground of divorce, cites a textbook to the effect that it is well-settled that a marriage will not be annulled for fraud where the woman induces the man to marry her by expressly representing that their illicit intercourse has rendered her pregnant, when she has been in fact rendered pregnant by another; but the cases cited in the textbook are those set out in this annotation, and very few of them, as appears here, support the doctrine.

In *Allen's Appeal* (1881) 99 Pa. 196, 44 Am. Rep. 101, the court, in dealing with a case of antenuptial pregnancy, where the husband denied intercourse with the woman before marriage, says that if a man marries a woman, knowing her to be pregnant, even though he may believe that he is the father, he cannot set up the fraud if afterwards discovered; and though she may have falsely assured him that the child was his, if he chooses to rely on the assurance, he must bear it as a misfortune.

In *Hoffman v. Hoffman* (1858) 30 Pa. 417, it is very difficult to ascertain the ground upon which the lower court acted in granting the divorce, which

was reversed by the supreme court. The allegation of fraud is of the most general kind, and the proof shows that a few days less than the usual period of gestation from the time of marriage the wife was delivered of a full-grown child. There was evidence to the effect that she had stated to some of the husband's friends prior to the marriage that she was pregnant by him, but the court says there is not a word of evidence to impeach her chastity or honesty; and, taking the view that the child was not premature, it was conclusive evidence that her statement was true, and that it was his child. But the court said: On the other hand, it was perfectly possible for the child to have been begotten after the marriage, when, in the absence of proof to the contrary, the law conclusively presumes the husband to be its father; so that, on the whole case, there was no allegation or proof of fraud which induced the marriage.

But the lower courts of the state, as noted above, have interpreted the case as authority for the rule that there can be no relief to one defrauded by false representations that he was the father of the child of which the woman was pregnant by another.

H. P. F.

CAPITOL HILL STATE BANK, Plff. in Err.,
v.
RAWLINS NATIONAL BANK OF RAWLINS.

Wyoming Supreme Court—November 21, 1916.

(24 Wyo. 423, 160 Pac. 1171.)

Bills and notes — enforcement by holder — proof of indorsement.

1. Mere possession of a certificate of deposit payable to order will not entitle the holder to enforce it against the maker without proof of indorsement or transfer by the payee, if such indorsement and transfer are denied by the maker, although a purported indorsement appears on the instrument.

[See note on this question beginning on page 952.]

Appeal — questions not presented as ground for new trial.

2. Denying a motion to strike portions of an answer and rejecting of-

fered evidence are grounds for motion for new trial, within a rule of court that nothing will be considered on appeal which, being ground for new

trial, was not assigned as such in the trial court.

[See 2 R. C. L. 98.]

Evidence — offer of certificate of deposit — effect as to indorsement.

3. An offer in evidence of a certificate of deposit the indorsement of which has been denied by the answer, without any reference to a purported indorsement either by counsel in making the offer or by the witness who identifies the paper, does not include an offer of the indorsement.

— **proof of indorsement of negotiable paper.**

4. In a suit against the maker by one claiming negotiable paper by indorsement, which is denied, proof of execution of the instrument does not prove the indorsement.

— **negotiation — indorsement.**

5. The indorsement of a certificate of deposit by the payee is not shown by testimony that it was negotiated with the holder.

Bills and notes — statutory provision — effect.

6. One merely in possession of a

negotiable instrument is not within the operation of a statute providing that every holder is deemed prima facie to be a holder in due course unless a prior title is shown to be defective, so as to permit one in possession of a certificate of deposit payable to order, indorsement of which by the payee is denied, to recover without proving such indorsement.

— **transfer without indorsement.**

7. Under the Negotiable Instruments Law a negotiable instrument payable to order may be transferred without indorsement, but the transferee takes only the equitable title and does not become a holder in due course.

[See 3 R. C. L. 987, 988, 1160.]

— **necessity of transfer by payee.**

8. To pass an equitable title to negotiable paper payable to order, in the holder, the transfer must be made by the payee or person to whose order the instrument has been made payable.

[See 3 R. C. L. 987, 988.]

ERROR to the District Court for Carbon County (Tidball, J.) to review a judgment in defendant's favor, and overruling a motion for new trial, in an action brought to recover the amount alleged to be due on a certificate of deposit issued by the defendant bank to the payee insurance company, and assigned by it to plaintiff. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. E. E. Sarchet and George E. Brimmer for plaintiff in error.

Mr. N. R. Greenfield, for defendant in error:

The burden rested upon plaintiff to establish assignment of the instrument, and failure to make out such assignment entitled defendant to judgment. This is equally true if the plaintiff relied on a transfer of the instrument by indorsement.

Stair v. Richardson, 108 Ind. 429, 9 N. E. 300; Johnson v. English, 53 Neb. 530, 74 N. W. 47; Doty v. Braska, 151 Iowa, 23, 126 N. W. 1108, Ann. Cas. 1913A, 193; Darlington-Miller Lumber Co. v. National Surety Co. 35 Tex. Civ. App. 346, 80 S. W. 238; Nakagawa v. Okamoto, 164 Cal. 718, 130 Pac. 707; Calloway v. Oro Min. Co. 5 Cal. App. 191, 89 Pac. 1070; Bovard v. Dickenson, 131 Cal. 162, 63 Pac. 162; Walker v. Land, Title & T. Co. 59 Kan. 777, 53 Pac. 476; Payne v. Liebee, 3 Neb.

(Unof.) 448, 91 N. W. 851; Shonkwiler v. Duñavin, 1 Ind. App. 505, 27 N. E. 991; Holton v. Alley, 15 Ky. L. Rep. 529, 24 S. W. 113; Vickery v. Burton, 6 N. D. 245, 69 N. W. 193.

The indorsement or assignment upon an instrument to which it refers is no part of the original instrument, but is a separate and distinct instrument, and its execution must be duly proved.

14 Enc. Ev. 736; 17 Cyc. 425-427, note 83; Hugumin v. Hinds, 97 Mo. App. 346, 71 S. W. 749; Turrell v. Morgan, 7 Minn. 368, 82 Am. Dec. 101; Johnson v. English, 53 Neb. 530, 74 N. W. 47; Schroeder v. Nielson, 39 Neb. 335, 57 N. W. 993; Mayers v. McRimmon, 140 N. C. 640, 111 Am. St. Rep. 879, 53 S. E. 447; Jones v. Wheeler, 23 Okla. 771, 101 Pac. 1112; Ayre v. Hixson, 53 Or. 19, 133 Am. St. Rep. 819, 98 Pac. 515, Ann. Cas. 1913E, 659; Witt v. Campbell-Lakin Segar Co. 66 Or. 144, 134 Pac. 316; Rio Grande

Extension Co. v. Coby, 7 Colo. 299, 3 Pac. 481.

And where, if an assignment had been made, it could only be made by an authorized agent, it was incumbent on the plaintiff not only to show the assignment, but also to show the power and authority of the agent to make it.

8 Cyc. 218; 14 Enc. Pl. & Pr. 615; 81 Cyc. 1381; 10 Cyc. 929; 7 Cyc. 784; 10 Enc. Ev. 7; Rio Grande Extension Co. v. Coby, 7 Colo. 299, 3 Pac. 481; Hamilton Nat. Bank v. Nye, 37 Ind. App. 464, 117 Am. St. Rep. 333, 77 N. E. 295.

Possession of unindorsed negotiable paper, payable to order, raises no presumption of ownership, and is no evidence of title in the possessor.

8 Cyc. 231; Shepard v. Hanson, 9 N. D. 249, 83 N. W. 20; Wade v. Boone, 184 Mo. App. 88, 168 S. W. 360; Witt v. Campbell-Lakin Segar Co. 66 Or. 144, 184 Pac. 316; Sloan v. Gilmore, — Tex. Civ. App. —, 167 S. W. 1089; Jefferson County Sav. Bank v. Interstate Sav. Bank, 5 Ala. App. 363, 59 So. 348; Shonkwiler v. Dunavin, 1 Ind. App. 505, 27 N. E. 991; Escamilla v. Pingree, 44 Utah, 421, L.R.A.1915B, 475, 141 Pac. 108; 4 Am. & Eng. Enc. Law, 2d ed. 319; Daniel, Neg. Inst. 812; Randolph, Com. Paper, 792; Baker v. Warner, 16 S. D. 292, 92 N. W. 393; Turner v. Mitchell, 22 Ky. L. Rep. 1784, 61 S. W. 468.

Potter, Ch. J., delivered the opinion of the court:

This is an action brought by the plaintiff in error, Capitol Hill State Bank, against the Rawlins National Bank of Rawlins, the defendant in error, upon a certificate of deposit issued by the defendant to the Western States Fire Insurance Company. The petition alleges that the Western States Fire Insurance Company, the payee named and intended to be named in said certificate, assigned and delivered the same before maturity, to the plaintiff for a valuable consideration, and that the plaintiff is the owner and holder thereof; that no part of the certificate has been paid; that plaintiff presented it for payment at maturity, indorsed on the back by the payee in its name and by the plaintiff in its name, to the defendant, the maker

thereof, and payment was demanded; that it was not paid, and the same was thereupon duly protested for nonpayment, of which due notice was given to the defendant; and that there is due the plaintiff thereon the sum of \$500, the principal, with interest at the rate stated in the certificate from the date thereof to its maturity, and with interest at the rate of 8 per cent thereafter upon the principal and accrued interest. The date of the certificate is August 23, 1912, and it certifies that the payee therein named has deposited with the issuing bank the sum aforesaid (\$500), payable to the payee's order in current funds twelve months after date, with interest to maturity only, at the rate of 5 per cent per annum, upon the return of the certificate, properly indorsed. A copy of the certificate is set out in the petition, but without the indorsements.

The answer sets up three separate defenses. By the first defense the alleged corporate character of the plaintiff and defendant, respectively, is admitted; also, the execution of the certificate of deposit by the defendant, that the copy set out in the petition is a true copy thereof, and that the Western States Fire Insurance Company was the payee named and intended to be named in the certificate. Each and every other allegation of the petition is denied. By the second defense it is alleged, in substance, that the money for which the certificate was issued was deposited with the defendant bank by a subscriber to the stock of a proposed fire insurance company, on the representation of one Paul Fayn that he was engaged in organizing such company and in soliciting subscribers for the stock thereof, and upon his agreement that one half of the par value of the stock subscribed for might be deposited in the local bank in the name of the Western States Fire Insurance Company, and remain in such bank for one year, unless the organization of the company was sooner perfected and a license

to write fire insurance in Wyoming was granted, and to be repaid to the depositing subscriber if such organization was not perfected and a license to write fire insurance in this state granted within one year; that upon such representation and agreement the defendant issued said certificate of deposit and delivered it to said Paul Fayn; that the defendant had since learned that within a day or two after issuing the certificate the said Paul Fayn, with intent to deceive and defraud, indorsed the certificate by writing the name of the payee on the back thereof by himself as vice president, and delivered the same to the plaintiff, and thereupon appropriated to his own use the money received thereon, and absconded, and has never accounted to said insurance company for any part thereof; that at the time of such indorsement he was not, and never has been, the vice president of said company; that he had no authority to make such indorsement, and the certificate was not indorsed by the company, but that its name written on the back of the certificate is a forgery; that said Fayn had no authority to assign or deliver the certificate to the plaintiff; that the plaintiff obtained no title thereto by said indorsement or by any pretended assignment by said Fayn, or in any other manner; and that plaintiff is not, and never has been, the owner thereof.

The motion to strike the third defense was sustained, and a reply was filed to the second defense, alleging, in substance, that the plaintiff was without knowledge as to the facts alleged respecting the representation and alleged agreement of Paul Fayn, the soliciting of subscriptions to the stock of a proposed fire insurance company, the payment by such subscribers into a local bank of part of the par value of the stock subscribed for, or the deposit for which the certificate was issued, and therefore denying the same. The reply alleges that the certificate was indorsed and delivered to the plaintiff by the Western States Fire Insur-

ance Company, by Paul Fayn as the vice president of said company, and that the company was thereupon credited with the amount of the certificate, and the money so deposited to its credit was thereafter checked out by the company and appropriated to its own use. The reply also alleges that the plaintiff is the bona fide holder of the certificate for value; that the plaintiff had no knowledge, at the time it accepted the same, of any equities in favor of the defendant, or any other person; and that the plaintiff obtained bona fide title to the certificate through the indorsement aforesaid by the company acting through said Paul Fayn.

Upon these issues the cause was tried to the court without a jury. No evidence having been introduced by the defendant, the alleged equitable defense is not in the case as it comes to this court; but the answer and reply concerning it have been referred to because they show the situation in which the parties entered upon the trial, and this may tend to illustrate the points to be considered. The only witness examined on the trial was Roy P. Gholson, the president since its organization of the plaintiff bank. After he had stated his residence and official connection with the plaintiff, he was handed a paper described in the question as "plaintiff's exhibit 1," and asked to state what it was.

His answer and the remainder of his testimony was as follows:

A. Certificate of deposit, \$500; Rawlins National Bank to Western States Fire Insurance Company, with notice of protest and nonpayment attached.

Q. Is that the certificate of deposit in question?

A. It is.

Q. Was that certificate of deposit negotiated with the plaintiff bank?

A. It was.

Q. On what date?

A. About August 26, 1912.

Q. Plaintiff bank the present holder?

A. It is.

(Counsel for defendant here objected to the question and moved to strike out the answer, stating: "That is one of the material issues in the case. We object to the question as calling for a conclusion of the witness. That is one of the questions for the court to decide." The court ruled on the matter by saying: "It may be stricken out." The plaintiff took an exception.)

Q. Has the plaintiff corporation received any payment of this paper, Mr. Gholson?

A. It has not.

Q. What is the amount now due on this certificate of deposit?

A. Five hundred and twenty-eight dollars and sixty cents was the amount of the certificate, with interest and protest fees.

Q. That is, that includes interest and protest fees?

A. Yes, up to the time it was presented and payment refused.

Q. That was the amount due on the date of presentation?

A. Yes, August 23, 1913.

(Plaintiff's counsel here offered plaintiff's exhibit 1 in evidence. Defendant's counsel objected as follows: "We object to the introduction of the form of protest attached to the certificate, for the reason that it is not an issue in this case. There are no pleadings here as to the protest fees; and of course the execution of the certificate is admitted. I will admit that the certificate of deposit was presented for payment on August 23, 1913, and the execution of the certificate is admitted in the pleadings." The court: "It may be admitted for that purpose—of showing presentment for payment.")

Q. Mr. Gholson, what consideration did the plaintiff bank pay for this paper? (An objection to the question as immaterial overruled.)

A. Paid \$500, less 5 per cent discount, making the paper draw 10 per cent for the year. It carried 5 per cent interest, and then we discounted 5 per cent more.

There was no cross-examination,

and no further testimony was introduced or offered by either party. On the back of the certificate of deposit is stamped, as if by a rubber stamp, the name, "The Western States Fire Insurance Company," and immediately underneath that name appears the written signature, "Paul Fayn, V. Pres't."

The court found generally for the defendant and against the plaintiff, and judgment was rendered in defendant's favor for costs. A motion for new trial was filed and overruled, and the plaintiff has brought the case here on error. The grounds stated in the motion for new trial were, in substance: (1) That the decision is against the weight of the evidence and contrary to law. (2) That the court erred in finding for the defendant. (3) That the findings, decision, and judgment were in defendant's favor and against the plaintiff. (4) That the decision is not sustained by sufficient evidence. The overruling of the motion for new trial is assigned as error in this court, and also substantially as in the motion that the decision is against the weight of the evidence, contrary to law, and not sustained by sufficient evidence. Rulings of the court upon plaintiff's motion to strike out parts of the second defense in the answer, and rejecting evidence offered by the plaintiff, are also here assigned as error.

Under our rule 13 (104 Pac. xiii.), the alleged error in denying plaintiff's motion to strike portions of the answer and in rejecting evidence offered by the plaintiff cannot be considered. Those matters were not assigned as grounds for new trial in the court below, and the rule aforesaid provides that nothing which could have been properly assigned as a ground

for new trial in the court below will be considered in this court, unless it shall appear that the same was properly presented to the court below by a motion for a new trial, and that such motion was overruled and an excep-

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trial.

tion at the time reserved to such ruling.

Although the certificate of deposit appears to be indorsed as above stated, there was no specific proof of the indorsement, and we understand that to have been the reason for the finding and judgment in defendant's favor, and perhaps, also, the failure to otherwise prove a transfer by the payee. Indeed, the principal contention here of counsel for defendant in error is that it was necessary for the plaintiff, to entitle it to recover, to prove the genuineness of the indorsement and the authority of Paul Fayn to indorse the name of the payee upon the instrument, if it be shown that he did so indorse it; and that the offer and introduction in evidence of the certificate, with its execution admitted, did not carry with it the indorsement. On the other hand, it is contended by counsel for plaintiff in error that the plaintiff held the certificate as a negotiable instrument, clothed with the presumption that it was negotiated for value in the usual course of business at the time of its execution and without notice of any equities between the prior parties to the indorsement, and that possession of the certificate was prima facie evidence of ownership and lawful possession, so that the plaintiff was required to do nothing in opening its case except to prove the execution of the instrument and introduce it in evidence; and, further, that all of the certificate, including the indorsement, was received in evidence when plaintiff's exhibit 1 was offered and received without objection, except as to the protest notice; but that, if the indorsement is not in the evidence, the plaintiff would be entitled to recover for the reason that the mere production on the trial of an unindorsed negotiable instrument payable to order is prima facie evidence of ownership, and entitles the holder to recover, in the absence of evidence rebutting such presumption. Said counsel also contend that indorsement by the payee is shown by the testimony of the

witness Gholson that the certificate was negotiated with the plaintiff bank.

The questions thus presented will be considered in what we deem their proper order, and, first, whether the indorsement was offered and received in evidence without objection, so as to obviate the necessity of proving it, assuming for the present that, if so offered and received, such proof would be unnecessary, but otherwise would have been required. We think the record fails to show that the indorsement was either received or offered in

evidence. It was not referred to by the witness when asked to describe

Evidence—offer of certificate of deposit—effect as to indorsement.

the proposed exhibit, nor by counsel when offering the same in evidence, and there is no mention of it anywhere in the evidence. The first reference to the exhibit aforesaid or the certificate was by this question, propounded by plaintiff's counsel to the only witness examined: "I hand you plaintiff's exhibit 1 (handing paper to witness). You may state what that is."

The witness thereupon described it, as above shown, by stating that it was a certificate of deposit for \$500, Rawlins National Bank to Western States Fire Insurance Company, with notice of protest and nonpayment attached. Without any further description of it, "plaintiff's exhibit 1" was offered in evidence. The notice of protest having been referred to as part of the exhibit, an objection was interposed to it as immaterial under the issues, and it was admitted for the purpose of showing presentment for payment. But as the indorsement had not been mentioned as part of such exhibit, in identifying it or in the offer, and no proof had been made of the indorsement, though denied by the answer, defendant's counsel might rightfully assume, and we think it must be understood that he did, that the offer did not include the indorsement. The indorsement is not so essentially a part of the certificate that it would

necessarily be included in an offer of the certificate in evidence, where proof of the indorsement is required. *Witt v. Campbell-Lakin Segar Co.* 66 Or. 144, 134 Pac. 316; *Johnson v. English*, 53 Neb. 530, 74 N. W. 47; *Levy v. Cunningham*, 56 Neb. 348, 76 N. W. 882; *Comstock v. Kerwin*, 57 Neb. 1, 77 N. W. 387; *Stroud v. Harrington*, *Hempst.* 116, *Fed. Cas. No. 13,546a*; *Wallace v. Reed*, 70 Ind. 263.

It is clear that in a suit against the maker of such an instrument, or of a promissory note, by one claiming to hold it by or under an indorsement, where the execution of the instrument and the indorsement are both denied, or the indorsement merely, so as to require proof in the one case of both execution and indorsement, and in the other of the indorsement, proof of the execution alone would not prove the indorse-

—proof of
indorsement of
negotiable
paper.

ment, or be sufficient to entitle the indorsement to be admitted in evidence.

And we do not suppose it would be contended that the instrument, whether a promissory note, bill of exchange, or certificate of deposit, would be inadmissible in evidence without or separate from the indorsement. Yet the effect of a rule that the offer and admission merely of the instrument in evidence, upon proof of its execution, or without such proof where execution is admitted, or not denied, carries with it or includes the denied indorsement of the payee, would be to dispense with proof of such indorsement, and thus nullify the rule requiring it, or cause the exclusion of the instrument itself upon a valid objection to the indorsement. Since the indorsement appearing on the back of the certificate was not identified as part of it, or as part of the exhibit, or referred to in the offer, the defendant ought not to be held subject to the consequences of a failure to object to evidence offered and admitted.

But, as above stated, it is contended that, although the indorse-

ment may not have been received in evidence under the offer aforesaid, the certificate is shown to have been indorsed by the payee and delivered by it to the plaintiff, by the testimony of the witness Gholsen that it was "negotiated with the plaintiff bank." This contention is based upon the technical meaning of the word "negotiated" in the Law of Negotiable Instruments, which includes indorsement as well as delivery of an instrument payable to order. *Comp. Stat. 1910, § 3188.* So far as the use of the word in the question propounded to and answered in the affirmative by the witness may have implied a legally proper and completed transfer, it involved a legal conclusion, and without any showing of the facts of the transaction. Certainly it was not the best or the proper method of proving the indorsement; nor would the affirmative answer aforesaid be conclusive if the facts were in evidence; and we seriously doubt whether, standing alone, it could properly be held sufficient to require a verdict or finding that the instrument had been either indorsed or delivered by the payee, even if the word was used in the question so propounded and answered in the sense above indicated. However, aside from the fact that the word has other ordinary meanings, and may be employed to denote something different and less than its technical definition in the law relating to the transfer of negotiable instruments, as well as the obvious difficulty in determining what the witness understood the question to mean, if not what counsel intended by it, the question and the answer thereto might reasonably be construed to mean nothing more than that the certificate was transferred to the plaintiff by someone; and this would not necessarily imply that such transfer was by the payee, or that the payee had indorsed or authorized the indorsement or transfer. We think a witness might answer such a question in the affirmative with reference to an in-

strument payable to order, but transferred merely by delivery by some third person, honestly believing it to be true because of an incorrect understanding of the law, or, if appearing to have been indorsed by the payee, believing that it was so indorsed. There is nothing in this case to show that the witness based his answer even partly upon the indorsement, for his attention was not directed to it, and it was not mentioned in the testimony. If we might properly assume that he knew what was necessary to the transfer of the title to a negotiable instrument payable to order, we are not satisfied that it ought also to be assumed that he was acquainted with the technical or statutory definition of the word "negotiated." If the contention as to this testimony was made in the trial court, that court evidently refused to accept it as proof of an indorsement by the payee, or a transfer and delivery by the latter to the plaintiff, or to infer from it the fact of such indorsement or transfer. It is in any event a mere conclusion, except as it may tend to show a transfer to plaintiff by someone not necessarily the payee; and as what was intended and understood by it is, at least, involved in much doubt, and it was within the power of plaintiff to show expressly or by direct evidence from whom and under what circumstances it received the certificate, we think the judgment ought not to be disturbed upon the ground of a

-negotiation
-indorsement.

merely possible inference or implication of the payee's indorsement or transfer from the testimony aforesaid. *Vickery v. Burton*, 6 N. D. 245, 69 N. W. 193; *St. Johns Table Co. v. Brown*, 126 Mich. 592, 85 N. W. 1124.

In *Vickery v. Burton*, *supra*, the name of the payee appeared on the back of the notes sued on, and the payee and another witness testified about a certain transaction, and that thereafter the plaintiff was the lawful owner and holder of the notes, but without stating that the payee

had indorsed or assigned the notes, or referring at all to an indorsement or assignment. The court, in mentioning such testimony, said that there seemed to be a studied effort to avoid the crucial matter of the actual indorsement of the notes, and that the plaintiff had failed to show the essential fact of the indorsement by the payee; and it was held that the trial court erred in granting a motion for a directed verdict in plaintiff's favor.

This brings us to the main question in the case, viz.: Whether the possession of the certificate entitled the plaintiff to recover without proving an indorsement, or at least a transfer, by the payee, or, in other words, whether, the execution of the certificate having been admitted by the pleadings, the mere fact of possession, as shown by the production of the certificate on the trial and its introduction in evidence, was sufficient *prima facie* to entitle the plaintiff to recover, in view of the denial by the answer of the alleged indorsement and delivery by the payee, as well as the alleged ownership of the plaintiff.

Counsel for plaintiff base their contention that the mere fact of such possession was sufficient to entitle the plaintiff to recover, first, upon the principle that possession of a negotiable instrument payable to the bearer, or indorsed in blank, is *prima facie* evidence of title. But that well-settled rule does not reach the question of the necessity of proving the indorsement. On the contrary, it assumes that the instrument has in fact been indorsed in blank by the payee or special indorsee, and does not refer to an instrument merely appearing to have been so indorsed. Where the genuineness of the indorsement is not legally challenged, or is established by proof, then the rule applies, and for the reason that, like an instrument made payable to bearer on its face, one payable to order may be negotiated by mere delivery when indorsed in blank by the payee. Hence the presumption of owner-

ship from the mere fact of the possession of such an instrument.

This is illustrated by some of the cases cited and quoted from in counsels' brief. Among them is the case of *Dawson Town & Gas Co. v. Woodhull*, 14 C. C. A. 464, 32 U. S. App. 134, 67 Fed. 451, wherein Circuit Judge Thayer, in the opinion of the court, said: "The legal presumption of ownership which exists in favor of one who is ostensibly in possession of negotiable notes indorsed in blank by the payee, as these notes were, and who brings a suit thereon, is not overcome by a mere denial of the fact of ownership contained in the answer. When these notes were offered, they were in the hands of the plaintiff's attorneys. The legal presumption was that they had received them from the hands of their client . . . and that they were the client's property. There was no occasion, therefore, for offering testimony to confirm the presumption before the notes were admitted in evidence."

The court was there clearly referring to the presumption of ownership in favor of one in possession of a negotiable note shown to have been actually indorsed in blank by the payee,—not merely appearing to have been so indorsed, for the fact of such indorsement is stated in that part of the opinion above quoted,—and in stating the facts of the case the learned judge said that the notes sued on were executed by the defendant in favor of J. T. Hoile, as payee, "and were subsequently indorsed by him to said Woodhull."

Counsel quote from the opinion in the case of *Collins v. Gilbert*, 94 U. S. 753, 24 L. ed. 170, the statement, among others, that possession of a negotiable instrument payable to bearer, or indorsed in blank, is *prima facie* evidence that the holder is the proper holder and lawful possessor of the same, and that actual possession of such an instrument payable to bearer or indorsed in blank is *plenary* evidence of title in the holder until other evidence is produced to control it. But it was

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also stated in the opinion in that case that "the record shows that the draft was accepted by the defendant, and was duly indorsed by the payee," and that "due delivery of the executed draft of the contractor indorsed in blank is admitted." Thus the court had in mind an instrument shown to have been in fact indorsed by the payee. Indeed, it was further said, after stating that possession of an instrument payable to bearer, or indorsed in blank, is *prima facie* evidence that the holder is the lawful holder and possessor of the same, that in a suit in the name of the transferee the former has nothing to do, in the opening of his case, "except to prove the signatures to the instrument, and introduce the same in evidence."

In this connection, also, counsel cite and quote from the Connecticut case of *New Haven Mfg. Co. v. New Haven Pulp & Board Co.* 76 Conn. 126, 55 Atl. 604. The question in that case was whether the trial court had found the note to have been indorsed by the payee, and whether the evidence was sufficient to show such indorsement. The note appeared to have been indorsed in the name of the payee, a corporation, by "one Tutton in its behalf." The evidence in the case went beyond the mere production of the note on the trial, and, among other things, it was shown that Mr. Tutton, while negotiating with the plaintiff in behalf of the payee for the purchase of certain machinery, left the note with the plaintiff to be credited to the payee, and that it was so credited. That case does not hold that the mere fact of possession of a note appearing to have been indorsed in blank is sufficient without proof of the indorsement.

Counsel also rely upon the case of *Gumaer v. Sowers*, 31 Colo. 164, 71 Pac. 1103. But that case cannot be regarded as authority in support of the contention since explained in the more recent Colorado case of *Marks v. Munson*, 59 Colo. 440, 149 Pac. 440, Ann. Cas. 1917A, 766. It was held by a majority of the court

in the latter case that the mere fact of possession was not sufficient, without proof of the indorsement, and the case of *Gumaer v. Sowers*, supra, was referred to as follows: "There the objection to the introduction of a note without proof of the signatures was not made in apt time, so as to make the ruling on its admission reviewable in this court. The judgment was properly affirmed, but in the opinion there are some statements which support the position of defendant in error in this case. They were, however, not necessary to the decision, were due to evident misapprehension of the authorities, as in the case above discussed (*Pendleton v. Smissaert*, 1 Colo. App. 508, 29 Pac. 521), and should be regarded as dicta merely."

In *Daniel on Negotiable Instruments*, § 812, it is said: "The mere possession of a negotiable instrument, produced in evidence by the indorsee, or by the assignee where no indorsement is necessary, imports prima facie . . . that he is the owner thereof, entitled to recover the full amount against all prior parties. In other words, the production of the instrument, and *proof that it is genuine* (where indeed such proof is necessary), prima facie establishes his case, and he may there rest it."

Thus the author seems to exclude from such presumption the genuineness of the instrument, if put in issue, which we think was intended to embrace the signature of an indorser necessary to negotiation as well as that of maker or acceptor. And in the succeeding section (813) it is said that it "is not competent for the defendant to deny that the plaintiff is the owner and holder of a note upon which he brings suit as such, without traversing the signature, the indorsement, or the delivery of the note," clearly recognizing, it seems to us, the right to deny the indorsement and the resulting necessity of proving it to make out a prima facie case. Should the indorsement, if in blank, be proved,

the presumption of ownership would then, of course, apply.

The same learned author stated the rule as to the presumption from possession in § 1200, by quoting from *Whiteford v. Burckmyer*, 1 Gill, 127, 39 Am. Dec. 640, as follows: "A bill payable to bearer, or a bill payable to order and indorsed in blank, will pass by delivery, and bare possession is prima facie evidence of title; and for that reason possession of such a bill would entitle the holder to sue,"—citing only *Crosthwait v. Misener*, 13 Bush, 543, and *Wells v. Schoonover*, 9 Heisk. 805, in addition to the Maryland case aforesaid. The Maryland case was against the indorser, and it shows that the plaintiff proved the handwriting of both drawer and indorser. The Tennessee case shows the fact of indorsement by the payee of the notes sued on, and that it was not denied that the legal title to the notes passed by the indorsement of the payee to the plaintiff. And in the Kentucky case the court merely said: "Possession of a note is prima facie evidence of ownership, and appellee exhibits the note and claims it as his; that claim and possession will be respected till his title to the note is denied by the pleadings of his adversary."

It does not appear, therefore, that the author was stating a rule dispensing with proof of the indorsement, but rather a rule of evidence where the indorsement is not denied, or, if denied, is established by proof. In the 6th edition of the same work, by T. H. Calvert, a paragraph is added to § 1200, stating that possession of the note or bill is prima facie evidence that the same was indorsed by the person by whom it purports to be indorsed, citing only certain Minnesota cases, viz.: *National Bank v. Mallan*, 37 Minn. 404, 34 N. W. 901; *Tarbox v. Gorman*, 31 Minn. 62, 16 N. W. 466, and *First Nat. Bank v. Loyhed*, 28 Minn. 396, 10 N. W. 421. But the cases so cited were each based upon a statute so providing, viz., that in actions on promissory notes or bills

of exchange by the indorsee, the possession of the note or bill is prima facie evidence that the same was indorsed by the person by whom it purports to be indorsed.

The supreme court of Colorado, by Teller, J., considering the rule aforesaid and the cases cited to sustain the contention that under it proof of the payee's indorsement of an instrument is not required, says in the recent case of Marks v. Munson, supra: "The language of these cases, when applied to the facts thereof, clearly means only that an instrument in fact executed as a note, bearing a genuine indorsement, when offered in evidence by an indorsee, if indorsed in blank, makes a prima facie case of ownership." And further: "There is no presumption that the names on the note were written by or under the authority of the persons whose signatures they purport to be."

So it was held that in a suit against the maker of a note by one claiming as an indorsee, when the execution and indorsement are put in issue by the answer, such note is not admissible in evidence without proof of the signatures.

The rule that a presumption of title arises from the fact of possession of a note payable to order and indorsed in blank is found stated in Randolph on Commercial Paper, 2d ed. § 776. Yet in a preceding section (774) it is said that an indorsee, in an action against maker or acceptor, must prove the indorsements under which he holds, and that, where the indorsement is made by an agent, both his signature and authority must be proved. Evidently the former rule, as stated, was not supposed to be inconsistent with the latter. The rule as to presumption from possession, at least where the indorsement of an instrument to order is denied, we find stated consistently with the rule as to proving the indorsement in James v. Chalmers, 6 N. Y. 209, 214. There the court said that the long-established and well-settled rule was that where a plaintiff introduces and proves a

negotiable promissory note, payable to a third person or bearer, or, if to the order of such person, by proving his indorsement thereof, the plaintiff is prima facie not only to be deemed the lawful owner of the note, but that it came to him in the regular course of business before maturity. In Way v. Richardson, 3 Gray, 412, 63 Am. Dec. 760, an action against the maker on a note indorsed in blank, Shaw, Ch. J., said: "The genuineness of the signature and indorsements was admitted. This, with the production of the note, was prima facie evidence of title, and good, unless rebutted."

And we think it clear that the rule as generally stated means, as to an instrument indorsed in blank, one actually so indorsed by the payee, or the special indorsee, as the case may be.

We are not now considering the manner of proving an indorsement, or what would be sufficient evidence thereof aside from the fact of possession, but the necessity for such proof. Although there are some decisions apparently to the contrary, we believe it to be well settled by the great weight of authority that an indorsement necessary to the title of one bringing suit upon a negotiable instrument must be

proved to authorize the presumption of ownership from the fact of possession,

when the indorsement is put in issue by the pleadings, and in the absence of a statute providing otherwise. Story, Bills (Bennett's ed.) § 262; Edwards, Bills & Notes, 683; 2 Greenl. Ev. (Redfield's ed.) §§ 163-168; Byles, Bills, 425; 3 Phillips, Ev. (Cowen & Hill's Notes) 189; Abbott's Proof of Facts, 3d ed. 775; Smith v. Chester, 1 T. R. 654, 99 Eng. Reprint, 1308, 1 Revised Rep. 345; Robinson v. Yarrow, 7 Taunt. 456, 129 Eng. Reprint, 183, 1 J. B. Moore, 150, 18 Revised Rep. 537; Beeman v. Duck, 11 Mees. & W. 251, 152 Eng. Reprint, 796, 12 L. J. Exch. N. S. 198, 4 Eng. Rul. Cas. 622; Jacobs v. Tarleton, 11 Q. B.

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421, 116 Eng. Reprint, 534, 17 L. J. Q. B. N. S. 194, 12 Jur. 517; Marston v. Allen, 8 Mees. & W. 494, 151 Eng. Reprint, 1134, 1 Dowl. N. S. 442, 11 L. J. Exch. N. S. 122; Lloyd v. Howard, 15 Q. B. 995, 117 Eng. Reprint, 735, 20 L. J. Q. B. N. S. 1, 15 Jur. 218; Harrop v. Fisher, 10 C. B. N. S. 196, 142 Eng. Reprint, 426, 30 L. J. C. P. N. S. 283, 7 Jur. N. S. 1058, 9 Week. Rep. 667, 4 Eng. Rul. Cas. 338; Spicer v. Smith, 23 Mich. 96; St. Johns Table Co. v. Brown, 126 Mich. 592, 85 N. W. 1124; Canal Bank v. Bank of Albany, 1 Hill, 287; Newton v. Principaal, 82 Mich. 271, 46 N. W. 234; M'Cormick v. Trotter, 10 Serg. & R. 94; Wallace v. Reed, 70 Ind. 263; Anniston Pipe Works v. Mary Pratt Furnace Co. 94 Ala. 606, 10 So. 259; Jefferson County Sav. Bank v. Interstate Sav. Bank, 5 Ala. App. 363, 59 So. 348; Hugumin & Co. v. Hinds, 97 Mo. App. 346, 71 S. W. 479; Wade v. Boone, 184 Mo. App. 88, 168 S. W. 360; Scotland County Nat. Bank v. Hohn, 146 Mo. App. 699, 125 S. W. 539; Claffy v. Farrow, 44 N. Y. S. R. 789, 18 N. Y. Supp. 160; Church v. Church, 80 Vt. 228, 67 Atl. 549; Boles v. Harding, 201 Mass. 103, 87 N. E. 481; Whid-don v. Sprague, 203 Mass. 526, 89 N. E. 917; Smith v. Bryan, 33 N. C. (11 Ired. L.) 418; Blum v. Sallis, 24 La. Ann. 118; Andrews v. Powers, 35 Wis. 644; Swanby v. Northern State Bank, 150 Wis. 572, 137 N. W. 763; Clason v. Parrish, 93 Va. 24, 24 S. E. 471; Baker v. Warner, 16 S. D. 292, 92 N. W. 393; Vickery v. Burton, 6 N. D. 245, 69 N. W. 193.

In Story on Bills, in the section cited, it is said that there is no implied admission on the part of the acceptor of the genuineness of the signature of the payee, or of any other indorser, and consequently the holder, in order to recover of the acceptor, must establish by proof the genuineness of such signatures, to show title to the bill, although he need not prove the signature of the drawer. In Byles on Bills, supra, it is also said that the indorsement must be proved, if the action be against a maker or acceptor by an

indorsee. The doctrine is stated in Greenleaf on Evidence, vol. 2, § 163 as follows: "Where the action is between the immediate parties to the contract, as payee and maker of a note, or payee and acceptor of a bill, the plaintiff, ordinarily, has only to produce the instrument and prove the signature. But where the plaintiff was not an original party to the contract, but has derived his title by means of some intermediate transfer, the steps of this transfer become, to some extent, material to be proved."

And in § 166: "The plaintiff is not bound to allege, nor of course to prove, any indorsements but such as are necessary to convey the title to himself. All others may, therefore, be stricken out."

And in Phillips on Evidence, above cited, it is said: "The indorsement is to be proved in the ordinary mode, like other handwriting. . . . It must appear that the indorsement was made by the person by whom it purports to have been made."

In Smith v. Chester, 1 T. R. 654, 99 Eng. Reprint, 1303, it was held that, in an action by an indorsee of a bill of exchange against the acceptor, it is necessary to prove the handwriting of the first indorser, notwithstanding that such indorsement was on the bill when it was accepted. Answering the contention that, as the indorsement was on the bill at the time of the acceptance, it must be taken to have been admitted by the drawee, and that he could not afterwards dispute it, Ashhurst, J., said: "The law has been otherwise settled. And if it were not so, there would be no difference in this respect between bills payable to order, and those payable to bearer. And it would open a door to great fraud."

And Buller, J., said: "This point was much considered in a late case before this court, when they were perfectly clear that an indorsee of a bill of exchange, in an action against the acceptor, was obliged to prove the handwriting of the first indorser. For when a bill is presented for

acceptance, the acceptor only looks to the handwriting of the drawer, which he is afterwards precluded from disputing; and it is on that account that an acceptor is liable, even though the bill be forged."

In the Michigan case of *Spicer v. Smith*, in which the opinion was delivered by Graves, J., and concurred in by the other eminent justices of the court, Justices Cooley, Campbell, and Christiancy, it was held, in a suit brought by an indorsee against the maker of a promissory note payable to order and having indorsed upon it the name of the payee by one as agent, that it was incumbent on the plaintiff, aside from the execution of the note, to prove that the indorsement was made by the one signing as agent and that he had authority to make it. In the Wisconsin case of *Swanby v. Northern State Bank*, 150 Wis. 572, 187 N. W. 763, Chief Justice Winslow, delivering the opinion of the court, said that mere naked possession of negotiable paper payable to order does not prove title.

The rule as to proving an indorsement as well as the execution of a negotiable instrument has been modified or changed by statute in Minnesota, as above shown, and perhaps in other states by a statute to the same effect; and it has been modified in several states by statutory provision making proof of execution or indorsement unnecessary unless the same is denied under oath. Under our Code of Civil Procedure every pleading of fact must be verified by the affidavit of the party, his agent, or attorney, except in certain cases not here material. Comp. Stat. 1910, §§ 4422-4430. The answer in this case was verified as required by statute. Under the former Code, displaced by the one now in force, such verification was not required; but it was provided that, in all actions, allegations of the execution of written instruments and indorsements thereon shall be taken as true, unless the denial of the same be verified by the affidavit of the party, his agent, or

attorney. Comp. Laws 1876, p. 46, chap. 3, § 103. That provision was omitted from the present Code, which requires verification in all cases, with the immaterial exceptions aforesaid, and obviously because of such requirement. Under the former Code the question might arise as to the effect of an unverified pleading denying the execution or indorsement of a negotiable instrument, and, though otherwise good as a pleading, such unverified denial would be, and was in practice, disregarded. And it will be found that many of the cases holding proof of execution or indorsement to be unnecessary are based upon a statutory provision to that effect, where the pleading containing a denial of such matter is not properly verified. See *Whiddon v. Sprague*, 203 Mass. 526, 89 N. E. 917; *First Nat. Bank v. Smith*, — Tex. Civ. App. —, 183 S. W. 862; *O'Rear v. American Trust & Sav. Bank*, 195 Ala. 277, 71 So. 105.

Thus far, with respect to the contention that plaintiff's possession and production of the certificate in court were alone sufficient to entitle it to recover, we have considered the meaning and effect of the principle aforesaid that possession of a negotiable instrument indorsed in blank is *prima facie* evidence of title. But the contention is also based upon § 3217, Compiled Statutes of 1910, a section of the Negotiable Instruments Law, the uniform law on that subject adopted in this state. The part of the section relied on reads as follows: "Every holder is deemed *prima facie* to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course."

It is argued with reference to that section of the statutes that the plaintiff, being the holder of the certificate, is to be deemed a holder in due course until it is shown by proper evidence that the title of the

person who negotiated the instrument was defective, and that the attack upon the indorsement to the plaintiff bank in the answer is not itself sufficient to overcome the presumption. The fault with this argument is that it fails to distinguish between mere possession and the legal term "holder," and misconceives the purpose and intent of the provision referred to, which is to state the presumption in favor of one who is in fact the holder that he is a holder in due course, but that the burden of proving that he acquired such title in due course will be upon him when the title of any person who has negotiated the instrument was defective. The section does not declare that one in possession is to be deemed a holder in due course, though it is true that he may come within the terms of the section if in fact the holder. The term "holder," as used in the section and throughout the act, unless otherwise shown by the context, is defined by that act as meaning "the payee or indorsee of a bill or note, who is in possession, or the bearer thereof." The same law defines "bearer" as meaning "the person in possession of a bill or note which is payable to bearer." Comp. Stat. 1910, § 3349. Hence one in possession may be the holder, and he is the holder of an instrument payable to bearer, either on its face or by the indorsement in blank of the person to whose order it has been made payable. The instrument is then transferable by mere delivery so as to pass the legal title. But if not payable to bearer, then the "holder" can only be the payee or indorsee who is in possession. *Swanby v. Northern State Bank*, supra. The concluding words, "or the bearer thereof," in the above definition of "holder," evidently refer to one who is in possession of an instrument payable to bearer; that is, the "bearer," as defined by law. Unless an instrument payable to the order of a person named is indorsed by the payee in blank, it does not become payable to bearer, and therefore mere possession by one

other than the payee will not constitute him the holder, as that term is defined by the statute and usually understood.

Whether or not the plaintiff, if it became the holder, was a holder in due course, is not the question in this case; for, if the plaintiff is the holder, then it would be deemed a holder in due course, since no evidence was introduced to rebut that fact, or to throw the burden of proving it upon the plaintiff. But the question is whether it has been shown that the plaintiff was the holder, or, to be exact, whether the fact of possession, and that the plaintiff paid money for the instrument to someone not named in the evidence, is sufficient to show its title and right to recover. And we find nothing in the Negotiable Instruments Law making ^{—statutory provision—} ~~effect.~~

the mere fact of possession evidence of title to negotiable paper payable to order, or evidence that it was indorsed by the payee in blank or otherwise, or dispensing with proof of such indorsement, if denied, and the indorsement be relied on to show title, or is necessary for that purpose. On the contrary, that law provides (Comp. Stat. 1910, § 3188) that an instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof, and that if payable to order it is negotiated by the indorsement of the holder completed by delivery; and the "holder" for the purpose of such indorsement and delivery, as manifestly intended by this provision, having reference to the definition of "holder" by the same statute, is the payee or indorsee in possession of the instrument. This clearly means an actual indorsement by the one to whose order the instrument has been made payable, or by his authority, a fact to be established by proof when it is put in issue, in the absence of a statutory provision making such proof unnecessary.

However, it is well settled that a negotiable instrument payable to or-

der may be transferred by the payee or holder without indorsement, though in such case the transferee takes only the title and right of the one so transferring it, and does not become the holder in due course, but has only the equitable instead of the legal title. 1 Dan. Neg. Inst. § 741; First Nat. Bank v. Moore, 70 C. C. A. 89, 137 Fed. 505; Moore v. Miller, 6 Or. 254, 25 Am. Rep. 518. And this principle is recognized by the Negotiable Instruments Law. Comp. Stat. 1910, § 3207. Therefore, if the plaintiff had shown a transfer of the certificate to it by the payee, although without indorsement, it would have been entitled to recover, in the absence of evidence showing a good defense as against the payee, or that would otherwise interfere with such recovery. But mere possession is insufficient to show such a transfer. 1 Dan. Neg. Inst. § 741; 2 Randolph, Com. Paper, § 791; Caldwell v. Meshew, 44 Ark. 564; School Dist. v. Reeve, 56 Ark. 68, 19 S. W. 106; Porter v. Cushman, 19 Ill. 572; Redmond v. Stansbury, 24 Mich. 445; Bausman v. Kelley, 38 Minn. 197, 8 Am. St. Rep. 661, 36 N. W. 333; Beard v. First Nat. Bank, 39 Minn. 546, 40 N. W. 842; Red River Valley Invest. Co. v. Cole, 62 Minn. 457, 64 N. W. 1149; Vastine v. Wilding, 45 Mo. 89, 100 Am. Dec. 347; Jolly v. Huebler, 132 Mo. App. 675, 112 S. W. 1013; Turner v. Mitchell, 22 Ky. L. Rep. 1784, 61 S. W. 468; Frankenstein v. Levini, 65 N. Y. Supp. 562; Shepard v. Hanson, 9 N. D. 249, 83 N. W. 20; Baker v. Warner, 16 S. D. 292, 92 N. W. 393; Swanby v. Northern State Bank, 150 Wis. 572, 137 N. W. 763; Witt v. Campbell-Lakin Segar Co. 66 Or. 144, 134 Pac. 316; Crisman v. Swisher, 28 N. J. L. 149. In the section of Daniel on Negotiable Instruments above cited it is said: "Where a bill or note payable 'to order' is transferred without indorsement, the transferee does not acquire the legal, but only the equitable, title. The holder under such

-transfer without indorsement.

a transfer must aver and prove the assignment, for the mere possession of the instrument undorsed is not evidence of ownership, and its exhibition in a suit not sufficient ground of recovery."

We are aware that there is a direct conflict in the decisions on the question of the sufficiency of mere possession to show equitable ownership, so as to authorize a recovery against the maker by one other than the payee or special indorsee. The view is maintained in a few jurisdictions that possession is alone sufficient for that purpose, unless the presumption of ownership therefrom is rebutted by proof. It is so held in North Carolina, while conceding that the mere introduction of a note in evidence does not prove the payee's indorsement. *Tyson v. Joyner*, 139 N. C. 69, 51 S. E. 803; *Johnson County Sav. Bank v. Scroggin Drug Co.* 152 N. C. 142, 50 L.R.A. (N.S.) 581, 136 Am. St. Rep. 821, 67 S. E. 253.

But the clear weight of authority, and the better reasoning, in our opinion, sustain the rule that mere possession of such an instrument undorsed is not sufficient or prima facie evidence of even the equitable title. See note in 50 L.R.A. (N.S.) 581-591. We agree with the remark of the court in *Swanby v. Northern State Bank*, 150 Wis. 572, 137 N. W. 763, that such possession "does not prove or tend to prove" the transfer of a note payable to order and not shown to have been indorsed by the payee. The fact necessary to the equitable title, in such case, is a transfer by the payee or the person to whose order the instrument has been made payable. Such proof is generally, at least, within the power of the person seeking to recover upon the instrument, if it has been so transferred, while the other party might be wholly without knowledge or information concerning the matter. The presumption of delivery from possession is proper and reasonable where the instrument is payable to

-necessity of transfer by payee.

bearer; but we see no good reason for giving effect to such presumption where the instrument is payable to order and not indorsed, so as to overcome the usual and primary presumption, in such case, that the instrument remains the property of

the person to whose order it is made payable.

Holding, therefore, that the proof was insufficient to entitle the plaintiff to recover, the judgment will be affirmed.

Beard, J., concurs.

ANNOTATION.

Production of paper purporting to be indorsed in blank by payee or by a special indorsee, as prima facie evidence of plaintiff's title to the paper.

- I. Introduction, 952.
- II. Presumption where issue is raised as to indorsement:
 - a. Rule that indorsement must be proved, 954.
 - b. Rule that possession creates a prima facie presumption of ownership, 957.
- III. Presumption where indorsement is proved or admitted, 960.

I. Introduction.

The present note is confined to actions by holders through blank indorsements. The right of one whose name appears upon a negotiable instrument as an indorsee to sue thereon, and the presumptions that arise in such a situation, have not been generally considered herein. Nor has the right of one whose name appears as indorser been considered. For example, the presumption which arises upon an action by the payee who has transferred the note and again come into possession thereof is not considered.

The discussion in the reported case (*CAPITOL HILL STATE BANK v. RAWLINS NAT. BANK*, ante, 937) contains a very clear and accurate statement of the presumptions as to ownership that arise from the possession by the plaintiff in an action thereon, of commercial paper payable to order and indorsed in blank by the payee or a special indorsee.

Before discussing the cases bearing upon this question, other cases in which no issue was raised as to the genuineness of the indorsement should be noted. Unless there is a denial in due form, so that there is an issue as to the genuineness of an indorse-

ment, proof of its genuineness is, of course, not necessary. *Solomon v. Brodie* (1897) 10 Colo. App. 353, 50 Pac. 1045; *Grier v. Gibson* (1864) 36 Ill. 521; *Astry v. Fox River Distilling Co.* (1913) 182 Ill. App. 339; *W. A. Fowler Paper Co. v. Bert Jones Sales Book Co.* (1913) 183 Ill. App. 310; *Stouffer v. Stoy* (1910) 46 Ind. App. 180, 91 N. E. 250; *Lobdell v. Merchants' & Mfrs. Bank* (1876) 33 Mich. 408 (action against maker and indorsers); *Howry v. Eppinger* (1876) 34 Mich. 29 (action against maker and indorser); *Tucker v. Sherman* (1906) 29 Ohio C. C. R. 368; *Rosenfield v. Rosenthal* (1897) — Tex. Civ. App. —, 39 S. W. 193 (action against indorser whose signature was in question).

Statutes and rules of court dispensing with proof of an indorsement unless its genuineness is denied in some special manner, usually under oath, have quite generally been adopted. It is a general principle, announced in many cases governed by such statutes or rules of court, that unless the genuineness of an indorsement is denied, as required by statute, its genuineness will be presumed.

United States. — *Mills v. Bank of United States* (1826) 11 Wheat. 431, 6 L. ed. 512.

Alabama. — *Beal v. Snedecor* (1839) 8 Port. 525; *Jennings v. Cummings* (1839) 9 Port. 309; *Tarver v. Nance* (1843) 5 Ala. 712; *Bancroft v. Paine* (1849) 15 Ala. 834 (holding that a plea not verified as required by statute was bad); *Deshler v. Guy* (1848) 5 Ala. 186; *Bragg v. Nall* (1848) 14 Ala. 619; *Savage v. Walshe* (1855) 26 Ala. 619;

O'Rear v. American Trust & Sav. Bank (1916) 195 Ala. 277, 71 So. 105.

Georgia. — **Habersham v. Lehman** (1879) 63 Ga. 380; **Tyson v. Bray** (1903) 117 Ga. 689, 45 S. E. 74; **Neal v. Gray** (1905) 124 Ga. 510, 52 S. E. 622; **Sheffield v. Johnson County Sav. Bank** (1907) 2 Ga. App. 221, 58 S. E. 386; **South & Lane v. People's Nat. Bank** (1908) 4 Ga. App. 92, 60 S. E. 1087; **Cedar Rapids Nat. Bank v. Beckham** (1909) 6 Ga. App. 571, 65 S. E. 359; **Gray v. Oglesby** (1911) 9 Ga. App. 356, 71 S. E. 605; **Harper v. Peoples** (1912) 11 Ga. App. 161, 74 S. E. 1008; **Kirby v. Johnson County Sav. Bank** (1913) 12 Ga. App. 157, 76 S. E. 996.

Illinois.—**Clarke v. Newton** (1908) 235 Ill. 530, 85 N. E. 747.

Kansas.—**Eggan v. Briggs** (1880) 23 Kan. 710.

Massachusetts. — **Whiddon v. Sprague** (1909) 203 Mass. 526, 89 N. E. 917.

Mississippi. — **Kendrick v. Kyle** (1900) 78 Miss. 278, 28 So. 951; **Hibernia Bank & T. Co. v. Smith** (1906) 89 Miss. 298, 42 So. 345 (counsel states that note was payable to bearer. Court makes no reference to this fact).

Ohio. — **McMurtry v. Campbell** (1824) 1 Ohio, 262 (sealed bill).

Oklahoma. — **Commonwealth Nat. Bank v. Baughman** (1910) 27 Okla. 175, 111 Pac. 332.

Pennsylvania.—**Grange Trust Co. v. Brown** (1912) 49 Pa. Super. Ct. 274.

Texas.—**First Nat. Bank v. Smith** (1916) — Tex. Civ. App. —, 183 S. W. 862.

No proof is necessary where the genuineness of the indorsement is not denied, although the payee has indorsed through an agent, a fact which appears in the form of indorsement. **Habersham v. Lehman** (1879) 63 Ga. 380; **Neal v. Gray** (1905) 124 Ga. 510, 52 S. E. 622. It has been held that no proof of genuineness need be made when there is no denial of the indorsement, even though the indorsement is that of a corporation, and does not show by whom made, nor contain the corporate seal. **Sheffield v. Johnson County Sav. Bank** (1907) 2 Ga. App. 221, 58 S. E. 386. That proof of a cor-

porate indorsement need not be made, although not accompanied by the corporate seal, is held in **Cedar Rapids Nat. Bank v. Beckham** (1909) 6 Ga. App. 571, 65 S. E. 359, and **Kirby v. Johnson County Sav. Bank** (1913) 12 Ga. App. 157, 76 S. E. 996.

A statute which declares that "an indorsement or assignment of any bill, bond, or note, when the same is sued on by the indorsee, need not be proved unless denied on oath," dispenses with the proof of the indorsement, whether the action be against the indorser upon the indorsement itself, or against the maker upon the note. **Habersham v. Lehman** (1879) 63 Ga. 380 (action by indorsee against the maker).

A statement in the answer of defendant that the notes sued upon "were received by the plaintiffs . . . as the agent and attorney in fact of the payees" dispenses with proof of the genuineness of the payees' signatures. **Moore v. Polk** (1872) 24 La. Ann. 216.

In **Thatcher v. West River Nat. Bank** (1869) 19 Mich. 196, in an action upon a note a copy of which, with the indorsement thereon, accompanied the declaration, upon a plea of the general issue, it was held that the plaintiff need not prove the indorsement, where the note and indorsement were read in evidence without objection, and no evidence was given tending to disprove the indorsement. But compare with **Spicer v. Smith** (1871) 23 Mich. 96, *infra*, II. a.

In **First Nat. Bank v. Stam** (1914) 186 Mo. App. 439, 171 S. W. 567, an action by an indorsee upon a note payable to one of the makers and indorsed by it, in which the maker who indorsed the note defaulted, one of the other defendants objected to a recovery because of an alleged absence of proof of the indorsement. In answer to this objection, the court states that the uncontradicted and unchallenged testimony showed "that plaintiff purchased the note, was the owner thereof, and the payee, whose name appeared thereon as having indorsed it, was a party defendant, who, by his default, admitted plaintiff's ownership."

In **Gerding v. Welch** (1898) 30 App.

Div. 623, 51 N. Y. Supp. 1064, an action on a note which had been indorsed by the payee, it is stated that the production by the plaintiff of the note bearing an indorsement in blank is sufficient to raise the presumption that the plaintiff was the owner thereof, and entitled to recover the full amount against the maker. The state of the pleading does not appear. It was further held, in this case, that the defendant had rebutted the presumption, so that there was judgment for the defendant. That possession of the note is not evidence of a transfer and delivery by a lawful holder to the plaintiff is held in *Chadwick v. Booth* (1861) 13 Abb. Pr. (N. Y.) 249, where an issue was raised as to the ownership.

II. Presumption where issue is raised as to indorsement.

a. Rule that indorsement must be proved.

In the reported case (*CAPITOL HILL STATE BANK v. RAWLINS NAT. BANK*, ante, 937), the alleged indorsement and delivery by the payee, as well as the alleged ownership of the plaintiff, were denied. In this situation, the court holds, and this decision is almost uniformly supported by the authorities, that the genuineness of the indorsement must be proved. In brief, where an issue is raised as to the genuineness of an indorsement by a denial thereof, it is necessary for the plaintiff to prove the indorsement.

United States.—*Stroud v. Harrington* (1831) Hempst. 117, Fed. Cas. No. 13,546a.

Alabama.—*Slaughter v. First Nat. Bank of Montgomery* (1895) 109 Ala. 157, 19 So. 430; *Peevey v. Tapley* (1906) 148 Ala. 320, 42 So. 561; *Jefferson County Sav. Bank v. Interstate Sav. Bank* (1912) 5 Ala. App. 363, 59 So. 349.

California. — *Grogan v. Ruckle* (1850) 1 Cal. 158, affirmed on reargument in (1850) 1 Cal. 193; *Mahe v. Reynolds* (1869) 38 Cal. 560; *Mair v. Forbes* (1889) 3 Cal. Unrep. 81, 21 Pac. 552; *Nakagawa v. Okamoto* (1918) 164 Cal. 718, 130 Pac. 707; *Curran v. Wilson* (1918) 36 Cal. App. 208, 171 Pac. 817.

Colorado.—*Marks v. Munson* (1915) 59 Colo. 440, 149 Pac. 440, Ann. Cas. 1917A, 766, overruling contrary statements in *Gumaer v. Sowers* (1908) 31 Colo. 164, 71 Pac. 1108, and *Pendleton v. Smisaert* (1892) 1 Colo. App. 508, 29 Pac. 521.

Illinois.—*Hall v. Freeman* (1871) 59 Ill. 55; *Johnston v. Loar* (1908) 145 Ill. App. 448; *Pierik v. Mueller* (1915) 201 Ill. App. 108; *Nokomis Nat. Bank v. Hendricks* (1917) 205 Ill. App. 54.

Kansas.—*State Sav. Asso. v. Barber* (1886) 35 Kan. 488, 11 Pac. 330; *James v. Blackman* (1904) 68 Kan. 723, 75 Pac. 1017.

Kentucky. — *Chaney v. City Bank* (1884) 6 Ky. L. Rep. 215 (abstract); *Holton v. Alley* (1893) 15 Ky. L. Rep. 529, 24 S. W. 113.

Louisiana.—*Nott v. Brander* (1840) 14 La. 368; *Lambeth v. Rivarde* (1840) 16 La. 572.

Massachusetts. — *Dana v. Underwood* (1837) 19 Pick. 99; *Estabrook v. Boyle* (1861) 81 Allen, 412; *Boles v. Harding* (1909) 201 Mass. 103, 87 N. E. 481.

Missouri.—*Reinhard v. Dorsey Coal Co.* (1887) 25 Mo. App. 350; *Mayer v. Old* (1892) 51 Mo. App. 214; *Worrell v. Roberts* (1894) 58 Mo. App. 197; *Robinson v. Powers* (1895) 63 Mo. App. 290; *Federal Discount Co. v. Becker* (1909) 138 Mo. App. 54, 119 S. W. 981 (indorsement by rubber stamp); *Nance v. Hayward* (1914) 183 Mo. App. 217, 170 S. W. 429; *Wade v. Boone* (1914) 184 Mo. App. 88, 163 S. W. 360.

Nebraska. — *Schroeder v. Nielson* (1894) 39 Neb. 335, 57 N. W. 998; *Payne v. Liebee* (1902) 3 Neb. (Unof.) 448, 91 N. W. 851.

New Hampshire.—*Blodgett v. Jackson* (1859) 40 N. H. 21.

New York. — *Ensign v. Hooker* (1896) 16 Misc. 492, 38 N. Y. Supp. 968; *Claffy v. Farrow* (1892) 44 N. Y. S. R. 789, 18 N. Y. Supp. 160; *Congress Tucking Co. v. Alton Dress & Waist Co.* (1915) 154 N. Y. Supp. 156.

North Dakota.—*Vickery v. Burton* (1896) 6 N. D. 245, 69 N. W. 193 (the note sued on was payable to "Pulaski J. S." and was indorsed "P. J. S." but

this variance is not the sole ground of the decision that payee's indorsement must be proved); *Commercial Secur. Co. v. Jack* (1914) 29 N. D. 67, 150 N. W. 460.

Oklahoma. — *Lambert v. Harrison* (1918) — Okla. —, 171 Pac. 45 (non-negotiable instrument):

Pennsylvania. — *M'Cormick v. Trotter* (1823) 10 Serg. & R. 96.

South Dakota. — *Baker v. Warner* (1902) 16 S. D. 292, 92 N. W. 393 (dispute was whether the genuineness of the indorsement was in issue).

Canada. — *Hamilton v. Isaacson* (1912) — Alberta, —, 21 West. L. R. 333, 5 D. L. R. 114.

See *Shonkwiler v. Dunavin* (1891) 1 Ind. App. 505, 27 N. E. 991, and *Wallace v. Reed* (1880) 70 Ind. 263, *infra*, II. b.

At least, the indorsement must be proved before the plaintiff can claim as a bona fide holder free of defenses good as against the payee. *Tyson v. Joyner* (1905) 139 N. C. 69, 51 S. E. 803; *Mayers v. McRimmon* (1906) 140 N. C. 640, 111 Am. St. Rep. 879, 53 S. E. 447; *Myers v. Petty* (1910) 153 N. C. 462, 69 S. E. 417; *Woods v. Finley* (1910) 153 N. C. 497, 69 S. E. 502; *Park v. Exum* (1911) 156 N. C. 228, 72 S. E. 809; *J. L. Smathers & Co. v. Toxaway Hotel Co.* (1914) 167 N. C. 469, 83 S. E. 844; *Gault v. Kane* (1915) 44 Okla. 763, 145 Pac. 1128.

It is held in some cases, without stating whether there was an issue raised, that the indorsee of a bill or note cannot maintain an action against the acceptor, drawer, or maker, without proving the indorsement. *Blakeley v. Grant* (1810) 6 Mass. 385 (general issue was pleaded); *Peaslee v. Robbins* (1841) 3 Met. (Mass.) 164 (pleadings do not appear); *Smith v. Bryan* (1850) 33 N. C. (11 Ired. L.) 418 (plea was nonassumpsit); *Church v. Church* (1907) 80 Vt. 228, 67 Atl. 549 (general issue pleaded); *Clark v. Cropper* (1833) Hempst. 213, Fed. Cas. No. 2,817a. Upon a plea of nonassumpsit in an action by an indorsee against the drawer of a bill of exchange, the plaintiff was held under obligation to prove the indorsement, in *Duncan v. Scott* (1807) 1 Campb. (Eng.) 100. It

has been stated that, "where there is no proof of the genuineness of the alleged indorsement of a note made payable to order, proof of the mere possession of the note is not sufficient to support the claim of ownership." *Witt v. Campbell-Lakin Segar Co.* (1913) 66 Or. 144, 134 Pac. 316. In *Bush v. Ellsworth* (1838) 6 Ohio, 168, the court was divided in opinion as to whether, in an action in assumpsit by the indorsee against the maker of a note upon the plea of nonassumpsit without affidavit, the plaintiff was bound to prove the indorsement of the note. That an indorsee must prove the handwriting of the indorser in an action against the acceptor of a bill of exchange is held in *Smith v. Chester* (1787) 1 T. R. 654, 99 Eng. Reprint, 1303, 1 Revised Rep. 345. It seems that, in all such cases, it was considered that an issue as to the indorsement was raised.

The specific proof that must be introduced has not received much consideration. Some cases state that the "execution" of the indorsement must be proved. *Slaughter v. First Nat. Bank* (1895) 109 Ala. 157, 19 So. 430; *Peevey v. Tapley* (1906) 148 Ala. 320, 42 So. 561. The plaintiff must "prove the indorsement." *Stroud v. Harrington* (1831) Hempst. 117, Fed. Cas. No. 13,546a; *Lambeth v. Rivaude* (1840) 16 La. 572. It must be proved that the note was duly and properly assigned. *Nokomis Nat. Bank v. Hendricks* (1917) 205 Ill. App. 54. Other cases state that the "genuineness" of the indorsement must be proved. *Mahe v. Reynolds* (1869) 38 Cal. 560; *Worrell v. Roberts* (1894) 58 Mo. App. 197. Other cases, that there must be proof of the signature. *Marks v. Munson* (1915) 59 Colo. 440, 149 Pac. 440, Ann. Cas. 1917A, 766.

The production of the note with an indorsement thereon purporting to be that of the payee does not make a prima facie case of title in the plaintiff. *Marks v. Munson* (Colo.) *supra*, overruling *Gumaer v. Sowers* (1903) 81 Colo. 164, 71 Pac. 1103; *Holton v. Alley* (1893) 15 Ky. L. Rep. 529, 24 S. W. 113.

It has been held, however, that if

the note with the indorsement is introduced in evidence without objection by the defendant, the failure to object is a waiver of the right to insist upon proof of the indorsement brought into question by the plea. *Hancock v. Empire Cotton Oil Co.* (1915) 17 Ga. App. 170, 86 S. E. 434. This, however, is a question not within the scope of the note.

It has been held that, at common law, possession of indorsed notes did not dispense with proof of the indorsement. *Cass v. Northrop* (1831) 1 Stew. & P. (Ala.) 89. A statute dispensing with proof of the genuineness of an indorsement in a suit upon an assigned bond or other writing, unless the defendant deny the genuineness under oath, has been held not to apply where the defendant pleads indorsed notes as an offset; consequently, the defendant must prove the indorsements, although not denied by plaintiff under oath as required by the statute. *Ibid.*

The provision of the Negotiable Instruments Law that every holder is deemed prima facie a holder in due course is held to refer to a "holder" by a genuine indorsement. *Mayers v. McRimmon* (1906) 140 N. C. 640, 111 Am. St. Rep. 879, 53 S. E. 447. A statute containing a similar provision was similarly construed in *Vickery v. Burton* (1896) 6 N. D. 245, 69 N. W. 193.

In *Spicer v. Smith* (1871) 23 Mich. 96, an action in assumpsit in which the plaintiff declared upon the common counts, and set forth the copy of a note, with a notice that the original would be given in evidence upon the trial, in which the general issue was pleaded, it was held necessary for the plaintiff to prove the genuineness of the payee's indorsement. A rule of court which provided that, as against the alleged maker in a suit by the indorsee, payee, or holder of a note, plaintiff shall not be put to proof of the execution of the instrument unless it is denied on oath, was held not to apply to the proof of the payee's indorsement in an action against the maker. The court states that "while it is quite reasonable that a party prosecuted as the maker of a note

should be precluded from questioning its execution on the trial, unless he has before denied it upon oath, and while it is proper and just that one who has given currency to a note by his indorsement, and who is charged as such indorser, should be estopped from disputing the execution of the note so indorsed, it would be very unreasonable to make the failure of the maker to deny upon oath the independent contract of indorsement made by another, equivalent to an admission of the indorsee's title, and the rule in question is not open to such construction."

In *St. Johns Table Co. v. Brown* (1901) 126 Mich. 592, 85 N. W. 1124, where the defendants pleaded the general issue to an action upon a note, in which no indorsement of the note by the payee was set out or claimed in the declarations, or in the notice of what would be given in evidence, it was held incumbent upon the plaintiff to prove the indorsement.

In *Hardesty v. Newby* (1859) 28 Mo. 567, 75 Am. Dec. 137, it was held that a plaintiff who had purchased the note sued upon, after maturity, from an agent of the payee who indorsed it to the plaintiff, had the burden of proving the indorsement, and that the agent had authority to make it.

The state of the pleadings in *National Bank v. Pennington* (1890) 42 Mo. App. 355, is not shown, but apparently the ownership of the plaintiff was denied. In affirming a judgment against the plaintiff, the court states that "the testimony fails to show from whom plaintiff purchased the note. The proof should show that the purchase was made from the payee or his assignee. . . . The petition alleged that the note was indorsed by the payees and delivered to plaintiff. The testimony is silent as to this allegation. It should have been shown sufficiently to raise a prima facie case. . . . An indorsement purporting to be signed by the payee of the note was read with the note, but an indorsement or assignment itself, unsupported by evidence aliunde, is not sufficient."

In *Hugumin v. Hinds* (1902) 97 Mo. App. 346, 71 S. W. 479, an action upon

a note in which the defendant denied the allegations of the petition generally, except that the execution of a note was admitted, the court held it incumbent upon the plaintiff to prove the authenticity of the indorsement.

In a suit by the payee of a note made by a corporation and indorsed by members of the corporation, against the corporation and the indorser, it has been held necessary to prove that the indorsement was made by the individual who purported to indorse it. *Reedy Elevator Co. v. Silberstein & Silver* (1909) 114 N. Y. Supp. 785.

In a contest between the holder of a promissory note and the payee, who denies the genuineness of a purported indorsement thereon, the holder must prove the indorsement; title is not sustained by showing possession of the note. *Martin v. Drake* (1887) 18 Ohio L. J. 290.

Where, in an action on a promissory note, the plaintiff alleges an assignment, but does not allege a written assignment, he must prove the assignment where the answer denies the same, although such answer is unsworn. *Horner v. Amick* (1908) 64 W. Va. 172, 61 S. E. 40. A statute declaring that where a pleading alleges that any person may indorse or accept of any writing, no proof of writing shall be required unless the facts be denied by affidavit, was held not to apply where a written assignment is not alleged.

In *Poorman v. Mills* (1868) 35 Cal. 118, 95 Am. Dec. 90, where, in an action upon a certificate of deposit, the execution of the certificate was not denied, and it, together with the indorsement, was offered in evidence, without objection because of the fact that the indorsement was not proven, the court states that, had objection been made, proof of that fact would have been required.

The fact of the indorsement must be proved by a preponderance of the evidence. *Bank of Norwood v. Chapman* (1917) 19 Ga. App. 709, 92 S. E. 225; *Citizens & Southern Bank v. Blount* (1917) 20 Ga. App. 158, 92 S.

E. 758; *Stair v. Richardson* (1886) 108 Ind. 429, 9 N. E. 300.

Where the indorsement appears to have been made by one other than the payee, it has been held incumbent upon the plaintiff to prove authority to make it, where the indorsement and ownership are denied. *Bovard v. Dickenson* (1900) 131 Cal. 162, 63 Pac. 162.

There is no presumption of authority in an agent who assumes authority to indorse for the payee of a note, from the mere assumption of such authority. *Wade v. Boone* (1914) 184 Mo. App. 88, 168 S. W. 360.

A statute providing that when a suit is commenced, founded on any writing, the court shall receive such writing in evidence, and it shall not be lawful for the defendant to deny the execution of such writing unless it be by plea, supported by the affidavit of the party putting in such plea, was held not to apply in an action by an indorsee against the maker of the note, so that the indorsement of the note was governed by the common-law rule, and was put in issue by the plea of nonassumpsit, in *Stroud v. Harrington, Hempst.* 117, Fed. Cas. No. 13,546a.

b. Rule that possession creates a prima facie presumption of ownership.

Some cases apparently take the view that the production by the plaintiff of a note purporting to be indorsed by the payee is prima facie evidence of title in the plaintiff. These cases, except those decided under express statutes herein noted, are not, however, wholly satisfactory authority for the theory, especially in view of the fact that some of them were decided in jurisdictions in which the view discussed in II. a, is clearly adopted in other cases. In *Linder Hardware Co. v. Pacific Sugar Corp.* (1911) 17 Cal. App. 81, 118 Pac. 785, a note payable to a corporation was sent to the office of the corporation, apparently, by mail, and in a few days was received by the plaintiff through the mails. In an action upon the note, in which the assignment was expressly denied, the court states that possession of com-

mercial paper with indorsement makes a prima facie case of delivery by the indorser to the holder, and of ownership in the latter. A petition to have the cause heard in the supreme court was denied by that court, and from this denial there is a dissent, in which the view is taken that there was no evidence of the genuineness of the indorser's signature; hence that the indorsement was not proved. The lower court does not make it clear whether it regards the evidence, as above stated, as proof of the genuineness, or whether no such proof is regarded as necessary.

It has been stated, in cases in which the defendant expressly denied that the note was assigned to plaintiff, without any discussion, that the indorsement on the notes, coupled with plaintiff's possession, prima facie showed title and right of action in the plaintiff. In *Haas v. Commerce Trust Co.* (1915) 194 Ala. 672, 69 So. 894, notes which the defendants had indorsed for the accommodation of the maker were by the payee transferred. The action was against the defendant as indorser, and each count alleged that the notes were duly assigned to the plaintiff in writing. Among the defenses set up was one denying that the notes were assigned to plaintiff. The court states that "the indorsements on the notes, coupled with the plaintiff's possession of them at the time of suit, prima facie showed title and right of action in the plaintiff. The plea denying the plaintiff's ownership was without support in the evidence, and was properly ignored."

It is held in some courts that, although the indorsement is put in issue by a general denial, where the general denial is not verified, the plaintiff makes out his case by introducing the indorsement in evidence, without further proof of its execution. *Wallace v. Reed* (1880) 70 Ind. 263. In *Shonkwiler v. Dunavin* (1891) 1 Ind. App. 505, 27 N. E. 991, where there was a general denial, it was stated to be incumbent on the plaintiff "to prove the indorsement of the note sued on," as alleged in his complaint. Apparently all that is meant by the expression,

"to prove," is that it must be introduced in evidence, because the court concluded the opinion by stating: "It becomes our duty, therefore, to reverse the judgment, for the reason that it does not appear upon the record that the indorsement of the note sued on was introduced in evidence."

Other cases in which there was a denial of the plaintiff's ownership have been decided without requiring proof of the indorser's signature. In *Dawsey v. Kirven* (1919) 203 Ala. 446, 7 A.L.R. 1658, 83 So. 338, an action by the holder of a note indorsed in blank, against the makers, in which the defendants pleaded the general issue and a special sworn plea denying the plaintiff's ownership of the note, the court states that "the notes sued on were on their face negotiable paper, and were indorsed in blank by the payee, and plaintiff was shown by indisputable evidence to be the holder thereof for value. This, under a long line of decisions of this court, was sufficient to overcome the burden placed on the plaintiff by the sworn plea denying plaintiff's ownership thereof." The Colorado court in *Gumaer v. Sowers* (1903) 31 Colo. 164, 71 Pac. 1103, expressly states that the production of a note by the plaintiff with an indorsement thereon by one whose name is identical with that of the payee, and purporting to be the indorsement of the payee, is prima facie evidence of title in the holder; but in the subsequent case of *Marks v. Munson* (1915) 59 Colo. 440, 149 Pac. 440, Ann. Cas. 1917A, 766, the court, referring to this statement in the opinion in the *Gumaer Case*, says that the statements there made were due to an evident misapprehension of the authorities, and should be regarded as dicta merely. The court in the *Gumaer Case* further held that it was not necessary for the plaintiff to rely upon the indorsement at all, so that, as stated by the court in the subsequent case, the expression of opinion that the possession of the note by the plaintiff was prima facie evidence of his title was not necessary to the decision. The statements in accord with the *Gumaer Case* contained in *Pendle-*

ton v. Smissaert (1892) 1 Colo. App. 508, 29 Pac. 521, are characterized as dicta in Marks v. Munson, and, so far as the statements of the Pendleton Case sustain the theory that the possession of a note purporting to be indorsed by the payee is prima facie evidence of the holder's title, without proof of the genuineness of the indorsement, it is overruled by Marks v. Munson.

In some cases in which the plaintiff did not claim title to the note by indorsement alone, but alleged a purchase of the note, and supported the latter allegation by proof, it has been held that a recovery may be had without proof of the indorsement. In First Nat. Bank v. Sprout (1907) 78 Neb. 187, 110 N. W. 713, the plaintiff in an action on a promissory note set up the execution and delivery by the defendant of the note, payable to the order of the payee therein named, and alleged that thereafter, and before maturity, the plaintiff for value and in due course of trade purchased the said note of the payee, who then and there indorsed the same, and that the plaintiff was the owner and holder of the promissory note at the time of the action, and that the same was due and unpaid. The answer was a general denial. At the trial, the plaintiff produced the note, having it identified as an exhibit, and proved that he purchased the same and paid a valuable consideration therefor. In answer to the argument that the plaintiff was not entitled to recover, because of his failure to prove the indorsement, the court states: "Proof of the indorsement, however, under the allegations of the petition and the evidence of ownership, was not indispensable to the plaintiff's case. In Michigan Mut. L. Ins. Co. v. Klatt (1902) 2 Neb. (Unof.) 870, 90 N. W. 754, it was held that possession of a promissory note is prima facie evidence of its ownership. That action was one in equity for the foreclosure of a real estate mortgage, and the holding was in accord with the equitable rule; but it does not follow that, under the same statement of facts, an action at law could not be maintained against the

maker of the note. A parol transfer by the payee, without indorsement, of a check payable to order, accompanied by manual delivery, is valid. Freund v. Importers & T. Nat. Bank (1879) 76 N. Y. 352. A transferee of negotiable paper without indorsement may recover thereon by proving consideration. Farris v. Wells (1882) 68 Ga. 604. In Tullis v. Fridley (1864) 9 Minn. 79, Gil. 68, it was held that, where a promissory note payable to the husband is transferred by him directly to his wife without indorsement, the title thereto vests in her so far as the maker is concerned, although she paid no valuable consideration for such transfer. A person who has acquired the ownership and possession of a promissory note may bring suit thereon in his own name as the real party in interest, though no indorsement of the note has been made to him by the payee. Pearson v. Cummings (1869) 28 Iowa, 344. It will be observed from the allegations of the petition that the plaintiff does not claim title to the note in suit by indorsement alone, but alleges specifically that 'the plaintiff for value, in due course of trade, purchased said note.' This allegation of the petition, as we have already shown, is supported by proof of the details of the transaction. Under our Code, the plaintiff, as the real party in interest, is the only one entitled to maintain the action."

Some statutes provide that "the possession of the note or bill is prima facie evidence that the same was indorsed by the person by whom it purports to be indorsed." This statute governs corporate as well as individual indorsements. Huntley v. Hutchinson (1904) 91 Minn. 244, 97 N. W. 971. In the Huntley Case, the defendant expressly denied the indorsement in his answer. It was held in First Nat. Bank v. Loyhed (1881) 28 Minn. 396, 10 N. W. 421, that an indorsement which purports to have been made by the corporate payee of a note comes under this statute, so that possession of the note by the plaintiff is prima facie evidence that the indorsement was made by the corpo-

rate payee. The objection in this case, however, seems to have been that the indorsement was not made by an authorized agent of the corporation; but the court seems to treat the statute as covering both situations, that is, that the agent had authority to indorse, and that the indorsement was genuine. Under such a statute it has been held in an action upon a note given to a corporation which bears the indorsement of the corporate payee by its treasurer, and in which the defendants put in issue the indorsement of the note to the plaintiff, alleging that the payee named in the note was still the owner of it, that it was not necessary, in order to make a prima facie case for the plaintiff, to prove that the person named as treasurer was the treasurer of the corporation, or that he was authorized to make its indorsement. The note with the indorsement thereon was received in evidence without objection, and is stated to be prima facie evidence of the indorsement in blank by the payee, and of title in the plaintiff as indorsee. *Tarbox v. Gorman* (1883) 31 Minn. 62, 16 N. W. 466. In *National Bank v. Mallan* (1887) 37 Minn. 404, 34 N. W. 901, an action by an indorsee of corporate notes, each bearing the indorsement of the corporate payee, in which the answer alleged a want of consideration and denied that plaintiff was the purchaser for value before maturity, the notes with the indorsements thereon were held receivable in evidence, without proof that they were made by some officer or agent of the corporation having authority to make them. The court states that the notes "purport to be indorsed by the corporation, and plaintiff's possession of the notes establishes prima facie that the indorsements are its genuine indorsements, establishes prima facie the fact that they are in the genuine handwriting of some officer or person having authority to make them, for, without that fact, they were not made by the corporation." This statute was held to dispense with the proof of the genuineness of the signature of the payee of the checks; in an action by an indorsee against the drawer thereof,

in *Estes v. Lovering Shoe Co.* (1894) 59 Minn. 504, 50 Am. St. Rep. 424, 61 N. W. 674. It appeared in this case that the plaintiff in good faith received the checks from the payee, with his name already written upon the backs thereof, giving him in cash their full face value. The court states, apparently in consideration of the fact that the payee personally presented these checks with his name already written upon the back of each, and thus obtained the amount thereof from plaintiff, that it is of the opinion that a check comes within the purview of the statute above set out. Under this statute, the plaintiff makes out a prima facie case by the introduction of the note and the indorsement in evidence. *Thórson v. Sauby* (1897) 68 Minn. 166, 70 N. W. 1083. Such a statute does not change the burden of proof, but simply permits the holder to make a prima facie case in a way in which he could not have done before the statute was enacted. *Murphy v. Skinner* (1915) 160 Wis. 554, 152 N. W. 172, Ann. Cas. 1917A, 817.

III. Presumption where indorsement is proved or admitted.

Where the genuineness of an indorsement is either admitted or proved, the possession of paper so indorsed is prima facie evidence of title thereto.

United States. — *Swift v. Tyson* (1842) 16 Pet. 1, 10 L. ed. 865; *Collins v. Gilbert* (1877) 94 U. S. 753, 24 L. ed. 170; *Melton v. Pensacola Bank & T. Co.* (1911) 111 C. C. A. 166, 190 Fed. 126.

Alabama. — *Lake-side Land Co. v. Dromgoole* (1889) 89 Ala. 505, 7 So. 444; *Berney v. Steiner Bros.* (1895) 108 Ala. 111, 54 Am. St. Rep. 144, 19 So. 806.

California. — *Bank of California v. Mott Iron Works* (1896) 113 Cal. 409, 45 Pac. 674; *Hall v. Thurston* (1917) 176 Cal. 738, 171 Pac. 285.

Colorado. — *Wyman v. Colorado Nat. Bank* (1879) 5 Colo. 30, 40 Am. Rep. 183.

Georgia. — *Paris v. Moe* (1878) 60 Ga. 90.

Illinois. — *Gilham v. State Bank*

(1840) 8 Ill. 245, 35 Am. Dec. 105; Palmer v. Nassau Bank (1875) 78 Ill. 380; Breier v. Weier (1889) 38 Ill. App. 386; McClory v. Towne (1916) 202 Ill. App. 185.

Iowa.—Kelly v. Ford (1856) 4 Iowa, 140.

Kentucky. — McCarty v. Louisville Bkg. Co. (1896) 100 Ky. 4, 37 S. W. 144; Hargis v. Louisville Trust Co. (1895) 17 Ky. L. Rep. 218, 30 S. W. 877 (indorsed without recourse).

Louisiana. — Nicholas's Succession (1847) 2 La. Ann. 97.

Maine.—Metcalf v. Yeaton (1864) 51 Me. 198.

Maryland.—Whiteford v. Burckmyer (1843) 1 Gill, 127, 39 Am. Dec. 640, approved on subsequent appeal in (1847) 6 Gill, 1; Merrick v. Bank of Metropolis (1849) 8 Gill, 59; Ellicott v. Martin (1854) 6 Md. 516, 61 Am. Dec. 327; Kunkel v. Spooner (1856) 9 Md. 462; 66 Am. Dec. 332; Herrick v. Swomley (1881) 56 Md. 489.

Massachusetts.—Northampton Bank v. Pepoon (1814) 11 Mass. 288.

Mississippi. — Emanuel v. White (1857) 34 Miss. 56, 69 Am. Dec. 385.

Missouri. — Rubelman v. McNichol (1883) 13 Mo. App. 584; Baade v. Cramer (1919) 278 Mo. 516, 213 S. W. 121 (decided under Negotiable Instruments Act); Reinhard v. Dorsey Coal Co. (1887) 25 Mo. App. 350; Nance v. Hayward (1914) 183 Mo. App. 217, 170 S. W. 429 (decided under Negotiable Instruments Act); Chandler v. Hedrick (1915) 187 Mo. App. 664, 173 S. W. 93 (decided under Negotiable Instruments Law); Engles v. Williams (1918) — Mo. App. —, 203 S. W. 671.

New Hampshire. — Newmarket Sav. Bank v. Hanson (1893) 67 N. H. 501, 32 Atl. 774 (note payable to maker, and indorsed by him).

New York.—Bedell v. Carll (1865) 33 N. Y. 581; Martin v. Variety Mfg. Co. (1876) 1 N. Y. City Ct. Rep. 318; Ogilby v. Wallace (1829) 2 Hall, 553. See Gerding v. Welch (1898) 30 App. Div. 623, 51 N. Y. Supp. 1064.

North Carolina. — Fuller v. Smith (1859) 58 N. C. (5 Jones, Eq.) 192; Pugh v. Grant (1882) 86 N. C. 39.

North Dakota.—Commercial Secur. 11 A.L.R.—61.

Co. v. Jack (1914) 29 N. D. 67; 150 N. W. 460.

Oklahoma. — Jones v. Wheeler (1909) 23 Okla. 771, 101 Pac. 1112.

Oregon.—Sturgis v. Baker (1901) 39 Or. 541, 65 Pac. 810.

South Carolina.—Laney v. Gregory (1915) 101 S. C. 144, 86 S. E. 3 (does not appear that note was payable to order); Cannon v. Clarendon Hardware Co. (1916) 103 S. C. 538, 88 S. E. 284.

Texas. — Whithed v. McAdams (1857) 18 Tex. 551 (obiter); Myrick Bros. Co. v. Jackson (1906) 44 Tex. Civ. App. 553, 99 S. W. 143.

West Virginia.—Farmers Nat. Bank v. Howard (1912) 71 W. Va. 57, 76 S. E. 122.

Wisconsin.—Milwaukee Trust Co. v. Van Valkenburgh (1907) 132 Wis. 638, 112 N. W. 1083.

England. — Jacobs v. Tarleton (1848) 11 Q. B. 421, 116 Eng. Reprint, 534, 12 Jur. N. S. 517, 17 L. J. Q. B. N. S. 194.

This is true, even though the ownership by plaintiff is expressly denied by the defendant. Berney v. Steiner Bros. (1895) 108 Ala. 111, 54 Am. St. Rep. 144, 19 So. 806.

At least, possession is prima facie evidence of the plaintiff's right to sue. McCallum v. Driggs (1895) 35 Fla. 277, 17 So. 407; Hogan v. Dreifus (1899) 121 Mich. 453, 80 N. W. 254; Lachance v. Loeblein (1884) 15 Mo. App. 460; Porter v. Gunnison (1854) 2 Grant, Cas. (Pa.) 297; Wells v. Schoonover (1872) 9 Heisk. (Tenn.) 805 (not clear that note was payable "to order").

Seemingly a contrary view was taken in an inferior court decision in New York (Chadwick v. Booth (1861) 13 Abb. Pr. (N. Y.) 249), where it was held that possession of a note indorsed in blank is not evidence of a transfer and delivery by a lawful holder to plaintiff. In Fairthorne v. Garden (1855) 1 Houst. (Del.) 197, an action on a note payable to order and indorsed by the payee, it is held that the law presumes that the holder was properly and rightfully in possession of it, and entitled to sue for and recover the amount of it from the maker

without showing how he came by it, or in what manner he obtained it, "unless he was notified by the maker previous to the trial that the payment of it would be resisted by him for good and sufficient reasons in law."

In *Dawsey v. Kirven* (Ala.) set forth supra, II. b, in which it seemed to be assumed that the indorser's signature was the genuine signature of the payee, it is stated that the possession of the note by plaintiff, and its production at the trial, it being indorsed in blank by the payee, is prima facie evidence of ownership.

Some courts seem to confine the presumption to the case of the holder of an unmatured negotiable promissory note. *Nance v. Hayward* (1914) 183 Mo. App. 217, 170 S. W. 429. But in *Engles v. Williams* (1918) — Mo. App. —, 203 S. W. 671, it is stated that "possession of a note properly indorsed, even after maturity, is prima facie evidence of ownership on the part of said holder."

In *Bedell v. Carll* (1865) 33 N. Y. 581, where the plaintiff proved the genuineness of the signature of the payee, the court, in holding that her possession of the note was thereupon prima facie evidence of ownership, states: "On the trial she produced the note and proved the indorsement of her father, from whom she obtained it. This was enough. The possession of the note at the trial, indorsed in blank by the payee, was prima facie evidence of title, and certainly, to enable the plaintiff to recover, she was not required to show affirmatively the way in which she became the owner. It is true she alleged in her complaint that she acquired the title by gift, but this allegation was unnecessary, and did not cast on her the burden of prov-

ing it, or repel the presumption of ownership arising from her possession of the note."

In *Hays v. Hathorn* (1878) 74 N. Y. 486, an action by the indorsee against the indorser, the genuineness of the indorser's signature seems to be assumed, and it is stated that the production of the paper by the indorsee was prima facie evidence that it had been delivered to him by the payee, and that he had title to it.

Possession of a partnership note regularly indorsed by one of the partners after the dissolution of the firm creates a presumption that he is the owner thereof. *Fletcher v. Anderson* (1860) 11 Iowa, 228.

The indorsement of a note payable to a bank by the cashier is prima facie evidence of a legal transfer. *Farrar v. Gilman* (1841) 19 Me. 440, 36 Am. Dec. 766.

When it has been proven that the note has been paid, the presumption resulting from possession is completely met and answered, and if thereafter the holder asserts that, notwithstanding it has once been paid, it has been again reissued and put in circulation, it is incumbent on him to produce evidence of that fact. He cannot have the benefit of the presumption of title resulting from possession a second time. *Hopkins v. Farwell* (1855) 32 N. H. 425.

Under a count for money had and received by the indorser of a note against an indorsee, it is competent to show by parol testimony that the note was held in trust, to be accounted for in a particular manner, but in such case the possession of the note is prima facie evidence that it is the property of the holder. *Titcomb v. Powers* (1911) 108 Me. 347, 80 Atl. 851.
W. A. E.

WILLIAM P. PORTER, Plff. in Err.,
v.
EAST JORDAN REALTY COMPANY et al.

Michigan Supreme Court — June 7, 1920.

(— Mich. —, 177 N. W. 987.)

Bills and notes — effect of nonproduction of note.

1. The fact that the bank official making demand for payment of a note fails to have it in his possession at the time, and does not produce and exhibit it to the maker, does not, even though the Negotiable Instruments Act states that it must be exhibited to the person from whom payment is demanded, destroy the effect of the demand if production is not requested, and refusal of payment is placed on another ground.

[See note on this question beginning on page 969.]

— sufficiency of demand.

2. A sufficient demand for payment of a promissory note may be made by the bank official calling the attention of the maker to the fact that it is due, where the maker understands that a demand for payment is being made.

[See 3 R. C. L. 1171.]

— rule for benefit of maker.

3. The rule requiring production of a note for payment of which demand is made is for the benefit of the maker, and may be waived by him.

[See 3 R. C. L. 1205.]

Appeal — first objection to declaration.

4. The sufficiency of the declaration cannot be questioned for the first time on appeal.

[See 2 R. C. L. 86.]

— dismissal of action — what testimony considered.

5. The appellate court must consider the testimony most favorable to the plaintiff upon appeal from a decree holding the evidence insufficient to sustain a judgment for plaintiff.

ERROR to the Circuit Court for Charlevoix County (Mayne, J.) to review a judgment in favor of defendants in an action brought to recover the amount alleged to be due on a promissory note. *Reversed.*

Statement by Fellows, J.:

Carl Stroebel and William Stroebel are copartners engaged in the hardware business at East Jordan. William Stroebel is the vice president of defendant East Jordan Realty Company, and Claude Mack, who is there engaged in the jewelry business, is its secretary and general manager. On January 28, 1913, the realty company was indebted to the defendants Stroebel in the sum of \$1,413.22. On that day it executed its promissory note in the usual form to the Stroebels for this amount, payable on or before five years after date, with 7 per cent interest, payable annually. Subsequently the defendants Stroebel sold the note and indorsed it to one B. E.

Waterman, who later sold it to the plaintiff, indorsing it without recourse to him. Some time before the note was due, the plaintiff left it for collection at the State Bank of East Jordan, of which Mr. Suffern was cashier. Mr. Suffern and Mr. Mack talked about the note before it was due, and Mr. Mack informed Mr. Suffern that they could pay the interest, but could not pay the principal.

January 28, 1918, the day the note was due, was fuelless day, and the business places at East Jordan were closed. Mr. Suffern had arranged with Mr. Mack to come to Mr. Mack's store, two doors from the bank, that day, on business connected with the realty company.

They met at Mr. Mack's store. While there, Mr. Suffern said to Mr. Mack that the note was due, and Mr. Mack told him again that they could pay the interest, but could not pay the note. Mr. Suffern testifies:

I went in there to keep an appointment with him for looking over the realty company's books, or to talk with him about it,—a report that he wanted to make,—and when I was there I just told him that the note was due, which is all the demand we ever make. We don't go at it very rough when we ask payment on anything. . . .

"Why, we had talked this note over several times, and neither one of us considered it necessary to be formal about the conversation. We both knew what note we had in mind all right."

At this time the note was at the bank, and Mr. Mack did not demand its production, and it was not produced by Mr. Suffern. Mr. Mack's refusal to pay was based entirely on the lack of funds. There is testimony that notice of dishonor of the note was given to defendants the following day. The testimony was somewhat in conflict, but the trial court disposed of the case on the ground that plaintiff had failed to make a case against defendants Stroebel. We must therefore accept the testimony most favorable to the plaintiff, and shall not set out all the conflicting claims on the facts.

This action was brought against the realty company and the Stroebels. Judgment passed by default against the company and for the defendants Stroebel, the trial judge holding that the presentment and demand for payment were insufficient to charge the indorsers. There are numerous assignments of error, but counsel for plaintiff quite properly say in their brief:

"The case, as presented, has two questions:

"(1) Did the conversation between Mr. Mack and Mr. Suffern constitute a legal presentment and demand of payment of the note, exhibit A?

"(2) Was it necessary that Mr. Suffern actually exhibited the note to Mr. Mack when demand was made, its exhibition not being requested at the time, and payment being refused solely on the ground of lack of funds?"

Messrs. Clink & Williams, for plaintiff in error:

No particular form of words is necessary to make a legal demand of payment; it is sufficient if it appears that the parties understood each other, and understood that payment was requested upon the note.

Hodges v. Blaylock, 82 Or. 179, 161 Pac. 396; Gregg v. George, 16 Kan. 546.

The actual exhibition of the note was not necessary.

8 C. J. 561; Freudenberg v. Lucas, 38 Cal. App. 95, 175 Pac. 482; Hodges v. Blaylock, 82 Or. 179, 161 Pac. 396; Gallagher v. Roberts, 11 Me. 489; Maine Bank v. Smith, 18 Me. 99; King v. Crowell, 61 Me. 244, 14 Am. Rep. 560; Legg v. Vinal, 165 Mass. 555, 43 N. E. 518; Waring v. Betts, 90 Va. 46, 44 Am. St. Rep. 890, 17 S. E. 739; Porter v. Thom, 167 N. Y. 584, 60 N. E. 1119, affirming 40 App. Div. 34, 57 N. Y. Supp. 479; Gilpin v. Savage, 60 Misc. 605, 112 N. Y. Supp. 802, 118 N. Y. Supp. 1108, 132 App. Div. 948, Selover, Neg. Inst. 2d ed. § 193; Lockwood v. Crawford, 18 Conn. 361; Tre-dick v. Wendell, 1 N. H. 80; Byels, Bills, Am. ed. 196; 1 Parsons, Notes & Bills, 230, note, and 367; Freeman v. Boynton, 7 Mass. 483; Musson v. Lake, 4 How. 262, 11 L. ed. 967; Draper v. Clemens, 4 Mo. 52.

Messrs. Dwight L. Wilson and A. B. Nicholas, for defendants in error Stroebel:

While the law does not set forth the exact words which must be used in demanding payment of a negotiable instrument, it does contemplate a certain degree of formality; and a mere statement that "it was due to-day," not accompanied with exhibition of the note, cannot be construed as a demand of payment.

State Nat. Bank v. Vickery, — Tex. —, 206 S. W. 841; State of New York Nat. Bank v. Kennedy, 145 App. Div. 669, 180 N. Y. Supp. 412.

The actual exhibition of the note is necessary to constitute a legal presentment of it.

3 R. C. L. p. 1205; Gilpin v. Savage, 201 N. Y. 167, 34 L.R.A. (N.S.) 417, 94

(— Mich. —, 177 N. W. 987.)

N. E. 656, Ann. Cas. 1912A, 861; Eastman v. Potter, 4 Vt. 313, 24 Am. Dec. 609; Waring v. Betts, 90 Va. 46, 44 Am. St. Rep. 890, 17 S. E. 739; Union Bank v. Lea, 7 Rob. (La.) 76, 41 Am. Dec. 275; Parker v. Stroud, 98 N. Y. 379, 50 Am. Rep. 685; State of New York Nat. Bank v. Kennedy, 145 App. Div. 669, 130 N. Y. Supp. 412; Bayless v. Harris, 124 Mo. App. 234, 101 S. W. 617.

Fellows, J., delivered the opinion of the court:

We shall first consider whether what was said and done by the parties on January 28th amounted to a demand of payment. We have not quoted all the testimony on the subject; it is to the effect that the cashier, Mr. Suffern, called the attention of Mr. Mack to the fact that the note was due that day. This was what was usually done by him in demanding payment. Mr. Mack understood full well, we think, that payment of the note was demanded. He explained to Mr. Suffern that the company did not have funds to pay the note, but could pay the interest. The question is not without authority. In the leading case of Gregg v. George, 16 Kan. 546, the instrument involved was a check. The indorsee had taken it, together with some money, to the bank, to buy St. Louis exchange. He was told that they were not selling exchange. He asked to have the check passed to his credit, which was refused. He did not demand the cash, and testified that he did not want money. The opinion in the case was written by Justice Brewer, then a member of that court. We quote from what was there said by him, speaking for the unanimous court: "Waiving all question as to the matter of exchange on St. Louis, it appears that he asked the bank to credit the check to his account, and it refused. This was a dishonor of the check. It was unnecessary after that to go through the form of specifically demanding its payment in cash over the counter. Demand and refusal may be necessary; but no particular form or expression is essential to either. It is sufficient if

it clearly appears that the bank, after a demand, refuses to accept the check as of the value its face indicates."

In the case of Gilbert v. Dennis, 3 Met. 495, 38 Am. Dec. 329, the maker of the note called on the holder on the day it was due, and told him he was unable to pay it, should not pay it, and desired the holders to give notice to the indorser. It was held that this was a sufficient demand. Chief Justice Shaw, speaking for the court, said: "A note is payable at any reasonable time on demand, on the last day of grace, and if not then paid, it is dishonored, and notice may be immediately given to the indorser. Staples v. Franklin Bank, 1 Met. 43, 35 Am. Dec. 345; Shed v. Brett, 1 Pick. 401, 11 Am. Dec. 209. It appears by the report, in the present case, that on the last day of grace, the promisor went to the store of the holder, where the note was, and stated that he was unable to pay, and should not pay, the note, and wished the plaintiff to notify the indorser. The court are of opinion that this was a sufficient demand and refusal to constitute a dishonor of the note. There are many cases in which it is held that it is not necessary to produce and exhibit the note. As where a note is in terms, or by the tacit or express consent of the parties, payable at a bank, it is sufficient that the note is there, ready to be given up on payment, should the promisor come to pay it. State Bank v. Hurd, 12 Mass. 172; Whitwell v. Johnson, 17 Mass. 449, 9 Am. Dec. 165; Saunderson v. Judge, 2 H. Bl. 509, 126 Eng. Reprint, 675, 3 Revised Rep. 492. If the promisor does not go to the bank and pay the note, it is dishonored, and it would be but an idle ceremony to take the note from the files and make a demand, when there is no one on whom to make it. And should the promisor come and declare his inability to pay, his intention not to pay, and leave without payment, it is surely not less a dishonor than if he had stayed away. The default of the promisor, in such

cases, is his not paying the note at the bank; and the default of the promisor, in whatever it consists, constitutes the dishonor of the note, upon which the indorser, if duly notified, may be legally charged. Even under the law of tender, which is extremely strict, it is held that when the party to whom a tender is to be made, declares that he will not accept it, an actual production and offer of the money, or any other thing to be tendered, is unnecessary. In the present case, the plaintiff held the note, the promisor knew it, knew it was due, and, instead of waiting for the holder to come to him, he went to the holder, declared by his conduct that he knew the note was due and payable, and that the holder had the note ready to be given up, and expected and had a right to expect payment of him as promisor; and, in anticipation of a presentment and express demand, declared that he could not pay the note, and departed without paying it. It does not appear that the holder did not request him to make payment; and the circumstances are such as to warrant the inference that he did. The declaration of the promisor, that he could not pay, implies that he considered the holder as looking to him for payment, which is all that was necessary, and that he anticipated a more formal offer of the note and demand of payment, by a declaration which rendered it unnecessary."

And the same court in *Whitwell v. Johnson*, 17 Mass. 449, 9 Am. Dec. 165, said: "Certainly an indorser is not bound to pay, without evidence of a legal demand upon the maker; but when such demand has been made, his liability occurs. Now, if the indorser has seasonable notice of the fact of nonpayment, when the note is due, it must be immaterial to him in what form the demand upon the maker was made. If there had been no demand, he would not be liable; because it does not appear but that the note would have been paid, if demanded; and it is within the terms of the stipulation

that such demand shall be made. But if there has been such a demand as the maker was bound by, so that he had no right to refuse payment, it is not easy to see how it concerns the indorser, whether the legal forms had been complied with, or waived by the promisor."

See also *Re Swift* (D. C.) 106 Fed. 65; *Minturn v. Fisher*, 7 Cal. 573; *Tucker Mfg. Co. v. Fairbanks*, 93 Mass. 101; 8 C. J. 557; 3 R. C. L. 1171..

We reach the conclusion from an examination of the authorities that the evidence was <sup>Bills and notes—
sufficiency of
demand.</sup> sufficient to justify a finding that there had been a demand. Mr. Suffern and Mr. Mack met on the day the note was due, at Mr. Mack's store, which was the office of the realty company, on business of the realty company. When Mr. Suffern said to Mr. Mack that the note was due that day, Mr. Mack clearly understood this was a demand for payment. He so treated it, and explained that payment of the note could not then be made, due to lack of funds. Both parties considered and treated it as a demand, and the fact that it was couched in courteous language does not deprive it of its legal effect, or of the effect given it by both parties.

At the time payment was demanded, the note was at the bank, two doors away, and was not produced and exhibited to Mr. Mack. He did not request <sup>—effect of non-
production of
note.</sup> its production, and placed his refusal of payment solely on the ground of inability of the company to pay. The trial judge was of the opinion that, under § 76 of the Negotiable Instruments Act (§ 6115, Comp. Laws 1915), it was imperatively necessary that the note be physically present and exhibited to the maker in order to charge the indorser. This section provides: "The instrument must be exhibited to the person from whom payment is demanded, and when it is paid must be delivered up to the party paying it."

But the adoption of this section of the Negotiable Instruments Act, the making of this provision statute law, wrote no new law into the law of negotiable instruments of this state. This was the well-recognized law long before the Negotiable Instruments Law was adopted. Professor Bunker, in his work on Negotiable Instruments, well said (page 5): "These facts are a guaranty that we have in the Negotiable Instruments Law the legislative expression of the law theretofore determined by the courts, through a long series of years and in a multitude of decisions barring, of course, those conflicting decisions and diverse statutes which had led to embarrassment and confusion in the administration of the law of commercial paper. It may be said, probably without serious question, that, in the enactment of this statute, no essential feature of the law of negotiable instruments as theretofore determined has been eliminated."

Our inquiry with reference to this provision is as to whether it is for the benefit of the maker or the indorser,—whether it is personal to the maker, and may be waived by him,—and upon this question the holdings of the courts before this provision was made statute law are as important as those which have been handed down since.

In *King v. Crowell*, 61 Me. 244, 14 Am. Rep. 560, it was said by the court:

"It is true that the rule requiring the person making the demand to exhibit the evidence of debt is well settled, and well grounded in reason; and, although applicable to all written contracts on which a demand is necessary, it is, as has been well said, especially applicable to negotiable securities, which may be legally transferred to another at the very time the original payee makes the demand. But the reasons applicable to cases in which the maker offers to pay cannot apply to cases in which he not only does not offer, but absolutely refuses, to pay, and

does not even express any desire to see the note.

"The idle ceremony of producing the note when the maker unqualifiedly refuses to pay is well illustrated by *Shaw, Ch. J.*, in *Gilbert v. Dennis*, 3 Met. 497, 38 Am. Dec. 329, where he says: 'Even under the law of tender, which is extremely strict, it is held that where a party to whom a tender is to be made declares that he will not accept it, an actual production and offer of the money is not necessary.'"

In *Lockwood v. Crawford*, 18 Conn. 361, the question was before the court, and it was said:

"But it is still claimed that no sufficient presentment or demand of payment of the makers of the note was ever made; and that B. W. Lockwood's deposition does not conduce to prove any. We think otherwise. It is true that it does not directly appear that the deponent, who was the payee, presented the note in form and demanded payment; but, as he had not at that time transferred it, the makers might well presume it continued in his possession, ready to be delivered up upon payment. When called upon for the balance, they did not inquire for it, nor refuse to pay because the note was not shown to them; on the contrary, they said that they could not conveniently pay any more then, and requested the payee to draw upon them at a future time; thereby waiving, as they had right to do, a more formal demand.

"We are satisfied, therefore, that the demand of payment was legal; and that, at the time mentioned by B. W. Lockwood, the note in question, by reason of the neglect and refusal of the makers to pay it, then became dishonored."

In *Union Bank v. Lea*, 7 Rob. (La.) 76, 41 Am. Dec. 275, demand was made for payment and refused because there were no funds in the bank for the purpose. The court, speaking through Justice Martin, said: "When the notary of a bank receives a note to be protested, he goes to the drawer and demands

payment; if he is answered that it will not be paid, he does not take it out of his pocketbook or out of the bundle which contains it, to present it, for that would be a vain ceremony. *Lex neminem cogit ad vana*. The cashier having said that there were no funds to pay the note, no presentation was necessary."

And in the recent case of *Hodges v. Blaylock*, 82 Or. 179, 161 Pac. 396, it was said: "If, therefore, the note should have been presented in order to constitute a valid demand for its payment, and if the plaintiff's testimony is to be believed, which was for the jury to determine, the defendant S. E. Blaylock waived an exhibition of the negotiable instrument by not asking for it, and by refusing payment on the ground that he did not then have the money, and that he needed that sum with which to support his family."

The supreme court of Virginia, in *Waring v. Betts*, 90 Va. 46, 44 Am. St. Rep. 890, 17 S. E. 739, said: "Presentment of the bill or note and demand of payment should be made by an actual exhibition of the instrument itself; or at least the demand of payment should be accompanied by some clear indication that the instrument is at hand, ready to be delivered, and such must really be the case. This is requisite in order that the drawer or acceptor may be able to judge (1) of the genuineness of the instrument; (2) of the right of the holder to receive payment; and (3) that he may immediately reclaim possession of, upon paying the amount. If, on demand of payment, the exhibition of the instrument is not asked for, and the party of whom demand is made decline on other grounds, a formal presentment by actual exhibition of the paper is considered as waived."

Ruling Case Law (3 R. C. L. p. 1204) thus states the rule: "It certainly is essential to a proper presentment that the person making demand for payment have the instrument in his possession at the time and place of demand. The Negotiable Instruments Law provides that

'the instrument must be exhibited to the person from whom payment is demanded, and, when it is paid, must be delivered up to the party paying it.' It may not be necessary actually to produce the instrument, if the person having it in possession demands payment, and is answered by the maker or acceptor that it will not be paid. The notary or other person need not take the instrument out of his pocketbook or portfolio and make exhibition of it, for this would be an idle ceremony if the maker or acceptor assures him in advance that payment will not be made. The production of the instrument is for the benefit of the obligor, in order that he may determine its genuineness and take it in possession, and there seems to be no sound reason why he may not waive his rights in this respect."

Corpus Juris (8 C. J. p. 560) states the rule in this language: "The Negotiable Instruments Law expressly provides that the instrument must be exhibited to the person from whom payment is demanded, and, when it is paid, must be delivered up to the party paying it. But this right to have the paper produced may be waived by failure to request its production, the same as under the law merchant."

See also *Gallagher v. Roberts*, 11 Me. 489; *Maine Bank v. Smith*, 18 Me. 99; *Freudenberg v. Lucas*, 38 Cal. App. 95, 175 Pac. 482; *Legg v. Vinal*, 165 Mass. 555, 43 N. E. 518; *Selover*, Neg. Inst. 2d ed. 263.

We do not think the cases cited by defendant's counsel militate against the rule announced in the authorities considered and cited by us. *Gilpin v. Savage*, 201 N. Y. 167, 34 L.R.A.(N.S.) 417, 94 N. E. 656, Ann. Cas. 1912A, 861, involved a demand made by telephone. The case will be found reported in 34 L.R.A.(N.S.) 417, where the editor points out that it is the only case disclosed where that question was involved. *Bayless v. Harris*, 124 Mo. App. 234, 101 S. W. 617, involved a demand by mail, while in *Eastman v. Potter*, 4 Vt. 313, 24

(— *Mitch.* —, 177 N. W. 987.)

Am. Dec. 609, the maker had asked the holder of the note to produce it. The other cases cited are equally distinguishable.

The rule of the law merchant, now made statute law by the Negotiable Instruments Act, is for the benefit of the maker,—that he may examine the instrument to determine its genuineness, the right of the holder to payment, and, upon payment, may take it up and destroy it, or keep it in his possession. It is

—rule for benefit of maker.

a provision personal to him, and may be waived by him, and

is waived where he makes no request for its production, and his refusal to pay is solely based on other grounds; i. e., lack of funds. The law does not require the doing of idle things, and such requirements

as are for the sole benefit of the maker of the note may be waived by him.

There is some discussion in defendants' brief of the question of the sufficiency of the declaration; but this question was not raised in the court below, and cannot be considered here.

Appeal—first objection to declaration.

We do not, of course, pass upon the credibility of the testimony. As we have stated, there is a conflict in it; but, as the case was disposed of as a matter of law in the court below, it became our duty to treat it in the most favorable light to plaintiff.

—dismissal of action—what testimony considered.

The judgment must be reversed, and a new trial granted. Plaintiff will recover costs of this court.

ANNOTATION.

Bills and notes: necessity of possession and exhibition of paper at time of demand in order to make a valid presentment.

I. Necessity of possession:

- a. General rule, 969.
- b. Cases holding possession not necessary, 971.
- c. Lost instruments, 975.
- d. Instruments payable at a bank, 976.

II. Necessity of actual exhibition of instrument, 977.

III. Presentation by mail, 979.

IV. Presentation by telephone, 979.

I. Necessity of possession.

a. General rule.

The rule is announced in a number of cases that, in order to make a good presentment of a bill or note, the person making the demand must have the instrument in his possession at the time and place of such demand.

United States. — *Musson v. Lake* (1846) 4 How. 262, 11 L. ed. 967.

Iowa.—*Citizens' Bank v. First Nat. Bank* (1907) 135 Iowa, 605, 13 L.R.A. (N.S.) 303, 113 N. W. 481.

Louisiana.—*Nott v. Beard* (1840) 16 La. 308; *Harbour v. Taylor* (1844) 7 Rob. 32.

Maryland.—*Farmers Bank v. Duvall*

(1835) 7 Gill. & J. 78; *Nailor v. Bowie* (1852) 3 Md. 251.

Massachusetts. — *Freeman v. Boynton* (1811) 7 Mass. 483; *Arnold v. Dresser* (1864) 8 Allen, 435.

Mississippi.—*Smith v. Gibbs* (1844) 2 Smedes & M. 479.

New York. — *Ocean Nat. Bank v. Fant* (1872) 50 N. Y. 475; *Bank of Vergennes v. Cameron* (1849) 7 Barb. 143; *Porter v. Thom* (1899) 40 App. Div. 34, 57 N. Y. Supp. 479, affirmed without opinion in (1901) 167 N. Y. 584, 60 N. E. 1119.

Vermont. — *Eastman v. Potter* (1882) 4 Vt. 313, 24 Am. Dec. 609.

It is said in *Farmers Bank v. Duvall* (Md.) supra, that a demand without the presentation of the note would, in general, be equivalent to no demand; and when it is made the holder should be prepared and ready to produce the note. The court, in *Freeman v. Boynton* (Mass.) supra, says: "Whenever a demand of payment is made, the person making the demand should have with him the evidence of the debt; for otherwise the debtor may well refuse

to pay, on the ground that he has a right to have his obligation or contract, or to see it canceled, when he is called upon to discharge it. And this rule will especially apply to negotiable securities which may be legally transferred to another at the very time the original payee makes his demand of payment." The court, in *Smith v. Gibbs* (Miss.) *supra*, says that a "demand, to be valid, must be accompanied by a presentment; for the maker is not bound to pay unless his note can be lifted."

See also *Hodges v. Blaylock* (1916) 82 Or. 179, 161 Pac. 396, and *Waring v. Betts* (1893) 90 Va. 46, 44 Am. St. Rep. 890, 17 S. E. 739, *infra*, I. b.

Accordingly, where the person making presentment does not have the bill or note with him, it has been held that the presentment is not valid. *Freeman v. Boynton*; *Arnold v. Dresser* (Mass.), and *Eastman v. Potter* (Vt.) *supra*. In *Harrington v. First Nat. Bank* (1899) 85 Ill. App. 212, a case involving the presentment of a check to a bank for payment, in which the holder of the check served upon the bank a notice with a copy of the check attached, the court says that this cannot be treated as a presentation for payment, "for the check itself was not presented," and the bank could not then have paid it if so disposed.

Where the holder of a bill of exchange, upon casually meeting the drawee, informs the latter that he has the bill, but does not actually present it, and the drawee declares that he will not pay the bill, it is held in *Fall River Union Bank v. Willard* (1842) 5 Met. (Mass.) 216, that such conversation does not constitute such a presentment of the bill as to discharge an indorser for want of notice. But a sufficient presentment was held to have been shown in *Gilbert v. Dennis* (1842) 3 Met. (Mass.) 495, 38 Am. Dec. 329, where the maker of a note went to the store of the holder, where the note was, and stated that he was unable to pay, and should not pay the note, and wished the holder to notify the indorser.

Compare *Gilbert v. Dennis* with *Freudenberg v. Lucas* (1918) 38 Cal. App. 95, 175 Pac. 482, *infra*, I. b.

The failure of a person making demand for the payment of a note, secured by collateral, to have possession of the collateral, prevents a valid demand. *Ocean Nat. Bank v. Fant* (1872) 50 N. Y. 474. The maker, upon demand, expressly refused to pay, upon the ground that the collateral securities were not produced.

The failure of the person making the demand for the payment of interest coupons to have possession of the note, which became due in default of payment of the interest, does not invalidate the presentment. *Codman v. Vermont & C. R. Co.* (1879) 17 Blatchf. 1, Fed. Cas. No. 2,936.

The decision in *Lockwood v. Crawford* (1847) 18 Conn. 361, merely goes to the extent of holding a presentment sufficient, although it does not appear that the person making demand had the note in his possession. The court says: "It is true that it does not directly appear that the opponent, who was the payee, presented the note in form and demanded payment, but, as he had not at that time transferred it, the makers might well presume it continued in his possession, ready to be delivered up upon payment. When called upon for the balance, they did not inquire for it, nor refuse to pay because the note was not shown to them. On the contrary, they said that they could not conveniently pay any more then, and requested the payee to draw upon them at a future time, thereby waiving, as they had a right to do, a more formal demand."

See also *Folger v. Chase* (1836) 18 Pick. (Mass.) 63, *infra*, I. d.

In some cases the objection has been as to the sufficiency of a showing in the notarial certificate that the paper was in the hands of the notary at the time of demand. These cases are in point in the present discussion in that they assume that the possession of the instrument is necessary to a valid presentment. The sufficiency of the notarial certificate as a showing of the presence of the note is beyond the scope of this discussion. It is interesting to note, however, that in *Warren v. Briscoe* (1838) 12 La. 472,

where the notarial certificate of protest stated that the notary went to the bank at which the note was made payable, and was informed by the teller there that there were no funds in the bank for payment of the note, whereupon he protested the same, it is stated by the court not to appear from the protest of the notary public that any actual presentment of the note or demand was ever made at the bank; but, in *Carlile v. Holdship* (1840) 15 La. 375, where the notary certified that he "demanded payment of the said note at the bank therein specified," it was held that, from the whole tenor of the protest, it appeared that the note was produced and presented for payment at the time and place specified therein; and in *Nott v. Beard* (1840) 16 La. 308, a notarial certificate that, at the request of the holder of the original draft, "I demanded payment of said draft at the countinghouse of the acceptors thereof, and was answered by a Mr. Bennett, one of said firm, that the same could not pay," was held to sufficiently show an actual presentment of the bill; and in *Harbour v. Taylor* (1844) 7 Rob. (La.) 32, a notarial certificate that, at the request of the holder of a note, he went to the bank at which the note was payable, and demanded of the cashier of the bank payment thereof, and was told that there were no funds to pay it, was held to sufficiently show an actual presentation of the note. Similar decisions appear in *Union Bank v. Penn* (1844) 7 Rob. (La.) 79; *Peet v. Dougherty* (1844) 7 Rob. (La.) 85; *Louisiana Bank v. Satterfield* (1859) 14 La. Ann. 80, 74 Am. Dec. 427. In *Bank of Vergennes v. Cameron* (1849) 7 Barb. (N. Y.) 143, a notarial certificate that the notary went with the draft to the bank and demanded payment was held to be fairly equivalent to saying that when he made the demand, he had the draft with him, and was prepared, in case of payment, to surrender it to the person who should honor the draft on behalf of the acceptor. But in *Musson v. Lake* (1846) 4 How. (U. S.) 262, 11 L. ed. 967, a notarial certificate that the "notary" demanded payment of said draft at the

countinghouse of the acceptors, and was answered by Mr. Keekman that the same could not be paid, was held insufficient.

b. Cases holding possession not necessary.

A few cases take the view that neither physical possession nor actual exhibition is necessary to a valid presentment. *Freudenberg v. Lucas* (1918) 38 Cal. App. 95, 175 Pac. 482; *PORTER v. EAST JORDAN REALTY CO.* (reported herewith) ante, 968. A presentment was sustained as valid although the note was not in the possession of the party making the demand at the time thereof, in *Hodges v. Blaylock* (1916) 82 Or. 179, 161 Pac. 396, and *Waring v. Betts* (1893) 90 Va. 46, 44 Am. St. Rep. 890, 17 S. E. 739. The ground of both of these decisions seems to be that of waiver, although, in speaking of the waiver, both courts speak of it as a waiver of the exhibition of the instrument, and not as a waiver of the possession. In fact, the Virginia court, in its discussion, seems to regard possession of the instrument as necessary. It thus discusses the question: "Presentment of the bill or note and demand of payment should be made by an actual exhibition of the instrument itself; or at least the demand of payment should be accompanied by some clear indication that the instrument is at hand, ready to be delivered, and such must really be the case. This is requisite in order that the drawer or acceptor may be able to judge (1) of the genuineness of the instrument; (2) of the right of the holder to receive payment; and (3) that he may immediately reclaim possession of upon paying the amount. If, on demand of payment, the exhibition of the instrument is not asked for, and the party of whom demand is made decline on other grounds, a formal presentment by actual exhibition of the paper is considered as waived." Further on in the opinion it is stated that "in this case the presentment of the note was not made at the bank within the usual bank hours, with the note in possession, but, as we have seen, this was

excused in this case (1) by the fact that there was no bank to present it at, and (2) because payment was refused upon the ground that the bank had ceased to do business and its assets distributed, and the note was not asked for nor required, payment being refused on other grounds, the right to have it produced must be considered as waived." Subsequently, on the same day, the notary, with the note in his possession, again demanded payment of the person who had been in charge of the bank at which it was made payable, and which had discontinued business, and who was also one of the indorsers on the note; but it seems that the presentment which the court is discussing in the above quotation is that which took place when the note was not in the possession of the party making the demand.

The only purpose of making a demand in *Hodges v. Blaylock* (Or.) *supra*, was to place the makers in default for the purpose of recovering an attorney's fee provided for in the note; and the court says that any reasonable request to pay a demand note at the time referred to is sufficient to put the maker in default if he fails to discharge the obligation.

In *Freudenberg v. Lucas* (1918) 38 Cal. App. 95, 175 Pac. 482, the note was in the custody of a third person, who had placed it in his safe, and was absent from his office on the date of maturity; upon inquiry by the owner of the note, he was informed of these facts, in the presence of the maker, whereupon he demanded payment of the note, and the maker stated that he was unable to pay it because he had no funds, but made no demand upon the owner that he exhibit the note to him. It was admitted that where the maker refuses to pay on the sole ground that he is without funds, and makes no demand that the note be exhibited to him, the exhibition of the note is excused; but it was claimed that the owner must have had the physical possession of the note, with the ability to exhibit it to the maker had demand then been made. In answer to this contention the court states that the "claim is highly tech-

nical, and, in our opinion, without any support in logic. When, on the date of the note's maturity, Lucas and plaintiff were in Curtis's office, the note was in the same room with them, in the safe where the depository chosen by Lucas and respondent had put it, and it was, in the eyes of the law, in plaintiff's possession, for it cannot be disputed that Curtis was, on that day, plaintiff's agent, and his possession was that of his principal. If exhibition of the note had been demanded, it might have taken some time to find Mr. Curtis and to get the safe open; but there was no legal impediment to the production of the note by plaintiff, any more than if plaintiff had brought it to Lucas in a strong box, the key of which plaintiff had inadvertently left at his home in another town. In either case the law would excuse the reasonable delay in physically producing the note, where such production was demanded; and where, as in the instant case, no such demand was made, it would be carrying technicality to a ridiculous extreme to make the validity of plaintiff's demand turn upon the wholly irrelevant question of his ability or inability to open his agent's safe."

Compare with *Gilbert v. Dennis* (1842) 3 Met. (Mass.) 495, 38 Am. Dec. 329, *supra*, I. a.

The circumstances under which the foregoing cases holding possession not necessary to a valid presentment were decided militate against them as authority for the proposition that possession is not necessary generally. These cases seem rather to be exceptions to the general rule that possession is necessary, than cases establishing a contrary rule.

In case of a note owned by a bank, or left with a bank for collection, it is held in some cases that the person making demand need not, in order to make a valid presentment, have the paper with him at the time of making the demand, where the maker has knowledge of the custom of banks to make demand in this manner. *Gallagher v. Roberts* (1834) 11 Me. 489; *Maine Bank v. Smith* (1841) 18 Me. 99; *Portland Bank v. Brown* (1843)

22 Me. 295; *Whitwell v. Johnson* (1821) 17 Mass. 449, 9 Am. Dec. 165; *Shove v. Wiley* (1836) 18 Pick. (Mass.) 558.

Such a demand seems to have been treated as sufficient in *Boston Bank v. Hodges* (1830) 9 Pick. (Mass.) 420, as against an indorser who had knowledge thereof. In fact, a demand by letter has been sustained in such a case. *Tredick v. Wendell* (1817) 1 N. H. 80. Whether the letter was sent by mail is not clear.

In *Maine Bank v. Smith* (1841) 18 Me. 99, *supra*, a written notice was sent to the house of defendant. The manner of sending this notice does not appear.

If the maker has knowledge of the usage, so that the demand is sufficient as to him, the demand is sufficient as to an indorser, who may not have knowledge of the usage. *Portland Bank v. Brown* (1843) 22 Me. 295; *Whitwell v. Johnson* (1821) 17 Mass. 449, 9 Am. Dec. 165.

This rule is held to have arisen by custom of bankers. The court in *Freeman v. Boynton* (1811) 7 Mass. 483, after referring to the general rule that the party making presentation and demand must have possession of the instrument, says: "This rule may admit of exceptions; as, where the security may be lost, in which case a tender of sufficient indemnity would make the demand valid without producing the security, and where, from the usual course of business, of which the parties are cognizant, the security may be lodged in some bank, whose officers shall demand payment and give notice to the indorser, according to the custom of such bank; the security not being presented at the time of the demand, but the parties being presumed to know where it may be found." In *Whitwell v. Johnson* (1821) 17 Mass. 449, 9 Am. Dec. 165, the court says: "The demand upon the promisors in this case, being made without any presentment of the note to them, would have been wholly nugatory, but for the usage of the bank in which the note was placed for collection to make demands in this form, and the consent of the promisors to have the demand

so made upon them, which is a legal inference from their knowledge of the usage, as found by the jury. It can make no difference that the note was not made payable at the bank, since the custom is so prevalent in commercial towns where there are banks, to lodge notes in them for collection, that any man in business must be supposed to know that such course would be adopted; and, in the case before us, the consent to the form of demand usual at banks implies a knowledge that the note would be left there. The demand, then, was a legal demand upon the promisors, and they were bound, according to the usage, to go to the bank and discharge the note within the hours of business on the day it became due." The earlier cases required it to appear in the case that the maker of the note in question had knowledge of the usage of banks; in *Grand Bank v. Blanchard* (1839) 23 Pick. (Mass.) 305, it is stated that "the custom of the banks in Massachusetts, of sending a notice to the maker of a note to come to the bank and pay it, and treating his neglect to do so during bank hours on the last day of grace as a dishonor, and all parties acquiescing in and assenting to such neglect as a dishonor, has become so universal and continued so long that it may well be doubted whether it ought not now to be treated as one of those customs of merchants of which the law will take notice, so that every man who is sufficiently a man of business to indorse notes is presumed to be acquainted with it and assent to it; at least, until the contrary is expressly shown. . . . When a custom has been definitely settled by judicial decision, it is taken notice of by courts as part of the law of the land, and need not be proved as a fact in each case." This point, however, was waived by the parties in this case, so that the above statement is obiter.

This custom was recognized in *Mechanics Bank v. Merchants Bank* (1843) 6 Met. (Mass.) 13.

A demand by the cashier of a bank was held sufficient although he did not have the note with him at the

time of making the demand, where he left with the maker the written notice in the usual form, which informed the maker where the note was, that is, at the bank, and where both he and the indorser lived in the city in which the bank was located. *Gallagher v. Roberts* (1834) 11 Me. 489.

No usage of banks is referred to in *Tredick v. Wendell* (1817) 1 N. H. 80, holding that there was a sufficient demand, where, on the day the note became due, the cashier of the bank sent a letter to the maker, informing him where the note was, and requesting him to pay it, and the letter was, on the same day, left at his house, with his daughter, he not being at home. The court says that "the general rule undoubtedly is, that when a demand is made of the maker, the note itself should be presented, in order that it may be delivered to him upon its being paid; but we think the facts in this case show a sufficient compliance on the part of the plaintiff with the spirit of the rule. The note was in a bank, within a few rods of the maker's house, and he was informed where the note was, and requested to pay it. This was, in our opinion, giving him a sufficient opportunity to pay the note and take it up, had he been disposed to do it."

A usage was held not to have been established in *Farmers Bank v. Duvall* (1835) 7 Gill. & J. (Md.) 78, where it appeared that a servant of the bank served on the drawer a written notice in the usual form, stating when the note was due and must be paid, and left such notice with the drawer. The court says that it is supposed this language constitutes evidence "of a usage on the part of the bank to make demand of payment at a time and under circumstances different from the general rules of law, and that efficacy should be given to such usage if found by the jury, so as to validate as a demand that which, without such usage, would be a nullity. In the view which we take of the evidence, it is immaterial to examine the question as to the legal effect of such usage if established, because we consider that the witness proves no usage bearing on the

question of a demand. The only conclusion which can be drawn from the evidence is that it is the practice of this bank, as it is of all banks, to give notice of the falling due of notes; that the parties may be apprised not only of the holders of the notes, but reminded and admonished of the near approach of the time for the payment of their liabilities. The witness does not state the existence of any usage to treat this common notification as a substitute for the legal demand on the holder. The rule established is, on the contrary, perfectly consistent with the necessity of presentment for payment when due, and in the accustomed legal mode. . . . Had reliance been intended to have been placed on such an alleged usage, the plaintiff should have gone further and proved that, by the usage of the bank, demands against the drawers of notes, in order to charge the indorser, were always made by the alleged notification on the day notes first fell due, instead of being made according to the rules of law, and that such notice was by usage a substitute for the lawful demand. In such a state of facts the question would have been brought before the court, how far, in point of law, such a notice could operate as a demand."

But other cases in which the note was held by a bank have applied the general rule that possession of the note is necessary to make a valid presentment. There was held to be no proper presentment in *Barnes v. Vaughan* (1859) 6 R. I. 259, in the case of notes left at a bank for collection, of which the maker had notice before the day of payment. The court states that this notice does not avail to make the note payable at the bank; that the maker had not, by the terms of his contract, agreed to pay the notes at that bank, and a demand there was no demand upon him; that it was necessary that demand should be made upon him personally, or at his dwelling or place of business on the last day of grace. In *Halls v. Howell* (1824) 16 S. C. L. (Harp.) 426, it was held that the depositing of a letter in the post-office upon the day that a note became due, directed to the maker, demanding

payment thereof, was not a sufficient demand of the maker to charge the indorser, although it was the common practice of the bank to make demands in that way.

In *Bayless v. Harris* (1907) 124 Mo. App. 234, 101 S. W. 617, where notes were placed by the holder in a bank, and a letter was written to the maker sometime before their maturity, stating that they would be in the bank on the date they matured, to be paid, and upon nonpayment, a notary public protested them without presenting them to the maker, the demand and presentment were held to be insufficient.

In *Moore v. Waite* (1842) 13 N. H. 415, it was held that the drawer of a bill of exchange which had been duly accepted was liable only after due presentment to the acceptor for payment and refusal thereof, and notice to him; that a notice that the note was due, sent through the mail, in accordance with the usage of the bank where the bill had been discounted or left for collection, was not a sufficient presentment of the bill to charge the maker. The court distinguishes *Tredick v. Wendell* (N. H.) *supra*, on the ground that, in the *Tredick* Case, the defendant, after drawing the bill, had himself negotiated it to a bank, or had left it there for collection.

A notification by mail or telephone to the drawee of a draft, that the draft was in the hands of a bank for collection, is not such a demand as will put in default the drawee, who agreed to pay demand drafts on himself for grain shipped. *Barnett v. Elwood Grain Co.* (1911) 153 Mo. App. 458, 133 S. W. 856. The court says that it is conceded that such demand drafts must be presented to the drawee, and that notice that they are in the hands of a third person for collection is not sufficient; but it added that this rule is subject to variation according to the usage of a bank and its customers, and reference is made to the Massachusetts rule above discussed.

c. Lost instruments.

The courts have generally made an exception to the rule requiring possession of the instrument in case of a

lost instrument, holding that the inability to produce the instrument does not prevent a valid demand. *Arnold v. Dresser* (1864) 8 Allen (Mass.) 435 (obiter); *Smith v. Gibbs* (1844) 2 Smedes & M. (Miss.) 479 (obiter). In *Arnold v. Dresser* (1864) 8 Allen (Mass.) 435, possession of the note by the person making the presentment is stated to be necessary "unless special circumstances, such as the loss of the note, or its destruction, are shown to excuse its absence." There was held to be a sufficient presentment in *Smith v. Rockwell* (1842) 2 Hill (N. Y.) 482, where, at the time the note became due, it had been mislaid by the holders, but demand was made and notice of nonpayment given without any objection being interposed by any of the parties on account of the absence of the note, which had been found at the time of trial.

In case of a lost note, presentment of a copy has been held sufficient. *Hinsdale v. Miles* (1824) 5 Conn. 331. In *Apperson v. Union Bank* (1867) 4 Coldw. (Tenn.) 445, a case involving a note in the possession of a bank, which had been removed therefrom with the other assets of the bank, to avoid its falling into the hands of the United States military authorities, who were about to occupy the city in which the bank was located, the court, in holding that the bank was not excused from making demand by the removal of its assets, said: "This could have been done on a copy; and the subsequent action of the bank demonstrates that it was fully in the power of the bank, at the maturity of the note, to have incorporated in the protest a substantial copy of the note, drawn from the 'descriptive list' of the bills and notes forcibly removed south. This the bank failed to do, and now insists as the reason for it the place of payment was not known. This is not sufficient to excuse them, especially in the absence of all proof of reasonable effort to ascertain the place of payment. The original being lost, destroyed, or, as in this case, placed by force beyond the control of the bank, it was bound, there being no legal excuse existing at the time, to

make due presentment and give notice upon a substituted copy, which must always be in as near conformity to the original as practicable."

It is stated in *Freeman v. Boynton* (1811) 7 Mass. 483, that the tender of sufficient indemnity would make the demand valid.

A demand by the holder of a note issued by a bank, by presenting to the bank the half of such note, the other half having been lost in transmission through the mail, is insufficient when unaccompanied by evidence of the ownership of the note, to place the bank in default and make it chargeable with interest and costs. *Farmers Bank v. Reynolds* (1826) 4 Rand. (Va.) 186.

See *Chicopee Bank v. Seventh Nat. Bank* (1869) 8 Wall. (U. S.) 641, 19 L. ed. 422, *infra*, I. d.

d. Instruments payable at a bank.

Where a note is made payable at a bank, and, at the time it becomes due, is present in the bank, it has been held that no formal presentation of the note is necessary, the presence of the paper in the bank at which it is payable being deemed in itself a sufficient presentment and demand.

United States.—*Fullerton v. Bank of United States* (1828) 1 Pet. 617, 7 L. ed. 286; *Bank of United States v. Carneal* (1829) 2 Pet. 542, 7 L. ed. 513; *Bank of United States v. Smith* (1826) 11 Wheat. 171, 6 L. ed. 443.

Colorado.—*De La Vergne v. Globe Printing Co.* (1915) 27 Colo. App. 308, 148 Pac. 923.

Illinois. — *Stewart v. Soenksen* (1912) 173 Ill. App. 1.

Kentucky. — *Huffaker v. National Bank* (1878) 13 Bush, 644.

Louisiana.—*Union Bank v. Morgan* (1847) 2 La. Ann. 418, approved in *Union Bank v. Jones* (1849) 4 La. Ann. 220.

Maryland. — *Graham v. Sangston* (1851) 1 Md. 59.

Massachusetts.—*Berkshire Bank v. Jones* (1810) 6 Mass. 534; *Phipps v. Chase* (1848) 6 Met. 491.

Mississippi. — *Goodloe v. Godley* (1849) 13 Smedes & M. 233, 51 Am. Dec. 159.

New York. — *Nichols v. Goldsmith* (1831) 7 Wend. 160; *Gillett v. Averill* (1847) 5 Denio, 85; *First Nat. Bank v. Crittenden* (1873) 2 Thomp. & C. 118; *Merchants' Bank v. Elderkin* (1862) 25 N. Y. 178; *Dykman v. Northridge* (1896) 1 App. Div. 26, 36 N. Y. Supp. 962, affirmed without opinion in (1897) 153 N. Y. 662, 48 N. E. 1104.

Pennsylvania. — *Hallowell v. Curry* (1861) 41 Pa. 322; *Jenks v. Doylestown Bank* (1842) 4 Watts & S. 505; *Rahm v. Bank of Philadelphia* (1829) 1 Rawle, 335.

Tennessee. — *State Bank v. Napier* (1845) 6 Humph. 270, 44 Am. Dec. 308.

England.—*Bailey v. Porter* (1845) 14 Mees. & W. 44, 153 Eng. Reprint, 382, 14 L. J. Exch. N. S. 244.

This has been stated to be true whether the bank is the holder of the note, or merely an agent for collection. *De La Vergne v. Globe Printing Co.* (1915) 27 Colo. App. 308, 148 Pac. 923.

In *Reynolds v. Chettle* (1811) 2 Campb. (Eng.) 596, an action by the indorsee against the acceptor of a bill of exchange accepted payable at certain named bankers, a presentment to the banker's clerk, in the clearing house, was held to be sufficient.

This rule was applied in case of a note payable at a private home, in *Woodin v. Foster* (1853) 16 Barb. (N. Y.) 146; and in *Saunderson v. Judge* (1795) 2 H. Bl. 509, 126 Eng. Reprint, 675, 3 Revised Rep. 492, in case of a note made payable at the house of the maker's banker, a demand at this place was held sufficient.

A demand by a bank teller upon himself at the bank door was held sufficient in *Bank of Syracuse v. Hollister* (1858) 17 N. Y. 46, 72 Am. Dec. 416, where the note had been delivered to him after banking hours, and he was unable to gain admittance to the bank, but knew that the maker had no funds there for its payment, and that no inquiry had been made on that day for the note.

The court in *Union Bank v. Morgan* (1847) 2 La. Ann. 418, discusses this question as follows: "It is objected that it does not appear from the protest of the notary that he had the note

in his possession when he demanded payment. It is manifest, not only from the evidence of the cashier, but from the protest, that the notes were held by the bank at maturity. The notary declares in each protest that he went to the bank on the day of maturity, at the cashier's request; and he declares that the cashier was the holder of the note, of which the copy annexed to the protest is a true copy. These declarations show that the note was in the hands of the cashier at the time, and that the notary must have taken a copy of it; and we are at a loss to see the difference between the cashier showing the note to the notary and asking him to protest it, and putting the note formally into the manual possession of the notary before he made the demand. If the bank had not been the holder, and the place of payment had not been at the bank itself, the objection would have been material."

It is said in *Allen v. Miles* (1845) 4 Harr. (Del.) 234, that a formal demand is not necessary if a bill or note is made payable at a particular bank, or at the house of a particular person, and such bank or person is the holder. In such a case it is a sufficient demand of payment for the holder to examine the books of account, and a sufficient refusal if it appears that the party who is to pay there has no funds deposited.

The note should be at the bank at the due date of the note; if it is not, there is no sufficient demand. *Woodbridge v. Brigham* (1815) 12 Mass. 403, 7 Am. Dec. 85, s. c. on subsequent appeal (1816) 13 Mass. 556; *Shaw v. Reed* (1831) 12 Pick. (Mass.) 132.

Although there is no express proof that notes are in a bank at which they are made payable, and which is the owner of the notes, at the time the notes fell due, this must be presumed. *Folger v. Chase* (1836) 18 Pick. (Mass.) 63.

But a bill is not present in the bank, within the meaning of this rule, where the letter inclosing it by accident fell through a crevice in the lid of a desk into a drawer, among waste paper, and was not discovered until after the

maturity of the bill, the bank officials having no knowledge that the bill was in the bank. *Chicopee Bank v. Seventh Nat. Bank* (1869) 8 Wall. (U. S.) 641, 19 L. ed. 422.

Where the notarial protest alone is relied upon to show due demand, the protest must show the requisite facts. *People's Bank v. Brooke* (1869) 31 Md. 7, 1 Am. Rep. 11.

In the case of a demand note, it seems that there must be a formal demand. *National H. River Bank v. Kinderhook & H. R. Co.* (1897) 17 App. Div. 232, 45 N. Y. Supp. 588, affirmed without opinion in (1900) 162 N. Y. 623, 57 N. E. 1118. The court, after referring to numerous cases in which it was held that where a bank at which a note is payable is the holder thereof, a formal demand is unnecessary, says: "Those were cases where the notes were payable not on demand, but at a specified date; and it was held that if the fact appeared that, at that date, there were no funds at the bank for the payment of the note, a formal demand was not necessary. Those cases are not controlling in the present case."

II. *Necessity of actual exhibition of instrument.*

It is apparent that if possession of the instrument at the time and place of demand is not necessary, an actual exhibition of the instrument is not. As shown in subd. I. a, however, possession is necessary according to the weight of authority. It has sometimes been said that the instrument must be actually exhibited to make a valid presentment. The manner of making a demand of payment, according to the court in *Musson v. Lake* (1846) 4 How. (U. S.) 262, 11 L. ed. 967, is "by presenting the bill to the drawee or acceptor; and so important is this part of the proceeding that the omission to present the bill to the acceptor will justify his refusal to pay it, although payment be demanded." In *Draper v. Clemens* (1835) 4 Mo. 52, where it appeared that the notary, at the holder's request, went to the countingroom of the acceptor of a draft during the hours of business, to demand payment,

that he inquired for the acceptor, and was told by his clerk that he was not in, whereupon the notary demanded payment of the clerk, and was told that he could not pay it, it is said by the court that the person demanding payment should have produced the draft. There is some language in *Bank of Vergennes v. Cameron* (1849) 7 Barb. (N. Y.) 143, that lends support to the theory that the bill must be actually exhibited; but the entire decision in that case seems to go only to the extent of holding that the person making the demand must have the instrument in his possession, ready to be delivered up, or to be exhibited if demanded.

But it is generally held that the paper need not actually be exhibited unless such exhibition is demanded. *Citizens' Bank v. First Nat. Bank* (1907) 135 Iowa, 605, 13 L.R.A. (N.S.) 303, 113 N. W. 481; *King v. Crowell* (1873) 61 Me. 244, 14 Am. Rep. 560; *Fisher v. Beckwith* (1846) 19 Vt. 31, 46 Am. Dec. 174. It was stated in *Legg v. Vinal* (1896) 165 Mass. 555, 43 N. E. 518, that while the maker of a note is entitled, upon demand for payment, to have the note exhibited to him, yet if he does not ask to see the note, and refuses to pay it on other grounds, this is a sufficient presentment to bind an indorser. Failure of the bank on which a check is drawn to demand an exhibition of the instrument, and an unqualified refusal to pay it, is a waiver of the production. *Citizens' Bank v. First Nat. Bank* (Iowa) *supra*; *Porter v. Thom* (1899) 40 App. Div. 34, 57 N. Y. Supp. 479, affirmed without opinion in (1901) 167 N. Y. 584, 60 N. E. 1119.

In *Wain v. Bailey* (1839) 10 Ad. & El. 616, 113 Eng. Reprint, 234, L. R. 2 Prob. & Div. 507, it was held that a non-negotiable note need not be actually produced in order to constitute a valid presentment and demand.

In *King v. Crowell* (1873) 61 Me. 244, 14 Am. Rep. 560, the court said: "It is true that the rule requiring the person making the demand to exhibit the evidence of debt is well settled, and well grounded in reason; and although applicable to all written con-

tracts on which a demand is necessary, it is, as has been well said, especially applicable to negotiable securities, which may be legally transferred to another at the very time the original payee makes the demand. But the reasons applicable to cases in which the maker offers to pay cannot apply to cases in which he not only does not offer, but absolutely refuses to pay, and does not even express any desire to see the note. The idle ceremony of producing the note when the maker unqualifiedly refuses to pay is well illustrated by *Shaw, Ch. J.*, in *Gilbert v. Dennis* (1842) 3 Met. (Mass.) 497, 38 Am. Dec. 329, where he says: 'Even under the law of tender, which is extremely strict, it is held that where a party to whom a tender is made declares that he will not accept it, an actual production and offer of the money is not necessary.' The case finds expressly that the maker had the note in his possession when he made the demand." Accordingly, the objection that the note was not exhibited was held invalid.

In *Fisher v. Beckwith* (1846) 19 Vt. 31, 46 Am. Dec. 174, upon the question of whether or not there had been a valid presentment of a draft to the drawee for acceptance, it appeared that the person making the presentment informed the drawee that he had the draft, and the language of the drawee implied that he neither wished to see it nor to be more particularly informed respecting it, so that the draft was not actually exhibited. In sustaining this as a valid presentment, the court said that "there is no rule requiring that a bill of exchange must be actually shown to the drawee in order to be a valid and binding acceptance. A party may bind himself by an acceptance of the bill not yet drawn, as in the great case of *Pillans v. Van Mierop* (1765) 3 Burr. 1663, 97 Eng. Reprint, 1035. It is enough if, when applied to for acceptance, he is enabled, by seeing the bill or otherwise, to give an intelligent answer. 1 Har. Dig. 493, and cases there cited. In this instance the question of a proper presentment for acceptance is involved in that regarding the validity

of the acceptance itself; for if the bill or order was well accepted, it is idle to say it was not sufficiently presented for that purpose."

Farmers Bank v. Duvall (1835) 7 Gill & J. (Md.) 78, supra, I. a; and see *Bank of Vergennes v. Cameron* (1849) 7 Barb. (N. Y.) 143, supra, and quotation from *Union Bank v. Lea* (1844) 7 Rob. (La.) 76, 41 Am. Dec. 275, in the reported case (*PORTER v. EAST JORDAN REALTY CO.* ante, 963).

III. Presentation by mail.

A demand by mail is generally held insufficient. *Closz v. Miracle* (1897) 103 Iowa, 198, 72 N. W. 502; *Davis v. Gowen* (1841) 19 Me. 447; *Stuckert v. Anderson* (1838) 3 Whart. (Pa.) 116. See *Bayless v. Harris* (1907) 124 Mo. App. 234, 101 S. W. 617; *Barnett v. Elwood Grain Co.* (1911) 153 Mo. App. 458, 133 S. W. 856; and *Halls v. Howell* (1824) 16 S. C. L. (Harp.) 426, supra, I. b.

But see the Massachusetts cases dealing with instruments held by a bank, supra, I. b.

It has been said that where the parties live in the same town demand cannot be made through the postoffice. *Davis v. Gowen* (1841) 19 Me. 447.

In *Stuckert v. Anderson* (1838) 3 Whart. (Pa.) 116, it is said that "a notification to the maker, through the postoffice, is not such a demand as the law requires, when the maker's residence is supposed to be ascertained."

In holding that certain letters addressed by the holder of a demand note to the maker, requesting payment, did not operate as a sufficient demand to start the Statute of Limitations against the note in favor of the indorser, the court, in *Parker v. Stroud* (1885) 98 N. Y. 379, 50 Am. Rep. 685, says: "The obligation to make a demand implies an opportunity afforded for performance; and there must be a person present to receive payment, as well as one from whom payment is demanded, in order to establish a breach of contract. Not only does the nature of the act lead to the conclusion that a demand by letter is insufficient to charge the indorser, but the principles laid down by elementary

writers, as well as those adjudged in numerous reported cases, are uniform to the same effect."

Letters mailed by a bank which was the holder of a demand note, payable thereat, calling the loan on a certain future day, were held not to be a demand which would mature the note, rendering it necessary to protest the same at that time for nonpayment, in order to hold the indorser, in *National H. River Bank v. Kinderhook & H. R. Co.* (1897) 17 App. Div. 232, 45 N. Y. Supp. 588, affirmed without opinion in (1900) 162 N. Y. 623, 57 N. E. 1118.

A letter written to the maker of a demand note by an attorney with whom it had been left for collection, requesting the maker to pay it, does not amount to a demand which, upon failure of the maker to pay, amounts to a dishonor, which requires notice to an indorser. *Thorne v. Scovil* (1844) 4 N. B. 557. The court states that, "in order to make a demand of payment, the note must be presented to the party."

IV. Presentation by telephone.

A demand by telephone of the maker for payment of a note which was payable at the maker's residence was held not a sufficient presentment to charge an indorser thereon, although the one making the demand had the instrument in his possession at the time the demand was made, in *Gilpin v. Savage* (1911) 201 N. Y. 167, 34 L.R.A. (N.S.) 417, 94 N. E. 656, Ann. Cas. 1912A, 861. The court in this case proceeds upon the theory that presentment of a note and demand of payment must be made by actual exhibition of the instrument itself; at least, the demand should be accompanied by some clear indication that the instrument is at hand, ready to be delivered; and that, while it may not be necessary to actually produce the note, if the maker refuses to pay it, it must be there at the place for presentment, otherwise, the presentment is insufficient. To comply with these requirements, the court is of the opinion that personal attendance at the place of demand, with the note in readiness to exhibit it, if required, and to receive payment

and surrender it if the debtor is willing to pay, is necessary.

In *Citizens' Bank v. First Nat. Bank* (1907) 135 Iowa, 605, 13 L.R.A. (N.S.) 303, 113 N. W. 481, a case in which a telephone conversation between a holder of a check and the bank on which it was drawn was urged as a due presentation and dishonor of the check, the court, without deciding whether a demand and refusal might be made by telephone, says that the general rule undoubtedly is, that, to constitute a valid demand, the person making it must have the instrument with him, to produce if called for; but that it may be conceded, for the pur-

poses of the case, that where the drawee does not demand an exhibition of the instrument, and unconditionally announces that he will not pay it, the actual presentation thereof will be held to have been waived, and notice of dishonor may be given at once.

See *Barnett v. Elwood Grain Co.* (1911) 153 Mo. App. 458, 133 S. W. 856, *supra*, I. b.

The acceptance of a check by telegraph or telephone is the subject of annotation in 2 A.L.R. 1146; and see later case, *Commercial Bank v. First Nat. Bank* (1920) — La. —, — A.L.R. —, 86 So. 342. W. A. E.

STATE OF KANSAS, Appt.,

v.

GEORGE L. McCULLAGH et al.

Kansas Supreme Court — December 11, 1915.

(96 Kan. 786, 153 Pac. 557.)

Commerce — power of Congress over game birds.

1. Congress has no power to prescribe regulations for the protection of migratory game birds while within the boundaries of a state.

[See note on this question beginning on page 991.]

Game — forbidding use of motorboat.

2. A state law forbidding the shooting of ducks from a motorboat is a valid exercise of the police power, not-

withstanding the same act limits the number to be killed by one person in a day.

[See 12 R. C. L. 692.]

Headnotes by MASON, J.

APPEAL by the state from a judgment of the District Court for Cherokee County (Sapp, J.) sustaining a motion to quash an information charging defendants with violation of the game laws of the state. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. S. M. Brewster, Attorney General, F. W. Boss, and Don H. Elleman, for the State:

The title to all migratory birds and animals in this state is in the state of Kansas, in trust for all the people of the state, and the state has a right to regulate the manner and mode of killing or capturing such wild birds and animals, and to regulate the manner of how they shall be disposed of after they are captured or killed.

Geer v. Connecticut, 161 U. S. 519, 40 L. ed. 793, 16 Sup. Ct. Rep. 600; *United States v. McCullagh*, 221 Fed. 288; *United States v. Shauver*, 214 Fed. 154.

Messrs. O. S. Barton, Truman T. Burr, and C. D. Sapp, for appellees:

Section 11 of chapter 198 of the Session Laws of 1911 is void.

State v. Saunders, 19 Kan. 127, 27 Am. Rep. 98.

The only right that the state of Kansas has to protect game birds, and especially migratory birds, is derived from its power of police regulation, and since the legislature has seen fit to limit the number of wild ducks killed by an individual within a day to the number of twenty, in its exercise of its police power it has no right to say in what manner these ducks

may be killed not exceeding the number of twenty.

Re Marshall, 102 Fed. 323; Geer v. Connecticut, 161 U. S. 538, 40 L. ed. 800, 16 Sup. Ct. Rep. 600.

Mr. C. B. Skidmore also for appellees.

Mason, J., delivered the opinion of the court:

An information was filed charging George L. McCullagh and H. B. Savage with having violated the game laws of the state by shooting wild ducks from a motorboat on April 2, 1914. A motion to quash was sustained, and the state appeals.

The state law undertakes to forbid shooting at or killing wild game birds from a motorboat. Laws 1913, chap. 199, § 1, amending Laws 1911, chap. 198, § 15. The defendants maintain that this and all other state laws for the protection of migratory birds are superseded and nullified by an act of Congress. The Agricultural Department Appropriation Act of March 4, 1913, contains these provisions:

"All wild geese, wild swans, brant, wild ducks, snipe, plover, woodcock, rail, wild pigeons, and all other migratory game and insectivorous birds which in their northern and southern migrations pass through or do not remain permanently the entire year within the borders of any state or territory, shall hereafter be deemed to be within the custody and protection of the government of the United States, and shall not be destroyed or taken contrary to regulations hereinafter provided therefor.

"The Department of Agriculture is hereby authorized and directed to adopt suitable regulations to give effect to the previous paragraph by prescribing and fixing closed seasons, having due regard to the zones of temperature, breeding habits, and times and line of migratory flight, thereby enabling the department to select and designate suitable districts for different portions of the country, and it shall be unlawful to shoot or by any device kill or seize and capture migratory birds within the protection of this law during said closed seasons, and any person

who shall violate any of the provisions or regulations of this law for the protection of migratory birds shall be guilty of a misdemeanor and shall be fined not more than \$100 or imprisoned not more than ninety days, or both, in the discretion of the court.

"The Department of Agriculture, after the preparation of said regulations, shall cause the same to be made public, and shall allow a period of three months in which said regulations may be examined and considered before final adoption, permitting, when deemed proper, public hearings thereon, and after final adoption shall cause the same to be engrossed and submitted to the President of the United States for approval. Provided, however, that nothing herein contained shall be deemed to affect or interfere with the local laws of the states and territories for the protection of nonmigratory game or other birds resident and breeding within their borders, nor to prevent the states and territories from enacting laws and regulations to promote and render efficient the regulations of the Department of Agriculture provided under this statute." 37 Stat. at L. chap. 145, p. 847, Comp. Stat. § 8837, 3 Fed. Stat. Anno. 2d ed. p. 414.

The Agricultural Department has defined the closed season for the birds referred to, varying with the species and locality, in regulations which have been approved and published, and which forbid the killing of wild ducks in Kansas between February 1st and September 15th. U. S. Dept. of Agr. Farmers' Bulletin No. 628, p. 12. The state law leaves an open season from September 1st to April 15th. Laws 1913, chap. 199, § 1. In the briefs of both parties it is assumed that the Federal regulations, if valid, supersede the state law. The ordinary rule is that the state may punish the same act that constitutes an offense against the laws of the general government, unless the Federal legislation is made exclusive, expressly or by fair implication. 12 Cyc. 137;

Sexton v. California, 189 U. S. 319, 47 L. ed. 833, 23 Sup. Ct. Rep. 543. But see *Easton v. Iowa*, 188 U. S. 220, 47 L. ed. 452, 23 Sup. Ct. Rep. 288, 12 Am. Crim. Rep. 522. In *State v. Sawyer*, 113 Me. 458, L.R.A. 1915F, 1031, 94 Atl. 886, Ann. Cas. 1917D, 650, it is held that the language of the act above quoted indicates a legislative purpose that the Federal regulations were to be exclusive. But there the prosecution was for killing game out of season. So far as relates to fixing the period within which birds may be hunted, the laws of the state and nation may perhaps be regarded as undertaking to cover fully the same field, and to be not complementary, but in a degree antagonistic. Here, however, the conduct complained of relates to the manner, and not to the time, of killing the birds. It might be argued, by analogy with the subject of interstate commerce, that if the regulation of hunters in their conduct toward migratory birds is committed to the control of the Federal government, Congress must be deemed to have intended them to be free from legislative interference with respect to matters concerning which it has not acted, and that beyond the establishment of a closed season no protection should be afforded the birds, except such as might be given by the states under the express authority granted them to enact laws to promote and render efficient the regulations of the Department. Even the exception might be questioned as an attempt to delegate the legislative power of Congress. Possibly the provision of the state law here invoked may be regarded as promoting the Department's regulations. It in no way conflicts with them, and is directed to the same general end. As these questions have not been argued, the case will be considered in the light in which it has been presented—as turning upon the validity of the act of Congress. In the only reported cases dealing with the question, the Federal act referred to is held to be unconstitutional because the power undertaken to be exercised is not

among those conferred upon Congress. *United States v. Shauver* (D. C.) 214 Fed. 154; *United States v. McCullagh* (D. C.) 221 Fed. 288; *State v. Sawyer*, supra.

The United States district court in South Dakota is said to have held to the contrary (17 West Pub. Co's Docket, 1476); but, if an opinion was written in that case, it does not appear to have been published.¹ The power referred to must be found, if at all, in the provision of the national Constitution relating to interstate commerce, or in that authorizing Congress to make regulations respecting the territory or other property belonging to the United States. U. S. Const. art. 4, § 3.

The natural flight of wild fowl from one point to another does not constitute "commerce," unless that word be expanded beyond any significance heretofore given it. Whatever other element may be spared from a definition of the term, it has not been heretofore applied to processes or occurrences not directed or affected by human intelligence. But, if the fact were otherwise, the circumstance that birds of a particular species do not habitually remain throughout the year in the same state could hardly bring them within the control of Congress, on the theory that they were thereby impressed with a national character as the subjects of interstate commerce. This court once decided that the legislature could not prohibit the shipment out of the state of prairie chickens lawfully caught or killed in Kansas, because such a prohibition was an interference with interstate commerce. *State v. Saunders*, 19 Kan. 127, 27 Am. Rep. 98. The Supreme Court of the United States explicitly disapproved the decision, saying that its reasoning was inconclusive, because it overlooked the authority of the state over property in game within its confines. *Geer v. Connecticut*, 161 U. S. 519, 534, 40 L. ed. 793, 798, 16 Sup. Ct. Rep. 600.

The argument for Federal control

¹ No written opinion filed.

based upon the power given to Congress to make regulations respecting the property of the United States fails, because, in our judgment, the habit of migration does not vest in the Federal government the title to the animal possessing it. In the case last cited, and in many others, wild animals are declared to be subject to the control of the state—to belong to the people of the state—and the rule has been repeatedly applied to migratory birds. The authority of a state to grant hunting privileges to its citizens to the exclusion of those of other states is generally recognized, and is based upon the same principle. 19 Cyc. 1008; note in 26 L.R.A.(N.S.) 794. See also 3 C. J. 18. Doubtless the general government could, if it had the authority, give game birds more effective protection than they now enjoy, or than could be afforded them by the separate action of the states. But Congress can derive no power to legislate on a particular subject from the fact that it can handle the matter more efficiently than the legislatures of the various states. *Kansas v. Colorado*, 206 U. S. 46, 91, 51 L. ed. 956, 972, 27 Sup. Ct. Rep. 655.

All phases of the questions involved are treated so fully in the three cases already cited in this opinion as to make further discussion superfluous. In the absence of a decision by the Federal Supreme Court upholding the act of Congress, no course seems open but to enforce the state law, even if in conflict with it.

An additional objection is made to the validity of the statute on which the action is based, on the ground that the prohibition against shooting ducks from a motorboat is an unreasonable exercise of the police power, and deprives an individual of the use of his property without process of law. A multitude of regulations of the methods of hunting and fishing, designed to limit the amount of game and fish taken, have been upheld. 19 Cyc. 1012. Other conditions being the

same, more birds could be shot within the same time from a motorboat than from a rowboat. The restriction in that regard is a means sufficiently adapted to the end in view to justify the legislature in its adoption. The Federal court for the northern district of California has held invalid a statute of that state, forbidding the use of a magazine gun in shooting certain game birds. *Re Marshall* (C. C.) 102 Fed. 323. The statute also forbade any person to kill more than twenty-five of such birds in a day. The court reasoned that the manifest purpose of the legislature was to prevent a single hunter from getting more than a fixed amount of game, and so long as he did not exceed the limit it made no difference what means he employed. The Kansas statute under consideration makes it unlawful for any one person to kill more than twenty wild ducks in one day. Laws 1913, chap. 199, § 2. It is argued that the end sought was manifestly to prevent one person from taking more than twenty ducks in a day, and that the legislature has no power to say in what manner that number may be taken. The argument is unsound. The general purpose of the statute is to diminish the slaughter of game. This is sought to be accomplished by imposing various restrictions upon the hunter. He is not granted an unconditional right to slay twenty ducks in a day. The prohibition against his use of a motorboat is not designed solely to keep him within the numerical limit. The two restrictions are independent, each operating, as do a number of others of a similar character, to promote the same general end.

The judgment is reversed, and the cause remanded, with directions to overrule the motion to quash.

NOTE.

Upon the question of the power of Congress to protect migratory birds, see annotation following *MISSOURI v. HOLLAND*, post, 991.

Commerce—
power of
Congress over
game birds.

Game—forbid-
ding use of
motorboat.

STATE OF MISSOURI, Appt.,

v.

RAY P. HOLLAND, United States Game Warden.

United States Supreme Court — April 19, 1920.

(252 U. S. 416, 64 L. ed. 641, 40 Sup. Ct. Rep. 382.)

Treaties — validity — infringement of state rights — migratory birds.

1. The rights of the several states are not unconstitutionally infringed by the Migratory Bird Treaty of December 8, 1916, and the Act of July 3, 1918, enacted to give effect to such treaty, under which the killing, capturing, or selling any of the migratory birds included in the terms of the treaty are prohibited except as permitted by regulations compatible with those terms, to be made by the Secretary of Agriculture.

[See note on this question beginning on page 991.]

States — suit by — necessary interest.

2. A suit by a state to enjoin a game warden of the United States from attempting to enforce the Migratory Bird Treaty Act and the regulation made by the Secretary of Agriculture in pursuance thereof on the ground that the statute is an unconstitutional interference with the reserved rights

of the states, and that acts of the defendant, done and threatened under that authority, invade the sovereign rights of the state and contravene its will manifested in statutes, is a reasonable and proper means to assert the alleged quasi sovereign rights of the state.

[See 25 R. C. L. 498.]

(Mr. Justice Van Devanter and Mr. Justice Pitney dissent.)

APPEAL by the state from a judgment of the District Court of the United States for the Western District of Missouri dismissing a suit brought to prevent a United States game warden from attempting to enforce the Migratory Bird Treaty Act, and regulations made by the Secretary of Agriculture in pursuance of that act. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. J. G. L. Harvey, John T. Gose, and Frank W. McAllister, Attorney General of Missouri, for appellant:

If an executive officer, Federal or state, is committing, or is about to commit, acts unauthorized by or in violation of law, to the irreparable injury of the property rights of another, such action or threatened action is good ground for injunctive relief against such officer.

Philadelphia Co. v. Stimson, 223 U. S. 605, 619, 620, 56 L. ed. 570, 576, 32 Sup. Ct. Rep. 340; Magruder v. Belle Fourche Valley Water Users' Asso. 133 C. C. A. 524, 219 Fed. 79; Noble v. Union River Logging R. Co. 147 U. S. 165, 172, 37 L. ed. 123, 126, 13 Sup. Ct. Rep. 271; School v. McAnnulty, 187 U. S. 94, 47 L. ed. 90, 23 Sup. Ct. Rep. 33; Dobbins v. Los Angeles, 195 U. S. 241, 49 L. ed. 177, 25 Sup. Ct.

Rep. 18; Truax v. Raich, 239 U. S. 37, 60 L. ed. 133, L.R.A.1916D, 545, 36 Sup. Ct. Rep. 7, Ann. Cas. 1917B, 283; Lane v. Watts, 234 U. S. 525, 540, 58 L. ed. 1440, 1456, 34 Sup. Ct. Rep. 965; Davis & F. Mfg. Co. v. Los Angeles, 189 U. S. 217, 47 L. ed. 780, 23 Sup. Ct. Rep. 498; Ex parte Young, 209 U. S. 162, 52 L. ed. 730, 13 L.R.A. (N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; United States v. Lee, 106 U. S. 196, 27 L. ed. 171, 1 Sup. Ct. Rep. 240.

In a suit of the character of the one at bar, mere property rights and loss of revenue, however, are not the chief consideration. Rights are involved which may not be valued in money, but the infraction of which the state may insist shall be stopped. An adequate remedy can only be had in a suit by the state to enjoin such infraction.

Georgia v. Tennessee Copper Co. 206

(252 U. S. 416, 64 L. ed. 641, 40 Sup. Ct. Rep. 382.)

U. S. 230, 237, 51 L. ed. 1038, 1044, 27 Sup. Ct. Rep. 618, 11 Ann. Cas. 488; *Missouri v. Illinois*, 180 U. S. 208, 45 L. ed. 497, 21 Sup. Ct. Rep. 331; *Kansas v. Colorado*, 185 U. S. 125, 46 L. ed. 838, 22 Sup. Ct. Rep. 552; *Glenwood Light & Water Co. v. Mutual Light, Heat & P. Co.* 239 U. S. 121, 60 L. ed. 174, 36 Sup. Ct. Rep. 30.

The power of the state over wild game within its borders is derived from the peculiar nature of such property and its common ownership by all the citizens of the state in their collective sovereign capacity.

Geer v. Connecticut, 161 U. S. 519, 529, 530, 40 L. ed. 793, 797, 16 Sup. Ct. Rep. 600; *McCready v. Virginia*, 94 U. S. 391, 24 L. ed. 248; *Martin v. Waddell*, 16 Pet. 410, 10 L. ed. 1012; *United States v. Shauver*, 214 Fed. 154; *United States v. McCullagh*, 221 Fed. 294; *Rupert v. United States*, 104 C. C. A. 255, 181 Fed. 90; *Magner v. People*, 97 Ill. 333; *Gentile v. State*, 29 Ind. 417; *Ex parte Maier*, 103 Cal. 483, 42 Am. St. Rep. 129, 37 Pac. 402; *Chambers Bros. v. Church*, 14 R. I. 400, 51 Am. Rep. 410; *Manchester v. Massachusetts*, 139 U. S. 240, 35 L. ed. 159, 11 Sup. Ct. Rep. 559; *Patson v. Pennsylvania*, 232 U. S. 138, 58 L. ed. 539, 34 Sup. Ct. Rep. 281; *The Abby Dodge*, 223 U. S. 166, 56 L. ed. 390, 32 Sup. Ct. Rep. 310; *Smith v. Maryland*, 18 How. 72, 15 L. ed. 270; *Carey v. South Dakota*, 250 U. S. 118, 63 L. ed. 886, 39 Sup. Ct. Rep. 403; *New York ex rel. Silz v. Hesterberg*, 211 U. S. 31, 53 L. ed. 75, 29 Sup. Ct. Rep. 10; *Re Deininger*, 108 Fed. 623; *Heim v. McCall*, 239 U. S. 175, 60 L. ed. 206, 36 Sup. Ct. Rep. 78, Ann. Cas. 1917B, 287.

The power of the state to control wild game is a necessary incident of the power of police. The power of police is an attribute of state sovereignty.

Geer v. Connecticut, 161 U. S. 519, 534, 40 L. ed. 793, 798, 16 Sup. Ct. Rep. 600; *New York v. Miln*, 11 Pet. 102, 132, 133, 9 L. ed. 648, 659, 660; *Pierce v. State*, 13 N. H. 576; *New York ex rel. Cutler v. Dibble*, 21 How. 366, 16 L. ed. 149; *Federalist*, No. XLV. (Hallowell, 1852) pp. 215, 216; *Compagnie Francaise De Navigation a Vapeur v. State Bd. of Health*, 186 U. S. 380, 46 L. ed. 1209, 22 Sup. Ct. Rep. 811; *Groves v. Slaughter*, 15 Pet. 449, 511, 10 L. ed. 800, 823; *Prigg v. Com.* 16 Pet. 539, 625, 10 L. ed. 1060, 1092; *Com. v. Alger*, 7 Cush. 84; *Thorpe v.*

Rutland & B. R. Co. 27 Vt. 149, 62 Am. Dec. 625; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 33, 24 L. ed. 989, 992; *Rupert v. United States*, 104 C. C. A. 255, 181 Fed. 90; *Cook v. Marshall County*, 196 U. S. 261, 49 L. ed. 471, 25 Sup. Ct. Rep. 233; *Re Raher*, 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865; *House v. Mayes*, 219 U. S. 270, 281, 282, 55 L. ed. 213, 217, 218, 31 Sup. Ct. Rep. 234; *Brodnax v. Missouri*, 219 U. S. 292, 293, 55 L. ed. 223, 224, 31 Sup. Ct. Rep. 238; *New York ex rel. Kennedy v. Becker*, 241 U. S. 556, 60 L. ed. 1166, 36 Sup. Ct. Rep. 705; *Cantini v. Tillman*, 54 Fed. 969; *Plumley v. Massachusetts*, 155 U. S. 461, 473, 39 L. ed. 223, 227, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154.

A prior act of Congress, approved March 4, 1913, was held unconstitutional and void.

United States v. Shauver, 214 Fed. 154; *United States v. McCullagh*, 221 Fed. 288.

The fact that the present act of Congress purports to give effect to a treaty between the United States and Great Britain cannot validate such act of Congress, when its effect is not only to accomplish that which, under the Constitution, Congress has no power to do, but also to do that which is forbidden to the entire Federal government in all or any of its departments, under the terms of the Constitution.

The Federalist, pp. 144, 145, 215, 216; *Works of Calhoun*, vol. 1, 203, 204, pp. 249, 250, 252, 253; *Geofroy v. Riggs*, 133 U. S. 258, 267, 33 L. ed. 642, 645, 10 Sup. Ct. Rep. 295; *People ex rel. Atty. Gen. v. Gerke*, 5 Cal. 383; 2 *Tucker*, Const. pp. 725, 726; *George v. Pierce*, 85 Misc. 105, 148 N. Y. Supp. 237; *Compagnie Francaise de Navigation a Vapeur v. State Bd. of Health*, 51 La. Ann. 662, 56 L.R.A. 795, 72 Am. St. Rep. 458, 25 So. 591, 186 U. S. 380, 46 L. ed. 1209, 22 Sup. Ct. Rep. 811; *Cantini v. Tillman*, 54 Fed. 969; 1 *Butler*, Treaty-Making Power, p. 64; *Citizens' Sav. & L. Asso. v. Topeka*, 20 Wall. 655, 662, 663, 22 L. ed. 455, 461; *Story*, Const. § 1508; *Duer*, Lectures on Const. Jur. of U. S. 2d ed. p. 228; *Cooley*, Const. Law, p. 117; *Von Holst*, Const. Law of U. S. p. 202; 1 *Thayer*, Cases on Const. Law, p. 373; *Cocke*, Const. History of U. S. p. 235; *Jefferson*, Manual of Parliamentary Practice, p. 110, note 3; 3 *Elliot*, Debates, pp. 504, 507; *Cherokee Tobacco*

(Boudinot v. United States) 11 Wall. 616, 20 L. ed. 227; Siemssen v. Bofer, 6 Cal. 250; People ex rel. Atty. Gen. v. Naglee, 1 Cal. 246, 52 Am. Dec. 312; 8 Ops. Atty. Gen. 411, 415; Kansas v. Colorado, 206 U. S. 46, 80, 51 L. ed. 956, 962, 27 Sup. Ct. Rep. 655; Murphy v. Ramsey, 114 U. S. 15, 44, 29 L. ed. 47, 57, 5 Sup. Ct. Rep. 747; Head Money Cases (Edye v. Robertson) 112 U. S. 580, 28 L. ed. 798, 5 Sup. Ct. Rep. 247; Jones v. Meehan, 175 U. S. 1, 32, 44 L. ed. 49, 61, 20 Sup. Ct. Rep. 1; Fong Yue Ting v. United States, 149 U. S. 698, 37 L. ed. 905, 13 Sup. Ct. Rep. 1016; 2 Butler, Treaty-Making Power, pp. 350, 352; Seneca Nation v. Christie, 126 N. Y. 122, 27 N. E. 275; Ft. Leavenworth R. Co. v. Lowe, 114 U. S. 525, 29 L. ed. 264, 5 Sup. Ct. Rep. 995; Pierce v. State, 13 N. H. 576; Cooley, Const. Lim. 7th ed. p. 11; Martin v. Hunter, 1 Wheat. 304, 326, 4 L. ed. 97, 102; Church of Jesus Christ of L. D. S. v. United States, 136 U. S. 1, 34 L. ed. 478, 10 Sup. Ct. Rep. 792.

Among those powers denied to the Federal government are those which are reserved to the states respectively, or to the people. These reserved powers include those over purely internal affairs which concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the state. Without exception wild game has been held to be a part of this mass which is within the exclusive and absolute power of the state.

Downes v. Bidwell, 182 U. S. 244, 312, 313, 369, 370, 45 L. ed. 1088, 1116, 1117, 21 Sup. Ct. Rep. 770; Pierce v. State, 13 N. H. 576; Hammer v. Dagenhart, 247 U. S. 251, 62 L. ed. 1101, 3 A.L.R. 649, 38 Sup. Ct. Rep. 529, Ann. Cas. 1918E, 724; South Carolina v. United States, 199 U. S. 447, 451, 50 L. ed. 264, 265, 26 Sup. Ct. Rep. 110, 4 Ann. Cas. 737; Collector v. Day (Buffington v. Day) 11 Wall. 125, 127, 20 L. ed. 122, 126; Tucker, Limitations on Treaty-making Power, 92, 93, 129, 130; Geoffroy v. Riggs, 133 U. S. 258, 267, 33 L. ed. 642, 645, 10 Sup. Ct. Rep. 295; George v. Pierce, 85 Misc. 105, 148 N. Y. Supp. 237; 2 Tucker, Const. pp. 726, 727; Federalist, p. 145; People ex rel. Atty. Gen. v. Gerke, 5 Cal. 383.

Mr. Richard J. Hopkins, Attorney General of Kansas, and Mr. Samuel W.

Moore, amici curiæ in behalf of the state of Kansas:

Every state possesses the absolute right to deal as it may see fit with property held by it, either as proprietor, or in its sovereign capacity as a representative of the people; and this right is paramount to the exercise by the national government of its legislative or treaty-making power.

State v. Heger, 194 Mo. 707, 93 S. W. 252; State v. McCullagh, 96 Kan. 786, ante, 980, 153 Pac. 557; Geer v. Connecticut, 161 U. S. 519, 40 L. ed. 793, 16 Sup. Ct. Rep. 600; New York ex rel. Silz v. Hesterberg, 211 U. S. 31, 53 L. ed. 75, 29 Sup. Ct. Rep. 10; Manchester v. Massachusetts, 139 U. S. 240, 35 L. ed. 159, 11 Sup. Ct. Rep. 559; The Abby Dodge, 223 U. S. 166, 174, 56 L. ed. 390, 392, 32 Sup. Ct. Rep. 310; Geer v. Connecticut, 161 U. S. 519, 522, 528, 40 L. ed. 793, 794, 796, 16 Sup. Ct. Rep. 600; Ward v. Race Horse, 163 U. S. 504, 41 L. ed. 244, 16 Sup. Ct. Rep. 1076; Patson v. Pennsylvania, 232 U. S. 138, 58 L. ed. 539, 34 Sup. Ct. Rep. 281; United States v. McCullagh, 221 Fed. 288; United States v. Shauver, 214 Fed. 154; New York ex rel. Kennedy v. Becker, 241 U. S. 556, 60 L. ed. 1166, 36 Sup. Ct. Rep. 705; State v. Rodman, 58 Minn. 393, 59 N. W. 1098; Smith v. Maryland, 18 How. 71, 75, 15 L. ed. 269, 271; Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; Carey v. South Dakota, 250 U. S. 118, 63 L. ed. 886, 39 Sup. Ct. Rep. 403.

The treaty-making power conferred upon the President and Senate does not include the right to regulate and control the property and property rights of an individual state, held by it in its quasi sovereign capacity.

Story, Const. § 1403; Stearns v. Minnesota, 179 U. S. 223, 45 L. ed. 162, 21 Sup. Ct. Rep. 73; Wharton v. Wise, 153 U. S. 155, 38 L. ed. 669, 14 Sup. Ct. Rep. 783; Virginia v. Tennessee, 148 U. S. 503, 37 L. ed. 537, 13 Sup. Ct. Rep. 728; Holmes v. Jennison, 14 Pet. 540, 10 L. ed. 579; 38 Cyc. 966.

The lack of legislative power in Congress to divest a state of its property right and control over the wild game within its borders cannot be supplied by making a treaty with Great Britain.

Rawle, Const. p. 66; Chinese Exclusion Case, 130 U. S. 581, 32 L. ed. 1063, 9 Sup. Ct. Rep. 623; United States v. Rauscher, 119 U. S. 407, 30 L. ed. 425, 7 Sup. Ct. Rep. 234, 6 Am. Crim. Rep. 222; Head Money Cases (Edye v. Rob-

(552 U. S. 416, 64 L. ed. 641, 40 Sup. Ct. Rep. 383.)

ertson) 112 U. S. 580, 28 L. ed. 798, 5 Sup. Ct. Rep. 247; Horner v. United States, 143 U. S. 570, 36 L. ed. 266, 12 Sup. Ct. Rep. 522; United States v. Lee Yen Tai, 185 U. S. 213, 220, 46 L. ed. 878, 882, 22 Sup. Ct. Rep. 629.

The treaty-making power of the national government is limited. It cannot divest a state of its police power, or take away its ownership or control of its wild game.

2 Whart. Int. Law Dig. ¶ 131a; Monongahela Nav. Co. v. United States, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622; Prout v. Starr, 188 U. S. 537, 47 L. ed. 584, 23 Sup. Ct. Rep. 398; Geofroy v. Riggs, 133 U. S. 258, 33 L. ed. 642, 10 Sup. Ct. Rep. 295; Geer v. Connecticut, 161 U. S. 519, 40 L. ed. 793, 16 Sup. Ct. Rep. 600; Collector v. Day (Buffington v. Day) 11 Wall. 113, 20 L. ed. 122; Kansas v. Colorado, 206 U. S. 46, 51 L. ed. 956, 27 Sup. Ct. Rep. 655; Hammer v. Dagenhart, 247 U. S. 251, 62 L. ed. 1101, 3 A.L.R. 649, 38 Sup. Ct. Rep. 529, Ann. Cas. 1918E, 724; Pierce v. State, 13 N. H. 576; Ward v. Race Horse, 163 U. S. 504, 41 L. ed. 244, 16 Sup. Ct. Rep. 1076; Coyle v. Smith, 221 U. S. 559, 55 L. ed. 853, 31 Sup. Ct. Rep. 688; Patson v. Pennsylvania, 232 U. S. 138, 58 L. ed. 539, 34 Sup. Ct. Rep. 281; Heim v. McCall, 239 U. S. 175, 60 L. ed. 206, 36 Sup. Ct. Rep. 78, Ann. Cas. 1917B, 287; Truax v. Raich, 239 U. S. 33, 60 L. ed. 131, L.R.A.1916D, 545, 36 Sup. Ct. Rep. 7, Ann. Cas. 1917B, 283; Cantini v. Tillman, 54 Fed. 969; Leong Mow v. Commissioners for Protection of Birds, Game & Fish, 185 Fed. 223; Re Wong Yung Quy, 6 Sawy. 442, 2 Fed. 624; Compagnie Francaise de Navigation a Vapeur v. State Bd. of Health, 51 La. Ann. 645, 56 L.R.A. 795, 72 Am. St. Rep. 458, 25 So. 591, affirmed in 186 U. S. 380, 46 L. ed. 1209, 22 Sup. Ct. Rep. 811; New York ex rel. Kennedy v. Becker, 241 U. S. 556, 60 L. ed. 1166, 36 Sup. Ct. Rep. 705; George v. Pierce, 85 Misc. 105, 148 N. Y. Supp. 230; Bondi v. MacKay, 87 Vt. 271, 89 Atl. 228, Ann. Cas. 1916C, 130; Downes v. Bidwell, 182 U. S. 313, 45 L. ed. 1118, 21 Sup. Ct. Rep. 796; Passenger Cases, 7 How. 283, 12 L. ed. 702; Holmes v. Jennison, 14 Pet. 616, 10 L. ed. 619; Tucker, Limitations on Treaty-making, p. 339; House v. Mayes, 219 U. S. 270, 55 L. ed. 213, 31 Sup. Ct. Rep. 234.

The treaty in this case does not, by its terms, purport to create a closed

season between December 31st and March 10th. Its executory agreement to pass future legislation covering this period is not the supreme law of the land, and cannot have the effect of giving validity to an unconstitutional act.

Whitney v. Robertson, 124 U. S. 190, 194, 31 L. ed. 386, 388, 8 Sup. Ct. Rep. 456; Turner v. American Baptist Missionary Union, 5 McLean, 347, Fed. Cas. No. 14,251.

Messrs. Alex. C. King and William L. Frierson, Assistant Attorney General, for appellee:

The Constitution expressly grants to Congress the power to enact such laws as may be necessary to give effect to treaties.

United States v. Thompson, 258 Fed. 257; United States v. Rockefeller, 260 Fed. 346; Baldwin v. Franks, 120 U. S. 678, 30 L. ed. 766, 7 Sup. Ct. Rep. 656, 763; United States v. Jin Fuey Moy, 241 U. S. 394, 60 L. ed. 1061, 36 Sup. Ct. Rep. 658, Ann. Cas. 1917D, 854; Chinese Exclusion Case, 130 U. S. 581, 600, 32 L. ed. 1068, 1073, 9 Sup. Ct. Rep. 623; Foster v. Neilson, 2 Pet. 253, 314, 7 L. ed. 415, 435; United States v. 43 Gallons of Whiskey (United States v. Lariviere) 98 U. S. 188, 196, 23 L. ed. 846, 847.

The power of the state over game is limited by such powers as have been conferred upon the Federal government.

Geer v. Connecticut, 161 U. S. 519, 528, 40 L. ed. 794, 796, 16 Sup. Ct. Rep. 600.

The power of Congress to legislate to make treaties effective is not limited to the subjects with respect to which it is empowered to legislate in purely domestic affairs.

Cohen v. Virginia, 6 Wheat. 264, 413, 5 L. ed. 257, 293; Legal Tender Cases, 12 Wall. 457, 555, 20 L. ed. 287, 313; Chinese Exclusion Case, 130 U. S. 581, 604, 32 L. ed. 1068, 1075, 9 Sup. Ct. Rep. 623; Hauenstein v. Lynham, 100 U. S. 483, 490, 25 L. ed. 628, 630; Re Ross (Ross v. McIntyre) 140 U. S. 453, 463, 35 L. ed. 581, 585, 11 Sup. Ct. Rep. 897.

The power of the Federal government to make and enforce treaties is not a limitation on the reserved powers of the states, but is the exercise of a power not reserved to the states under the 10th Amendment, being both expressly granted to the United States and prohibited to the states.

United States v. Thompson, 258 Fed. 264; *Wildenhuis's Case* (*Mali v. Keeper of Common Jail*) 120 U. S. 1, 17, 30 L. ed. 565, 568, 7 Sup. Ct. Rep. 383; *Ware v. Hylton*, 3 Dall. 199, 1 L. ed. 568; *Chirac v. Chirac*, 2 Wheat. 259, 276, 4 L. ed. 234, 238; *Geofroy v. Riggs*, 133 U. S. 258, 266, 33 L. ed. 642, 644, 10 Sup. Ct. Rep. 295; *Hopkirk v. Bell*, 8 Cranch, 454, 2 L. ed. 497; *United States v. 43 Gallons of Whiskey* (*United States v. Lariviere*) 93 U. S. 188, 23 L. ed. 846; *United States v. Winans*, 198 U. S. 371, 49 L. ed. 1089, 25 Sup. Ct. Rep. 662.

The treaty-making power of the United States embraces all such power as would have belonged to the several states if the Constitution had not been adopted; in the exercise of that power the Federal government is the accredited agent of both the people of the United States and of the states themselves.

Baldwin v. Franks, 120 U. S. 678, 682, 683, 30 L. ed. 766-768, 7 Sup. Ct. Rep. 656, 763.

The treaty-making power applies to all matters which may properly be the subject of negotiations between the two governments.

4 *Elliot, Debates*, p. 464; *Story, Const.* 5th ed. § 1508; *Ware v. Hylton*, 3 Dall. 199, 235, 1 L. ed. 568, 583; *Geofroy v. Riggs*, 133 U. S. 258, 266, 33 L. ed. 642, 644, 10 Sup. Ct. Rep. 295; *Re Ross* (*Ross v. McIntyre*) 140 U. S. 453, 463, 35 L. ed. 581, 585, 11 Sup. Ct. Rep. 897.

The protection of migratory game is a proper subject of negotiations and treaties between the governments of the countries interested in such game.

United States v. Rockefeller, 260 Fed. 347.

Mr. Louis Marshall for the Association for the Protection of the Adirondacks, as *amicus curiæ*.

Mr. Justice Holmes delivered the opinion of the court:

This is a bill in equity, brought by the state of Missouri to prevent a game warden of the United States from attempting to enforce the Migratory Bird Treaty Act of July 3, 1918, chap. 128, 40 Stat. at L. 755, Comp. Stat. § 8837a, Fed. Stat. Anno. Supp. 1918, p. 196, and the regulations made by the Secretary of Agriculture in pursuance of the same. The ground of the bill is that

the statute is an unconstitutional interference with the rights reserved to the states by the 10th Amendment, and that the acts of the defendant, done and threatened under that authority, invade the sovereign right of the state and contravene its will manifested in statutes. The state also alleges a pecuniary interest, as owner of the wild birds within its borders and otherwise, admitted by the government to be sufficient, but it is enough that the bill is a reasonable and proper means to as-
States—suit by—
necessary
interest.

sert the alleged quasi sovereign rights of a state *Kansas v. Colorado*, 185 U. S. 125, 142, 46 L. ed. 838, 844, 22 Sup. Ct. Rep. 552; *Georgia v. Tennessee Copper Co.* 206 U. S. 230, 237, 51 L. ed. 1038, 1044, 27 Sup. Ct. Rep. 618, 11 Ann. Cas. 488; *Marshall Dental Mfg. Co. v. Iowa*, 226 U. S. 460, 462, 57 L. ed. 300, 302, 33 Sup. Ct. Rep. 168. A motion to dismiss was sustained by the district court on the ground that the act of Congress is constitutional. 258 Fed. 479. *United States v. Thompson*, 258 Fed. 257; *United States v. Rockefeller*, 260 Fed. 346. The state appeals.

On December 8, 1916, a treaty between the United States and Great Britain was proclaimed by the President. It recited that many species of birds in their annual migrations traversed many parts of the United States and of Canada, that they were of great value as a source of food and in destroying insects injurious to vegetation, but were in danger of extermination through lack of adequate protection. It therefore provided for specified close seasons and protection in other forms, and agreed that the two powers would take or propose to their lawmaking bodies the necessary measures for carrying the treaty out. 39 Stat. at L. 1702. The above-mentioned Act of July 3, 1918, entitled, "An Act to Give Effect to the Convention," prohibited the killing, capturing, or selling any of the migratory birds included in the terms of the treaty except as permitted by regulations

compatible with those terms, to be made by the Secretary of Agriculture. Regulations were proclaimed on July 31 and October 25, 1918. 40 Stat. at L. 1812, 1863. It is unnecessary to go into any details, because, as we have said, the question raised is the general one whether the treaty and statute are void as an interference with the rights reserved to the states.

To answer this question it is not enough to refer to the 10th Amendment, reserving the powers not delegated to the United States, because by article 2, § 2, the power to make treaties is delegated expressly, and by article 6, treaties made under the authority of the United States, along with the Constitution and laws of the United States, made in pursuance thereof, are declared the supreme law of the land. If the treaty is valid, there can be no dispute about the validity of the statute under article 1, § 8, as a necessary and proper means to execute the powers of the government. The language of the Constitution as to the supremacy of treaties being general, the question before us is narrowed to an inquiry into the ground upon which the present supposed exception is placed.

It is said that a treaty cannot be valid if it infringes the Constitution; that there are limits, therefore, to the treaty-making power; and that one such limit is that what an act of Congress could not do unaided, in derogation of the powers reserved to the states, a treaty cannot do. An earlier act of Congress that attempted by itself, and not in pursuance of a treaty, to regulate the killing of migratory birds within the states, had been held bad in the district court. *United States v. Shauver*, 214 Fed. 154; *United States v. McCullagh*, 221 Fed. 288. Those decisions were supported by arguments that migratory birds were owned by the states in their sovereign capacity, for the benefit of their people, and that under cases like *Geer v. Connecticut*, 161 U. S. 519, 40 L. ed. 793, 16 Sup. Ct. Rep.

600, this control was one that Congress had no power to displace. The same argument is supposed to apply now with equal force.

Whether the two cases cited were decided rightly or not, they cannot be accepted as a test of the treaty power. Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention. We do not mean to imply that there are no qualifications to the treaty-making power, but they must be ascertained in a different way. It is obvious that there may be matters of the sharpest exigency for the national well-being that an act of Congress could not deal with, but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, "a power which must belong to and somewhere reside in every civilized government" is not to be found. *Andrews v. Andrews*, 188 U. S. 14, 33, 47 L. ed. 366, 370, 23 Sup. Ct. Rep. 237. What was said in that case with regard to the powers of the states applies with equal force to the powers of the nation in cases where the states individually are incompetent to act. We are not yet discussing the particular case before us, but only are considering the validity of the test proposed. With regard to that, we may add that when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the

light of our whole experience, and not merely in that of what was said a hundred years ago. The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the 10th Amendment. We must consider what this country has become in deciding what that Amendment has reserved.

The state, as we have intimated, founds its claim of exclusive authority upon an assertion of title to migratory birds,—an assertion that is embodied in statute. No doubt it is true that, as between a state and its inhabitants, the state may regulate the killing and sale of such birds, but it does not follow that its authority is exclusive of paramount powers. To put the claim of the state upon title is to lean upon a slender reed. Wild birds are not in the possession of anyone; and possession is the beginning of ownership. The whole foundation of the state's rights is the presence within their jurisdiction of birds that yesterday had not arrived, to-morrow may be in another state, and in a week a thousand miles away. If we are to be accurate, we cannot put the case of the state upon higher ground than that the treaty deals with creatures that for the moment are within the state borders, that it must be carried out by officers of the United States within the same territory, and that, but for the treaty, the state would be free to regulate this subject itself.

As most of the laws of the United States are carried out within the states, and as many of them deal with matters which, in the silence of such laws, the state might regulate, such general grounds are not enough to support Missouri's claim. Valid treaties, of course, "are as binding within the territorial limits of the states as they are effective throughout the dominion of the United States." *Baldwin v. Franks*, 120 U. S. 678, 683, 30 L. ed. 766, 767, 7 Sup. Ct. Rep. 656, 763. No doubt the great body of private relations usually falls within the control of

the state, but a treaty may override its power. We do not have to invoke the later developments of constitutional law for this proposition; it was recognized as early as *Hopkirk v. Bell*, 3 Cranch, 454, 2 L. ed. 497, with regard to statutes of limitation, and even earlier, as to confiscation, in *Ware v. Hylton*, 3 Dall. 199, 1 L. ed. 568. It was assumed by Chief Justice Marshall with regard to the escheat of land to the state in *Chirac v. Chirac*, 2 Wheat. 259, 275, 4 L. ed. 234, 238; *Hauenstein v. Lynham*, 100 U. S. 483, 25 L. ed. 628; *Geofroy v. Riggs*, 133 U. S. 258, 33 L. ed. 612, 10 Sup. Ct. Rep. 295; *Blythe v. Hinckley*, 180 U. S. 333, 340, 45 L. ed. 557, 561, 21 Sup. Ct. Rep. 390. So, as to a limited jurisdiction of foreign consuls within a state. *Wildenhuss's Case (Mali v. Keeper of Common Jail)* 120 U. S. 1, 30 L. ed. 565, 7 Sup. Ct. Rep. 383. See *Re Ross*, 140 U. S. 453, 35 L. ed. 581, 11 Sup. Ct. Rep. 897. Further illustration seems unnecessary, and it only remains to consider the application of established rules to the present case.

Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject-matter is only transitorily within the state, and has no permanent habitat therein. But for the treaty and the statute, there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the government to sit by while a food supply is cut off and the protectors of our forests and of our crops are destroyed. It is not sufficient to rely upon the states. The reliance is vain, and were it otherwise, the question is whether the United States is forbidden to act. We are of opinion that the treaty and statute must be upheld. *Carey v. South Dakota*, 250 U. S. 118, 63 L. ed. 886, 39 Sup. Ct. Rep. 403.

Decree affirmed.

Mr. Justice Van Devanter and Mr. Justice Pitney dissent.

Treaties—
validity—
infringement of
state rights
—migratory
birds.

ANNOTATION.

Power of Congress to protect migratory birds.

As shown in *STATE v. MCCULLAGH* (reported herewith) ante, 980, Congress on March 4, 1913, passed, as a rider on the 'Agricultural Appropriation Bill, a provision attempting to take under the protection of the Federal government all migratory birds, and provided a penalty for killing them. This law was held unconstitutional in *STATE v. MCCULLAGH*, and in *United States v. Shauver* (1914; D. C.) 214 Fed. 154; *United States v. McCullagh* (1915; D. C.) 221 Fed. 288, and *State v. Sawyer* (1915) 113 Me. 458, L.R.A.1915F, 1031, 94 Atl. 886, Ann. Cas. 1917D, 650. And these cases were approved in *United States v. Selkirk* (1919) — C. C. A. —, 258 Fed. 775.

One unreported case referred to in *STATE v. MCCULLAGH* seems to have held the other way. The argument in favor of this ruling is perhaps as well set out in *STATE v. MCCULLAGH* as any other. An attempt was made to have the question passed upon by the Supreme Court of the United States, and the case reported in (1914) 214 Fed. 154, was appealed to that court, but the appeal was dismissed by counsel, without decision, on January 7, 1919. 248 U. S. 594, 63 L. ed. 438, 39 Sup. Ct. Rep. 134.

The Supreme Court of the United States, however, held that the Act of 1913 did not prevent the state from passing statutes prohibiting the shipping of wild ducks by carriers. *Carey v. South Dakota* (1919) 250 U. S. 118, 63 L. ed. 886, 39 Sup. Ct. Rep. 403.

In the meantime, a treaty for the protection of migratory birds had been concluded with Great Britain, on August 16, 1916, and proclaimed by the President on December 8, 1916, and Congress, on July 3, 1918, passed a statute to give effect to the treaty. When prosecutions were instituted under this statute, it was contended that, since the prior statute had been held unconstitutional, the same result must follow in case of the enforcement statute.

The court in *United States v. Thompson* (1919) 258 Fed. 257, enters very fully into an examination of the question whether or not the treaty-making power of Congress was greater than its power to enact statutes, and holds that, while a treaty which clearly violated some provision of the Constitution might be declared void, no constitutional provision prohibited the making of this treaty, and that it was valid, and the statute enacted to enforce it was also valid.

Only a few days later, the same question was decided in a Texas district in favor of the law. *United States v. Selkirk* (1919) — C. C. A. —, 258 Fed. 775, the court saying: "It could not be for a moment contended that two sovereign states could not by treaty regulate the taking of migratory birds which pass from the one country to the other, and, with the state of Texas still a sovereign republic instead of a constituent part of the United States, there is no doubt that it could have concluded a treaty with Great Britain and enforced it, of the tenor and effect of that concluded by Congress. What a state itself could do, that all the states can do through their agent, the central government."

During the next month, the same conclusion was reached in the district of Montana. *United States v. Rockefeller* (1919) — C. C. A. —, 260 Fed. 346, the court saying: "Fisheries have been the subject of treaties always, and the principles and objects thereof are equally applicable and desirable in relation to migratory birds and other game. . . . The object of all thereof is to peacefully share those natural resources which are the property of no one till reduced to possession, from which all may take when within their territory, which are alternately found within the territory of the several nations and in places common to all, as the high seas, which may be wholly seized and exterminated by one to the great and irreparable damage of all, which in accord may

be preserved and enjoyed, a blessing to all, but in discord may be annihilated to the injury of all, and which may become legitimate causes for war, to obviate which is of the most ancient and important objects of treaties.

. . . Civilized nations have awakened to the value of certain wild life, and to the necessity of co-operation to conserve and perpetuate it. Not otherwise can migratory birds be preserved from extinction. It avails little to protect them at one of their resorts, if they are mercilessly slaughtered at others. If wild ducks, or their eggs and nests, are destroyed on the Northern breeding grounds, there will be little sport and profit in duck shooting in the Southern fields; and if these birds are exposed to unregulated killing in their winter resorts, there will be few to propagate their kind in the marshes of the north. Their continued existence is beyond the power of separate states and nations. It can be accomplished only by treaty to that end between nations."

Almost at the same time another decision was handed down in a Missouri district, in a consolidated action consisting of a prosecution for violation of the statute, and a bill in equity on behalf of the state of Missouri to prevent enforcement of the statute. The court says the statute is valid if the

treaty is valid, and, in considering the validity of the treaty, says: "By this treaty the United States profits by the protection which is accorded such wild fowl in Canada during the nesting and feeding seasons, before the migration sets in to the south. Canada gains by the same protection which is thrown about the same birds during their stay within the United States. The people of both countries, of our entire Union and of all the states, benefit by the mutual and reciprocal advantages which accrue from this arrangement. If this be so, then the subject-matter comes properly within the treaty-making power. If it curtails any right which would otherwise be lodged in an individual state, it does so only through the full and untrammelled exercise of a Federal power to negotiate with a foreign government." *United States v. Samples* (1919) — C. C. A. —, 258 Fed. 479.

The equity branch of that case was appealed to the Supreme Court of the United States, and the decision was affirmed in *MISSOURI v. HOLLAND* (reported herewith) ante, 984. This decision, of course, settled the question in favor of the validity of the law, and provides a method by which the lives of the migratory birds can be preserved.

H. P. F.

ATCHISON, TOPEKA, & SANTA FE RAILWAY COMPANY et al.,
Appts.,

v.

STATE OF OKLAHOMA et al.

Oklahoma Supreme Court—November 19, 1913.

(— Okla. —, 176 Pac. 393.)

Public service commission — requirement of sleeping cars.

1. The corporation commission is vested with authority to require all reasonable and proper facilities to be furnished by a railroad company, such as Pullman cars, and the fact that an order of the commission requiring such facilities may incidentally affect interstate commerce does not render the order a nullity; but where a railroad company has furnished all proper and reasonable facilities of the character required by the order, the commission has not the power to require the furnishing of additional facilities, where its order will interfere with interstate commerce.

[See note on this question beginning on page 996.]

Headnotes by HARDY, J.

Public service corporation — determination of adequate service.

2. What is or is not reasonable and adequate facilities or service to be furnished by a railroad company must be determined in the light of conditions existing at the time, and in relation to all surrounding circumstances.

— requiring unnecessary service.

3. Where reasonable and adequate Pullman service has been furnished by a railroad company to accommodate all

intrastate traffic between two points within this state, an order which requires additional Pullman service between said points is unreasonable, when such additional service can only be furnished at a loss to the railroad company.

— reasonableness of order.

4. The order in the instant case held to be unreasonable under the circumstances.

APPEAL by defendants from an order of the Corporation Commission requiring them to operate a Pullman car on certain trains, between certain stations, to determine whether the revenue from such operation would be remunerative. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. J. R. Cottingham and S. W. Hayes, for appellants:

The order in question is void because it constitutes and is an unauthorized and unlawful interference with interstate commerce, and without the jurisdiction of the corporation commission to make.

Illinois C. R. Co. v. DeFuentes, 236 U. S. 157, 59 L. ed. 517, P.U.R.1915A, 840, 35 Sup. Ct. Rep. 275; Chicago, B. & Q. R. Co. v. Railroad Commission, 237 U. S. 220, 59 L. ed. 926, P.U.R. 1915C, 309, 35 Sup. Ct. Rep. 560; Sargent v. Rutland R. Co. 86 Vt. 328, 85 Atl. 654; Railroad Commission v. St. Louis & S. F. R. Co. 195 Ala. 527, P.U.R.1916C, 451, 70 So. 645; Mississippi R. Commission v. Illinois C. R. Co. 203 U. S. 335, 51 L. ed. 209, 27 Sup. Ct. Rep. 90; Chicago, B. & Q. R. Co. v. Railroad Commission, 237 U. S. 220, 59 L. ed. 926, P.U.R.1915C, 309, 35 Sup. Ct. Rep. 560.

The order of the commission is void because it is unreasonable and unjust, and takes the property of these defendants without due process of law, in violation of the 14th Amendment to the Constitution of the United States and the Constitution of the state of Oklahoma.

Minneapolis, St. P. & S. Ste. M. R. Co. v. Railroad Commission, 136 Wis. 146, 17 L.R.A.(N.S.) 821, 116 N. W. 905; Chesapeake & O. R. Co. v. Public Service Commission, 78 W. Va. 667, P.U.R.1917A, 104, 89 S. E. 844; Public Service Commission v. Chesapeake & O. R. Co. (W. Va.) P.U.R.1916E, 353; Chesapeake & O. R. Co. v. Public Service Commission, 78 W. Va. 667, P.U.R. 11 A.L.R.—68.

1917A, 104, 89 S. E. 844; Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 56 L. ed. 863, 32 Sup. Ct. Rep. 535.

The order should be reversed because it is not supported by the findings of fact made by the commission, nor by the evidence in the record.

Atchison, T. & S. F. R. Co. v. State, 23 Okla. 210, 21 L.R.A.(N.S.) 908, 100 Pac. 11; Missouri, K. & T. R. Co. v. State, 24 Okla. 331, 103 Pac. 613; St. Louis & S. F. R. Co. v. State, 25 Okla. 420, 106 Pac. 818; St. Louis & S. F. R. Co. v. Williams, 25 Okla. 662, 107 Pac. 428; Ft. Smith & W. R. Co. v. State, 25 Okla. 866, 108 Pac. 407.

Mr. Paul Walker for appellees.

Hardy, J., delivered the opinion of the court:

Appellants own a line of railway extending through the state between Oklahoma City and Ardmore, and to points outside the state, both north and south, over which it operates three passenger trains per day, two of which, both north and south bound, pass through the points named during the daytime. One train, hereinafter referred to as 405, leaves Oklahoma City for the south at 12:01 at night, and one north-bound train, referred to as No. 406, arrives at Ardmore at 12:30 at night. No. 405 carries regularly, between Oklahoma City and Ardmore, and to points beyond in the state of Texas, terminating at Cleburne, Texas, two Pullman cars, one of which is

known as the Chicago-Cleburne Pullman, carried for the purpose of accommodating passengers between the two points and intervening points. The second is operated from Oklahoma City to Cleburne, and is known as the Oklahoma-Cleburne car. This latter Pullman is picked up by train No. 405 at Oklahoma City, and a like Pullman is carried by train No. 406 from Cleburne to Oklahoma City, arriving at Ardmore at 12:30 A. M. and at Oklahoma City at 4:21 A. M., where it is set out. Persons taking passage on train No. 405 at Oklahoma City may enter the Pullman at 9 o'clock P. M., and, desiring to disembark at Ardmore, are required to get up at 3:58 A. M. Passengers coming from Ardmore to Oklahoma City can embark on the Pullman at 12:30 A. M. and remain therein until 7 o'clock A. M., after arrival at Oklahoma City.

A number of residents of the various towns on the St. Louis & San Francisco Railway Company, between Ardmore and Hugo, and a number of citizens in the city of Ardmore, filed a complaint with the corporation commission, wherein they sought to procure an order requiring an extra Pullman to be attached to train No. 405, and carried to Ardmore, and set out to be picked up by the St. Louis & San Francisco passenger train, and carried over that line to Hugo, and for a Pullman to be attached to the train of the St. Louis & San Francisco Railway Company leaving Hugo in the afternoon, and arriving at Ardmore about 8 o'clock at night, to be picked up by train No. 406 of appellants and carried to Oklahoma City, and there set out. The evidence in support of the complaint is all by residents of towns along the line of the St. Louis & San Francisco Railway Company, and is largely based upon complaints that the passenger trains of the St. Louis & San Francisco Railway Company do not carry sufficient coaches to accommodate the passengers traveling over that road, and that the Pullman car would furnish additional accommodations for said passengers.

There were two hearings upon this complaint, the first hearing being continued to permit representatives of Ardmore to testify, but no witness from Ardmore testified to any necessity or demand for extra Pullman service. The commission ordered appellants to operate a Pullman car between Ardmore and Oklahoma City upon trains Nos. 405 and 406 until the 10th day of January, 1917, to determine whether the revenue from the operation thereof was remunerative, from which order appellants prosecute this appeal.

This order can be complied with only in one of two ways: either by stopping one of the through interstate cars now operated on their trains, or by attaching an additional Pullman to each of these two trains. The evidence conclusively shows that Pullman accommodations between Oklahoma City and Ardmore have at all times been adequate. Indeed, it appears that for a period of six months or more, about the first of the year 1916, vacant berths, both upper and lower, might be had at all times on any of the Pullmans operated on trains Nos. 405 and 406, between the two points, and no witness had testified that he ever applied for a berth and failed to obtain one. One witness testified that at one time he and a number of other persons applied for accommodations at Ardmore, and that four or five of them rode in the chair car. He does not say whether they did not obtain such accommodations, or whether they applied for lower berths and failed to get them, and refused to take upper berths. It also appears that during a long period of time the number of interstate passengers accommodated by the Oklahoma City-Cleburne car exceeded the number of intrastate passengers from 50 to 100 per cent. If the Oklahoma City-Cleburne car be operated only between Oklahoma City and Ardmore, all interstate passengers on train No. 406, who could not be accommodated on the Chicago-Cleburne car, would be required to arise at Oklahoma City at 4:21 A. M., and all passengers from Okla-

homa City to Texas points, embarking upon train No. 405, could not get to bed until the arrival of the train at Oklahoma City at 11:50 P. M. This would result in the same inconvenience to a much larger interstate traffic which this car accommodates than now exists as to intrastate traffic. In addition, the evidence satisfactorily shows that the traffic now taken care of by the Chicago-Cleburne car could not be taken care of by the Chicago-Cleburne car if the other was discontinued or required to be set out at Ardmore.

The corporation commission is vested with authority to require all reasonable and proper facilities to be furnished by a railroad company, such as Pullman service, and the fact

Public service
commission—
requirement
of sleeping
cars.

that an order of the commission requiring such facilities may incidentally affect interstate commerce does not render the order a nullity. *Chicago, R. I. & P. R. Co. v. State*, 53 Okla. 712, L.R.A.1916F, 1281, 157 Pac. 1039. But where a railroad company has furnished all proper and reasonable facilities of the character involved, the commission has not the power to require the furnishing of additional facilities, where its order would operate to interfere with interstate commerce; and if the order in the present case be construed to require the setting out at Ardmore of the Oklahoma City-Cleburne car, the order would be an unwarranted interference with interstate commerce. *Missouri, K. & T. R. Co. v. Norfolk* (*Missouri, K. & T. R. Co. v. State*) 25 Okla. 325, 29 L.R.A.(N.S.) 159, 107 Pac. 172; *St. Louis & S. F. R. Co. v. Troy*, 25 Okla. 749, 108 Pac. 753; *St. Louis & S. F. R. Co. v. Reynolds*, 26 Okla. 804, 138 Am. St. Rep. 1003, 110 Pac. 668; *Herndon v. Chicago, R. I. & P. R. Co.* 218 U. S. 135, 54 L. ed. 970, 30 Sup. Ct. Rep. 633; *Illinois C. R. Co. v. De Fuentes*, 236 U. S. 157, 59 L. ed. 517, P.U.R.1915A, 840, 35 Sup. Ct. Rep. 275; *Chicago, B. & Q. R. Co. v. Railroad Commission*, 237 U. S. 220, 59 L. ed. 926, P.U.R.1915C, 309, 35 Sup. Ct. Rep. 560.

The corporation commission is vested with power, under § 18, art. 9, of the Constitution, to require all public service corporations to establish and maintain all such facilities and conveniences as may be reasonable and just. The term "reasonable and just," or "reasonable and adequate," when applied to facilities or service required of public service corporations, is not capable of exact definition; but the terms are relative, and must be interpreted in the light of conditions existing at the time and in relation to all the surrounding circumstances. *Missouri, K. & T. R. Co. v. Norfolk*, supra; *Missouri, K. & T. R. Co. v. Witcher*, 25 Okla. 586, 106 Pac. 852. There is no necessity shown for any additional Pullman between these points to take care of the intrastate traffic; but, on the other hand, the evidence overwhelmingly establishes that on every train between Oklahoma City and Ardmore Pullman service is furnished to supply and furnish every applicant with accommodations. Where service is desired, as stated by witnesses, is that passengers coming over the line of the St. Louis & San Francisco Railroad to Ardmore will be allowed to go to bed early if the Pullman originates at Ardmore, and will be permitted to sleep as late as 7 o'clock at Oklahoma City, and when returning from Oklahoma City will not be required to disembark at 3:58 at Ardmore.

Public service
corporation—
determination
of adequate
service.

—requiring
unnecessary
service.

The order here is very similar to that reviewed in *Public Service Commission v. Chesapeake & O. R. Co.* (W. Va.) P.U.R.1916E, 353. An order had been made to require the railroad company to transfer at Huntington a Pullman known as the "Wheeling sleeper," operated by the Baltimore & Ohio Railway between Wheeling and Huntington, to a train of the Chesapeake & Ohio Railway Company, and carry the same into Charleston. The Chesapeake & Ohio Railway Company operated a parlor and buffet car on

this train, arriving at Charleston at 9:10 A. M., which furnished sufficient accommodations for all passengers transferring to its train from the Wheeling sleeper at Huntington for Charleston. It was urged that passengers going to Charleston were required to rise at 7:15 A. M., and be transported across the city in carriages, in order to take the Chesapeake & Ohio train, and, returning from Charleston, would arrive at Huntington at 9 P. M., where they would again be required to transfer to the Wheeling sleeper, which left Huntington at 11:50 P. M. It also appeared that this additional service would result in a loss to the Chesapeake & Ohio Railroad Company. The supreme court of West Virginia reversed the order of the commission (Chesapeake & O. R. Co. v. Public Service Commission, 78 W. Va. 667, P.U.R.1917A, 104, 89 S. E. 844), for the reason that the order imposed an unreasonable and unnecessary burden, in view of the facilities already furnished, and was unjust and unfair to the carrier, because of this unnecessary burden and the pecuniary loss which would be incurred in the performance of the order.

In the case at bar the corporation commission finds that the expense to appellants for the use of Pullman cars per year is \$6,000, being approximately \$20 per day per car. If two additional Pullmans be required to render the additional service, this would entail an extra expense of \$40 per day, saying nothing about the operating expense of hauling the cars, the wear and tear of the track, and repairs and other items. The evidence shows that the total patronage between Oklahoma City and

Ardmore is insufficient to pay the operating expenses of these two cars alone; and without any demand therefor justifying the additional accommodations, if all the traffic between the two points is considered, there would be a clear loss to the company of between \$2,000 and \$3,000 per year. In addition to this, the passenger traffic between the two points during the year 1916, covering a period of seven months, decreased more than 30 per cent. Under this statement of facts, the order appealed from is unreasonable and unjust, and imposes an unnecessary burden upon the appellants. —reasonable-
ness of order.

The question of expense in requiring facilities by a carrier is not always conclusive. *United States Exp. Co. v. State*, 47 Okla. 656, 150 Pac. 178. But where adequate and sufficient facilities have already been furnished, and the order requiring additional facilities is not necessary for proper and convenient accommodation of the traffic to be benefited, the question of expense becomes an important criterion to be considered in determining the reasonableness of the order. *Washington ex rel. Oregon R. & Nav. Co. v. Fairchild*, 224 U. S. 510, 56 L. ed. 863, 32 Sup. Ct. Rep. 535. It appearing that the traffic is already suitably provided for, and that compliance with the order would involve a financial loss to the appellants, we must say that the order is unreasonable, and the prima facie presumption that the order is reasonable, under § 22, art. 9, of the Constitution, is overcome, and no longer obtains.

The order is therefore reversed.

ANNOTATION.

Public service commissions: regulation of Pullman and sleeping car service.

This annotation is not concerned with the question of the liability of a sleeping car company or railroad for failure to furnish an individual passenger with a berth, nor with the ques-

tion of the liability of a railroad or sleeping car company for injury to the person or baggage of a passenger; it merely has to do with the question of existence and extent of the juris-

diction of public service commissions over sleeping car service.

Whether or not public utility commissions have jurisdiction over sleeping car companies depends upon the wording of the statute creating the commission, since the commission is a creature of the statute, and its jurisdiction and powers are purely statutory. In a number of the statutes, sleeping car companies are expressly mentioned as among the utilities over which the commission has jurisdiction; in other statutes the commission is given jurisdiction over common carriers, and common carriers are defined, for the purposes of the statute, as including sleeping car companies. Still other statutes make no mention of sleeping car companies, and in such cases, the question whether or not the commission has jurisdiction is to be determined by a construction of the statute.

Thus, in *Re Jurisdiction of Commission over Pullman Co.* (1908) 37 Ann. Rep. Ga. R. C. 53, the special attorney of the Georgia commission, in a requested opinion to the commission, held that the latter did not have jurisdiction over sleeping car companies, since the statute creating the commission did not expressly give it jurisdiction over such companies, and the Pullman Company was not a "common carrier," as that phrase has been construed by the supreme court of the state in various decisions passing upon the duty and liability of the company to its patrons.

In *Empire Rice Mill. Co. v. Railroad Commission* (1918) 143 La. 1036, P.U.R.1919A, 575, 79 So. 833, the Louisiana supreme court stated in a headnote by the court that the Railroad Commission of Louisiana is given certain powers, including, among others mentioned, powers over sleeping car tariffs and service; but this is an obiter statement, and the extent of the commission's jurisdiction is not defined.

In a large number of decisions, in cases in which passengers have sought to hold sleeping car companies liable for loss or injury to baggage, or for personal injuries, the statement will

be found that such companies are not common carriers. These statements, however, have only an indirect bearing upon the question discussed in this annotation, since they merely determine the degree of duty which a sleeping car company owes to a passenger, and the extent of the jurisdiction of public utility commissions is not in any way involved.

In determining the extent of the jurisdiction of public service commissions over sleeping car service, the first question to be determined is whether or not a railroad company is required to render such service. In other words, whether sleeping car service is of such a character as must, in proper cases, be rendered by the railroad company if the service of the company is to be considered adequate and reasonable; or whether such service is merely a luxury, which a railroad company need not furnish unless it desires.

There are several obiter statements in earlier decisions, to the effect that sleeping or parlor car service need not be rendered by railroads.

Thus, Mr. Justice Brewer, in *Southern R. Co. v. St. Louis Hay & Grain Co.* (1909) 214 U. S. 297, 53 L. ed. 1004, 27 Sup. Ct. Rep. 678, reversing (1907) 82 C. C. A. 614, 153 Fed. 728, in holding that a railroad was entitled to charge for the special service of reconsignment, something beyond the actual cost of the service, says: "A carrier may be under no obligation to furnish sleeping or other accommodations to its passengers, but if it does so it is not limited in its charges to the mere cost, but may rightfully make a reasonable profit out of that which it does furnish."

And in *Gulf, C. & S. F. R. Co. v. State* (1914) — Tex. Civ. App. —, 169 S. W. 385, which was an action to require a railroad company to stop through trains carrying cars at certain stations, the court said: "It is no answer to this to say that the [railroad] companies are not required to furnish sleeping car accommodations. This may be conceded; yet when they do furnish such accommodations to a part of the public, then we think they

are required to furnish the same to all others."

So, in *Fyfe v. Pere Marquette R. Co.* (1914) 2 Mich. R. C. 90, the Railroad Commission of Michigan, in passing upon the reasonableness of a charge for chair car service, said: "It is true that defendant company cannot be compelled by law to operate a parlor car over any portion of its system, and it may also be true that the operation of such cars may not result in an earning sufficient to meet all necessary expenses of such operation, and that it would be entirely within defendant company's right to cease giving such service."

The view, however, taken by the more recent court and commission decisions, is to the effect that, under the present-day conditions, sleeping car service is not a luxury but a necessity, and railroad companies in proper cases may be required to render such service.

Thus, in *Public Service Commission v. Chesapeake & O. R. Co.* (1916; W. Va.) P.U.R.1916E, 353 (reversed on questions of fact in *Chesapeake & O. R. Co. v. Public Service Commission* (1916) 78 W. Va. 667, P.U.R.1917A, 104, 89 S. E. 844), the West Virginia commission, in holding that sleeping car service was a matter of necessity rather than of convenience, said: "It is said that this proposed additional sleeper service is not a necessity, but only a convenience. That it is not an absolute necessity is true. No sleeping car is. No dining or parlor car is. Our fathers had none of them. If they traveled at night they slept in their seat in the day coach. As for meals, they took their lunches with them, or got their meals at the places where the train stopped 'twenty minutes for dinner,' or other meal. We can at this day get along without sleeping cars. We can travel as our fathers did. If there were no such cars everybody would be on a parity in that respect. Necessity and convenience are relative terms. What was a mere convenience a few years ago may now, in this age of telegraphs and telephones, become a practical necessity. The matter is affected by

time, circumstances, custom, conditions, and the state of society. In deciding as to what facilities should be provided in a given state of things, inquiry will at once arise as to what is usual in such a case,—what is the common practice. Our law requires 'adequate facilities.' 'Facility' is not synonymous with 'necessity,' for in § 4 of our Public Service Commission Law it is said that every public service corporation 'shall establish and maintain adequate and suitable facilities, safety appliances, or other suitable devices, and perform such service with respect thereto as shall be reasonable, safe, and sufficient for the security and convenience of the public.'"

And the West Virginia supreme court of appeals, although it reversed the commission on the facts (see *Chesapeake & O. R. Co. v. Public Service Commission* (W. Va.) supra), said: "The terms 'convenient and adequate facilities' are not susceptible of exact definition; they are relative terms, and must be interpreted in the light of the conditions existing at the time of their application, and the habits and customs then prevailing. Facilities for traveling which might have been considered entirely adequate and convenient fifty years ago would certainly not be so regarded now. The introduction and general use by railroad companies of parlor cars, sleeping cars, dining cars, and vestibule trains have made a public necessity of what would formerly have been considered a great luxury."

So, in *State ex rel. Missouri P. R. Co. v. Atkinson* (1917) 269 Mo. 684, L.R.A.1918A, 46, P.U.R.1917C, 971, 192 S. W. 86, Ann. Cas. 1917E, 987, after speaking of the statutory powers of the commission, the Missouri supreme court said: "Even if the statutes granting the powers were not as broad as they are, yet in these days of business activities, it can be said that sleeping cars have passed the point of mere conveniences, and reached the point of public necessities. We can't measure public necessities by the old rules. What years ago were deemed only luxuries are to-day public neces-

sities. . . . What were mere luxuries years ago have by constant uses, practices, and advanced business thought become necessities of to-day."

So, sleeping car or Pullman car service is not only a convenience, but in many cases may be found to be an absolute necessity. *Arizona Corp. Commission v. Arizona Eastern R. Co.* (1917; Ariz.) P.U.R.1917D, 705.

A public utilities commission whose statutory power extends over service in connection with or incidental to the "safety, comfort, and convenience" of the persons transported, has power to compel the furnishing, in a proper case, of sleeping car service. *State ex rel. Missouri P. R. Co. v. Atkinson* (1917) 269 Mo. 634, L.R.A.1918A, 46, P.U.R.1917C, 971, 192 S. W. 86, Ann. Cas. 1917E, 987; *Arizona Corp. Commission v. Arizona Eastern R. Co.* (1917; Ariz.) P.U.R.1917D, 705.

Whether or not a public service commission should order a railroad company, in a particular case, to furnish sleeping car service, depends upon the facts in the particular case.

It would seem entirely clear that a commission should not order service to be rendered where it appears both that the service would be unremunerative, and that it was not reasonably required by the patrons of the road. *ATCHISON, T. & S. F. R. Co. v. STATE* (reported herewith), ante, 992.

So, in *Chesapeake & O. R. Co. v. Public Service Commission* (1916) 78 W. Va. 667, P.U.R.1917A, 104, 89 S. E. 844, the West Virginia supreme court of appeals suspended an order of the public service commission requiring the petitioner company to operate a sleeping car between certain points on its line, since such operation could only result in a loss, and the time when the car would be run was between approximately 7 and 9 o'clock in the morning and 7 and 9 o'clock at night, during which time, as the court said, people do not generally sleep, and do not need sleeping car service.

In *State ex rel. Missouri P. R. Co. v. Atkinson* (Mo.) supra, the court, in passing upon the right of a railroad company to take off Pullman service on a certain line, said that the fact

that such service had been maintained by the railroad company for a period of thirty years was some evidence of necessity for the service.

An order requiring sleeping car service by a railroad company is not shown to be unreasonable merely because it is shown that the service in question will not be wholly compensatory.

Thus, in *Chesapeake & O. R. Co. v. Public Service Commission* (W. Va.) supra, the West Virginia supreme court of appeals said that the mere fact that an order of the public service commission requiring a railroad to render certain sleeping car service would result in a pecuniary loss was not, of itself, sufficient to show that the order was confiscatory, since, in order to determine that question, the railroad's entire intrastate earnings from its passenger traffic must be taken into account.

So, proof of a small pecuniary loss in sleeping car service on a branch line will not, of itself, render invalid an order requiring such service, in the absence of evidence that the sleeping car service on the entire railroad was unprofitable. *State ex rel. Missouri P. R. Co. v. Atkinson* (Mo.) supra.

That additional Pullman car service would not be entirely compensatory is not of itself a sufficient justification for refusal to furnish adequate and convenient service. *Arizona Corp. Commission v. Arizona Eastern R. Co.* (Ariz.) supra.

And see *ATCHISON, T. & S. F. R. Co. v. STATE* (reported herewith), ante, 992.

The mere fact that interstate commerce may be affected by an order of the state commission requiring a railroad to render sleeping car service does not necessarily make such an order invalid, as imposing a burden upon interstate commerce.

Thus, the establishment of more convenient car service, which is for the benefit of interstate as well as intrastate passengers, is not an illegal interference with interstate commerce. *Arizona Corp. Commission v. Arizona Eastern R. Co.* (Ariz.) supra.

So, an order of a public service commission, requiring an interstate train to carry a sleeping car between certain points within the state, is not necessarily illegal, as burdening interstate commerce. *Chesapeake & O. R. Co. v. Public Service Commission* (W. Va.) *supra*.

But the Wisconsin Railroad Commission has no jurisdiction to require a railroad company to change the intrastate point of departure of a sleeping car operated primarily in interstate passenger service, unless it appears that such regulation is necessary for adequate service. *Fond du Lac Business Men's Assn. v. Chicago & N. W. R. Co.* (1915; Wis.) P.U.R.1915A, 152.

Railroad companies are not authorized to charge more for the transportation of a person who occupies a drawing room or an entire compartment in a sleeping car than for transporting one who merely occupies a seat; the additional service should be paid for by the additional charge for the compartment or drawing room.

Thus, in *Re Southern P. Co. Decision No. 1775, Application No. 1007* (1914) 5 Cal. R. C. 358, the California Railroad Commission held that a railroad company could not charge a higher rate to a person traveling in a Pullman drawing room or compartment than was charged to a person riding merely in a seat, since, although the service rendered to the patron was greater, such additional service was paid for by the patron in the higher price charged by the Pullman company for drawing room and compartment ticket than for seats only.

So, a railroad may not require more than one transportation fare in addition to the regular drawing room or compartment charge for the use by one person exclusively of a compartment or drawing room in the sleeping car, on the theory that discrimination against families or individuals traveling together is thus prevented. *Public Service Commission v. Spokane, P. & S. R. Co.* (1915; Wash.) P.U.R.1916B, 105.

Several other decisions upon various points may be noted.

General Order No. 6 of the Colorado

Public Utilities Commission requires all railroads of Colorado to provide seats for all passengers upon their trains, whether intrastate or interstate, and in case seating room cannot be provided in coaches, it is to be provided for the passengers in Pullman cars without additional expense, providing such cars are attached to the train. *Re Providing Seating Accommodations in Pullmans* (1915; Colo.) P.U.R.1915D, 1098.

In *Re Pullman Co.* (1914) 4 Cal. R. C. 872, the California Railroad Commission found that the method of reservation of berths in Pullman cars was unjust and discriminatory, and suggested a form of receipt to be used by the company, and directed the company to eliminate from the form of receipts submitted by it the wording that such a receipt does not guarantee a reservation of a berth in the car. The Pullman Company was further directed to take such steps as might be necessary to place its scale of salaries upon a basis which would enable the public to give tips to the employees in a spirit of generosity, if they so desired, and not with a feeling of necessity, as was the case at present.

In *Snyder v. Pullman Palace Car Co.* (1910) 5 Ann. Rep. Ind. R. C. 69, the Indiana commission, in reducing the rate of fare of the Pullman Company, said: "Proper regulation of the public service corporation will not allow an advance in rates unless the company making the advance shall show that its revenues are insufficient on the old basis."

The United States Supreme Court in *Chicago, M. & St. P. R. Co. v. Wisconsin* (1915) 238 U. S. 491, 59 L. ed. 1423, L.R.A.1916A, 1133, P.U.R.1915D, 706, 35 Sup. Ct. Rep. 869, held that a state statute which prohibits the letting down of an unengaged and unoccupied upper berth in a sleeping car when the lower berth in the same section is occupied, takes property without compensation, contrary to the due process of law clause of the United States Constitution, and cannot be sustained as the reasonable exercise of the state's police power. This decision reversed the state supreme court in

State v. Chicago, M. & St. P. R. Co. (1913) 152 Wis. 341, 140 N. W. 70, Ann. Cas. 1914C, 478. A former statute in the same state had been declared unconstitutional in *State v. Redmon* (1907) 134 Wis. 89, 14 L.R.A. (N.S.) 229, 126 Am. St. Rep. 1003, 114 N. W. 137, 15 Ann. Cas. 408, upon the ground that the statute in question made it optional with the purchaser of the lower berth whether the upper berth should be closed or not,

and consequently it was an attempt to give to a patron the use, free of charge, of a part of the company's property.

This decision is not strictly in point on the subject of this note, but might be considered as authority if, in a particular case, it was sought through a commission, to require the railroad or sleeping car company to keep the upper berth closed unless it was to be occupied.
W. M. G.

E. E. UDEN, Respt.,

v.

A. SCHAEFER, Doing Business under the Style of A. Schaefer & Company,

and

MARYLAND CASUALTY COMPANY, Appt.

Washington Supreme Court (Dept. No. 2)—March 22, 1920.

(— Wash. —, 188 Pac. 395.)

Definition — strike.

1. A strike is the act of quitting work by a body of workmen for the purpose of coercing their employer to accede to some demand they have made upon him and which he has refused.

[See note on this question beginning on page 1004.]

Principal and surety — contractor's bond — exception of losses due to strikes.

2. The act of union employees in leaving their employment with no intention of returning, because their employer, a building contractor, loses his standing in the employers' association, is not within an exception in the bond given by him to one for whom he had contracted to perform labor,

relieving the surety from damages resulting from strikes or labor difficulties.

— exception in contractor's bond — labor difficulties.

3. In an exception of losses due to strikes and labor difficulties in a bond of a building contractor, an act of workmen which does not constitute a strike will not constitute labor difficulties.

APPEAL by the defendant Casualty Company from a judgment of the Superior Court for King County (Hall, J.) in favor of plaintiff in an action brought to recover damages for breach of a contract to furnish labor and material and install the plumbing and heating system in a building erected by plaintiff. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Roberts & Skeel for appellant.

Mr. Walter S. Fulton, for respondent:

The action of the laborers in refusing to work for Schaefer did not constitute a "so-called strike" or "labor difficulty," within the meaning of the

provisions of the bond which would relieve the surety from liability.

29 Cyc. 1065; 2 Lewis's Sutherland, Stat. Constr. § 414; *Virginia v. Tennessee*, 148 U. S. 519, 37 L. ed. 543, 13 Sup. Ct. Rep. 728; *Schenley's Appeal*, 70 Pa. 98; 32 Cyc. 307; *Fenton v. Fidelity & C. Co.* 36 Or. 283, 48 L.R.A. 770, 56 Pac. 1096; *American Surety Co. v. Pauly*, 170 U. S. 168, 42 L. ed. 993, 18 Sup. Ct. Rep. 563; *Cowles v. United States Fidelity & G. Co.* 32 Wash. 120, 98 Am. St. Rep. 838, 72 Pac. 1032; *Pacific Bridge Co. v. United States Fidelity & G. Co.* 33 Wash. 47, 73 Pac. 772; *McLeod v. Genius*, 31 Neb. 1, 47 N. W. 473; *Mahoney v. Smith*, 132 App. Div. 291, 116 N. Y. Supp. 1091.

Fullerton, J., delivered the opinion of the court:

On March 4, 1918, the defendant Schaefer and the respondent, Uden, entered into a written contract whereby the defendant agreed to furnish all the necessary labor and material and install the plumbing and heating system in an apartment building which the respondent was then constructing. The contract price was \$17,000, and was payable in monthly instalments of 85 per centum of the value of the labor and material in place at the end of each monthly period. The contract provided that the defendant should furnish an approved surety bond for the amount of the contract price, "otherwise the contract shall be null and void." The defendant, in compliance with the latter clause of the agreement, furnished a bond with the appellant Maryland Casualty Company as surety in the penal sum of \$3,000, which the respondent accepted. The bond so furnished, following the usual obligatory clause, contained, among others, the following exceptions: "Third. That the surety shall not be liable for any damages resulting from so-called strikes or labor difficulties, or from mobs, riots, fire, the elements, earthquake, cyclone, tornado, lightning, or any act of God, or for repair or reconstruction of any work or materials damaged or destroyed by any such causes; nor for the nonper-

formance of any guaranties of the efficiency or wearing qualities of any work done or materials furnished, or the maintenance thereof or repairs thereto; nor for patent infringement; nor for the furnishing of any bond or obligation other than this instrument; nor for damages caused by delay in finishing such contract in excess of 10 per centum of the penalty of this instrument; nor for payments made, or for which the obligee shall become liable to pay on account of death or personal injuries suffered by any person or persons."

The defendant began the performance of the work and pursued it for about two weeks, during which time he amassed some material and did some excavating. He then abandoned the work, and the respondent was compelled to relet it. This he did by calling for new bids. The best bid obtained for the uncompleted work was \$19,122, and the work was let for that sum.

In this action the respondent sues both the Maryland Casualty Company and the defendant Schaefer in damages as for a breach of the contract. The sum demanded totals \$3,198.75, made up of the difference between the original contract price and the price for which the work was relet, together with the sum of \$616, paid to carpenters for extra work alleged to have been made necessary by the defendant on account of work performed by him while in the prosecution of the original contract. The action was tried by the court, sitting without a jury, and resulted in a judgment against both the defendant and the Maryland Casualty Company in the sum of \$2,565.15, and an additional judgment against Schaefer in the sum of \$15. The Maryland Casualty Company alone appeals.

The appellant defended the action on the ground that the defendant's failure to perform the contract was because of a strike on the part of his workmen, or at least because of labor difficulties, and that it is thus not liable to answer to the respondent for a breach of the de-

fendant's contract because of that clause of its bond which exempts it from liability "for any damages resulting from so-called strikes or labor difficulties." Schaefer

Principal and surety-contractor's bond—exception of losses due to strikes.

seems to have given different reasons at different times for his failure to perform the contract, but, from his evidence, given at the trial, we gather that the cause of his failure was, in substance, this: At the time of entering into the contract with the respondent he was a member in good standing of the Seattle Plumbing & Heating Engineers' Association, which association had agreed with the plumbers' unions that its members, in their contracting work, would employ thereon only members of such unions, and which unions in turn had agreed not to work for any contracting plumber who was not a member of the association in good standing. That when the respondent called for bids for installing the plumbing and heating appliances in his building, Schaefer, with other members of the association, submitted bids, Schaefer's bid being somewhat larger than the lowest bid submitted. The respondent, for some reason, probably because he thought them too high, did not accept any of the bids submitted, and afterwards Schaefer entered into negotiations with him, which resulted in his entering into the contract out of which this controversy arises; the contract price being some \$2,000 less than the lowest of the bids submitted under the call for bids. For this act he was suspended from membership in the association, and when the suspension became known, the union plumbers which he then had in his employ, some two in number, quit his employment, and he was unable to procure others, either union or nonunion, necessary to perform the work. He further testifies that there was no strike on the part of the workmen or labor difficulties with them; that those he had in his employ at the time quit, and he was unable to employ others

to take their place because he could find no nonunion plumbers, and union plumbers, because of their agreement, would not work for contractors not members of the association mentioned.

In our opinion, these facts do not exonerate the appellant from the obligations of its bond. In the common acceptance of the term, it is not a "strike" for the workmen of an employer to quit his employment and go elsewhere, without any intention of returning; nor is it a "strike" for workmen to refuse to enter into the employment of a particular contractor. A "strike," in such common accep-

**Definition—
strike.**

tation, is the act of quitting work by a body of workmen for the purpose of coercing their employer to accede to some demand they have made upon him, and which he has refused; but it is not a strike for workmen to quit work, either singly or in a body, when they quit without intention to return to the work, whatever may be the reason that moves them so to do. It is a matter of common knowledge that during the late war period many employers of labor, because of the great demand for labor, had difficulty in employing and keeping a sufficient number of workmen. Many of such employers lost workmen in considerable numbers, who had long been in their employment, and for a time had practically to suspend operations. No one, however, supposed that the quitting of these workmen constituted a "strike." Schaefer's situation here was not different. By his own act he had placed himself in a position where certain workmen could not remain in or enter into his employment without violating their agreement, and others he could not obtain, and in no sense can this be denominated a strike.

The addition of the phrase "labor difficulties" to the term "so-called strikes" does not enlarge the meaning of the latter. It is rather definitive than expansive of it. In other

words, the phrase is but explanative of the meaning of the word "strike," and any act of the workmen which would not constitute a strike would not constitute a labor difficulty.

A further contention is that the judgment as rendered is too large. Schaefer claimed, while on the witness stand, that there was a balance of \$211.90 due him for work per-

formed by him which the respondent had not paid, and this sum the appellant contends should be deducted from the judgment. On the question whether it was paid or not the evidence was conflicting, and our examination of the evidence does not convince us that the court was in error in so finding.

The judgment is affirmed.

Holcomb, Ch. J., and Tolman, Bridges, and Mount, JJ., concur.

ANNOTATION.

What amounts to a strike within "strike clause" of a bond or other contract.

The present note is limited in general to the question indicated in the above title, as to what amounts to a strike, within the meaning of a "strike clause" in a contract, and does not purport to cover that class of cases involving various questions of construction and effect of such a clause, assuming that a strike exists. For example, such questions as whether the strike merely postpones performance of the contract are beyond the scope of the note. As an example of cases not within the scope of the note, attention is called to *Cottrell v. Smokeless Fuel Co.* (1906) 9 L.R.A.(N.S.) 1187, 78 C. C. A. 366, 148 Fed. 594, writ of certiorari denied in (1907) 205 U. S. 544, 51 L. ed. 923, 27 Sup. Ct. Rep. 792, holding that the mere increased cost of production of coal because of the necessity of suppressing a strike at a mine will not justify breach of a contract to deliver a certain amount of coal from that mine at a certain price, "subject to strikes beyond the control" of the seller, which might delay or prevent shipment. See also *W. K. Niver Coal Co. v. Cheronea S. S. Co.* (1905) 5 L.R.A.(N.S.) 126, 73 C. C. A. 502, 142 Fed. 402, writ of certiorari denied in (1906) 201 U. S. 647, 50 L. ed. 904, 26 Sup. Ct. Rep. 761, holding that a strike of coal operatives, making necessary the importation of coal to such an extent as to overtax the capacity of a harbor, and delay vessels chartered to carry

coal in unloading, was not within the clause of a charter party providing that, in case of strikes which delayed discharge, the charterer should not be liable for the delay, since such strike was merely a *causa sine qua non*, and not a *causa causans*, of the delay.

It is held in the reported case (*UDEN v. SCHAEFER*, ante, 1001) that the act of union employees in leaving their employment with no intention of returning, because their employer, a building contractor, loses his standing in the employers' association, was not within an exception in the bond given by him to one for whom he had contracted to perform labor, relieving the surety from damages resulting from strikes or labor difficulties. The court said: "In the common acceptation of the term, it is not a 'strike' for the workmen of an employer to quit his employment and go elsewhere, without any intention of returning; nor is it a 'strike' for workmen to refuse to enter into the employment of a particular contractor. A 'strike,' in such common acceptation, is the act of quitting work by a body of workmen for the purpose of coercing their employer to accede to some demand they have made upon him, and which he has refused; but it is not a strike for workmen to quit work, either singly or in a body, when they quit without intention to return to the work, whatever may be the reason that moves them so to do."

Refusal of miners to work in the

dangerous and unminable part of a coal mine, when they were continually at work in the other parts, was held in *New York Coal Co. v. New Pittsburgh Coal Co.* (1912) 86 Ohio St. 140, 99 N. E. 198, not to amount to a "strike" within the meaning of a provision in the lease of the mining company requiring it to pay a minimum royalty, but relieving it therefrom in case it was impossible to mine the required amount of coal by reason of strikes.

So, in *Stephens v. Harris* (1887) 56 L. J. Q. B. N. S. (Eng.) 516, 57 L. T. N. S. 618, 6 Asp. Mar. L. Cas. 192, where a claim was made for demurrage, it was held that the term "strike," in a charter party, meant a strike against the employers; i. e., a refusal to work and a standing out for higher wages; and that the abandonment of work by miners through fear of cholera was not within the exception, "no damages to be paid the vessel in case of any hands striking work." Upon appeal ((1887) 57 L. J. Q. B. N. S. 203) the court declined to pass upon the meaning of "strike," or "hands striking work," but affirmed the judgment upon other grounds.

And the contractor in a building contract requiring the completion of a building by a specified date "provided there be no interference from labor strikes" was held, in *McLeod v. Genius* (1890) 81 Neb. 1, 47 N. W. 473, not relieved from completing the building by the time agreed upon by the fact that mechanics quit work on the building on account of the contractor's failure to pay them their wages as agreed. The court said: "The proof fails to justify the claim that the 'labor strikes' interfered with the progress of the work. True, the men engaged upon the brickwork ceased to labor, but it was occasioned by the contractor failing to pay the men their wages when due. As soon as they were paid, which was within two or three days after they quit, the work went on as before. It is evident that it was not contemplated by the parties that delay caused by the failure of the contractor to pay his men was to excuse the completion of the buildings.

The plaintiff cannot interpose his own default as an apology for not keeping the contract."

It was held that a delay in unloading a vessel was not within the exception in a charter party requiring discharge of a cargo at a certain rate per day "except in cases of riot or any hands striking work," where, previous to the making of the contract, labor organizations at the port in question had published a declaration, which was widely known and regularly acted upon; that steamers were not to be discharged while moored end on to a quay, and the delay was due to the carrying out of this declaration during the time while the vessel lay stern on to a quay until a berth became available at which she could lie broadside on. *Horsley Line v. Roechling* [1908] S. C. 866, Scot. Ct. of Sess. as reported in *Mews, Eng. Case Law Dig. Supp.* 1898-1910, under "Shipping," col. 2092.

But where a contract required delivery of cans at a canning factory, as ordered, not exceeding a certain number per day, but excused delivery in event of inability to perform the contract by reason of a strike, it was held that delivery was excused on a day when the employees refused to work. *Californian Canneries Co. v. Pacific Sheet Metal Works* (1906) 144 Fed. 886, affirmed in (1908) 91 C. C. A. 108, 164 Fed. 980.

In *Williams Bros. v. Naamlooze Venootschap W. H. Berghuys Kolenhandel* (1915) 86 L. J. K. B. N. S. (Eng.) 334, it was held that there was a "strike" within the meaning of the charter party, where a crew on a Dutch vessel refused to make a voyage from England to France because of the German threat, during the late World War, to sink neutral vessels in the North sea, and it was impossible to obtain another crew to take their place. The charter party provided that the owners of the vessels would not be liable for any delay in the commencement or prosecution of the voyage "due to a strike or lockout of seamen or other persons necessary for the steamer's performance of this charter," or due to a "strike, lockout,

or disputes involving or preventing the engagement of the crew or part of the crew or any other person whatsoever necessary for the movement or navigation of vessel." The court said it was true that in older cases the definition which had been given by courts as to what constituted a strike turned chiefly on the question of wages, but that "a strike does not depend merely upon the question of wages. At the same time, I do not think it would be possible to say that abstention of a workman, from mere fear, to do a particular thing or perform a particular contract, would necessarily constitute a strike. I think the true definition of the word 'strike,' which I do not say is exhaustive, is a general, concerted refusal by workmen to work, in consequence of an alleged grievance. Was there a general, concerted refusal by workmen to work in consequence of an alleged grievance? I think in this case there was."

And where the workers in a colliery gave notice that they would work on Good Friday and on the following day, but that they would take Easter Monday and the following Tuesday and Wednesday as holidays, the colliery owners having no voice in the matter, it was held in *Allison & Co. v. Richards* (1904) 20 Times L. R. (Eng.) 584, that the owners were relieved from damages for delay for failure to load on Wednesday a vessel which was ready for a cargo of coal on the morning of that day, the case, however, apparently being regarded as within the provision excusing delay for "any cause beyond the control of the charterers," instead of strictly within the term "strikes." The charter party provided for loading the vessel in a certain number of hours, excluding Sundays and certain other days, not here material, and provided for exclusion in the computation of time of that lost through "strikes, lockouts, or any dispute between masters and men occasioning a stoppage" of workmen, or by reason of accidents to mines, etc., or by floods, frosts, fogs, storms, "or any cause beyond the control of the charterers;" it also provided that unless the steamer was already on de-

murrage, time was not to count in case of "strikes, lockouts, civil commotions, or any other causes or accidents beyond the control of the consignees which prevent or delay the discharging."

It was held that there was a "general strike" within the meaning of the charter party, which provided for the loading of a vessel with wood for transportation to London, and which required the discharge of the vessel at a certain rate, with an exception in case of a general strike of stevedores, lightermen, or dock laborers that might prevent the discharge of the cargo, where the evidence showed that, at the port of London, there was at the time a strike of all the lightermen who were engaged in this particular class of lightering, namely, timber lightering, and that the union would not allow other men to take their places, which strike prevented the discharge of the cargo, although there was not a strike of all lightermen, as, for example, coal lightermen. *Aktieselskabet Shakespeare v. Ekman & Co.* (1902) 18 Times L. R. (Eng.) 605. It was said that a strike was a general strike if it was not what should be called a particular strike; that is, a strike either by an individual workman or by a particular body of workmen working for a particular master; that if there was a strike against all the masters, and if that strike was participated in by the workmen irrespective of the masters for whom they were working, it amounted to a general strike; that the word "general" was not used in opposition to the word "partial," and that it could not be said there was not a general strike merely because some, as distinguished from all, of the men, were on strike.

The phrase "subject to strikes" in a contract to supply coal was held in *Hesser-Milton-Renahan Coal Co. v. La Crosse Fuel Co.* (1902) 114 Wis. 654, 90 N. W. 1094, explainable by parol evidence, under the rule that if words or phrases used in the written contract are technical, or by general usage have a definite and peculiar meaning in a certain trade, extrinsic

evidence may be received to show the meaning so acquired. And it was held prejudicial error to refuse to admit parol evidence to explain such meaning, offered by the coal company to excuse a failure to furnish coal, where the defense was a strike in its own mines. It was said: "The words 'subject to strikes' cannot be said to be entirely definite in their meaning. There may be a general strike in all the mines in the country, or there may be a strike confined to the plaintiff's mines alone, or to the mines in a certain district alone; or there may be a strike upon the railroad lines, interrupting all traffic. Any of the strikes supposed might seriously interfere with the carrying out of the contract to deliver coal. It is evident that, if the words here used were intended to refer to a general strike in all the coal mines of the country or in all the coal mines of the New River district, the plaintiff showed nothing in the way of a defense to the counterclaim; but if the words, by general usage and custom among coal dealers, meant a strike in Hesser & Milton's own mines alone, then the undisputed fact that there was a strike in their mines for nearly a month in March and April, 1900, would operate as a defense to the counterclaim so far as it is based upon any default occurring during that time. The appellant called witnesses who were experienced in the coal trade, and attempted to show by them the construction which the words 'subject to strikes' have acquired by general usage and custom in the coal trade, and the evidence was excluded. The purpose of the evidence so offered was evidently to show that the clause was satisfied by the happening of a strike in the mines of Hesser & Milton. We think, under the principles before stated, that this ruling was erroneous."

In *Consolidated Coal Co. v. Jones & A. Co.* (1908) 232 Ill. 326, 88 N. E. 851, the court said that the provision in a contract for the delivery of a certain amount of coal daily, relieving the coal company from liability for failure to furnish coal when prevented by a strike, referred to such strikes

as might be the proximate cause of preventing the coal company from handling the product of its mine, and not such as indirectly and remotely, acting in conjunction with other and independent efficient causes, might affect the business of the company, and cause the handling of its products to be attended with inconvenience and difficulty. And it was held that a strike existing among anthracite coal miners in another part of the country, which caused a serious shortage of cars, was not within the exception in the contract.

The term "strike" in a contract by a coal company for the delivery of coal, subject to the condition that it should not be responsible for damages from delay on account of strikes or causes beyond its control, was construed in *Davis v. Columbia Coal Min. Co.* (1898) 170 Mass. 391, 49 N. E. 629, as not limited merely to strikes in the company's own mines, but as including any strike having a legitimate tendency to prevent the execution of the contract, if the company was in the exercise of due care and diligence.

And in *Milliken v. Keppler* (1896) 4 App. Div. 42, 38 N. Y. Supp. 788, it was held that the words in a building contract, "contingent upon strikes and boycotts," did not refer merely to strikes occurring in the shops of the contractor, but should be construed as including other strikes which had a legitimate tendency to retard the contractor even though he exercised due care and diligence.

In *The Toronto* (1908) 168 Fed. 386, affirmed in (1909) 98 C. C. A. 386, 174 Fed. 682, an attempt was unsuccessfully made to distinguish between a "strike" within the meaning of a provision in a bill of lading excusing a vessel from responsibility for strikes and stoppage of labor, and mere labor troubles, which, it was claimed, could have been avoided by some increase of pay to the employees. In this case it was held that the evidence showed a general strike of stevedores, extending for over a month, and relieving the carrier from liability, even though, by granting the demand for increase in wages, the cargo could have been un-

loaded and the damage prevented. It was said in the affirming opinion that while the exception in the bill of lading as to strikes would, no doubt, not cover a strike or stoppage of labor caused by or promoted by the carrier, the court did not have a right to apply or refuse to apply it, according as it found the demands of the strikers reasonable or unreasonable.

The last case involves a question beyond the scope of the note, which has arisen sometimes in actions against carriers even in the absence of a "strike clause," as to the duty of the employer to comply with the demands of the employees, and thus prevent the strike. The question is closely associated with that considered in the present note as to what amounts to a strike, because it may be contended that if the employer, by reduction of wages or by unreasonable requirements, causes the employees to quit work, there has not been a strike within the meaning of the contract. And the question may arise whether the contract exception refers only to strikes which are not produced by acts done in bad faith by the employer. Attention is called to several cases on these questions which have treated the matter from the point of view indicated.

In *Delaware, L. & W. R. Co. v. Bowns* (1874) 58 N. Y. 573, it was held that a provision in the contract relieving a vendor of coal from delivery on account of failure due to strikes in the mines applied in case of a strike caused by reduction of wages by the company, provided it acted in good faith. It was said: "The strike, in the language of the referee, was immediately preceded and proximately caused by a reduction of the wages of the employees, and the contention of the defendants is that, as the strike resulted from the voluntary act of the plaintiffs, and would not have occurred but for that act, the plaintiff cannot claim or have the benefit of the exemption from liability for that cause. The claim is, that the corporation expressly engaged to make every effort to fulfil the contract, and that this was an inhibition against doing

any act which might induce a strike, and that the case is within the maxim that no one shall take advantage of his own wrong, and this view was adopted by the court below. The maxim referred to is well established and fully recognized in courts of law and equity, and its reasonableness cannot be questioned. As one of its results, if a party is disabled by his own default from performing his contract, it is not competent for him to allege the circumstances by which he was prevented as an excuse for the omission. . . . But parties may agree in advance under what circumstances and upon what contingency the contract shall terminate, or either party be absolved from its obligations, and if the circumstances occur or the contingency happen, even by the voluntary act of the party claiming the benefit of the stipulation, it will be available to him in the absence of any fraud or mala fides. . . . There can be no doubt that if a strike had been brought about by the act of the plaintiff, with a view to relieve itself from the obligations of the contract, and in fraud of the rights of the defendants, the circumstance would not have availed as an excuse for a failure to perform. The case would have been within the maxim that no man shall take advantage of his own wrong, and the plaintiff would have been held to have become disqualified for the performance of the contract by its own unlawful or wrongful act. But the plaintiff did not, by entering into the engagement with the defendants, subject to the limitations and restricted terms of the contract, surrender the right to conduct and manage its affairs, and especially its mining and coal-producing operations, upon the same general principles by which it would be governed had the contract not been made. It was still at liberty, irrespective of its effect upon the action of the operatives in its employ, to adopt and abide by such prudential rules and regulations in the conduct of its business as had been and were usual, and such as were reasonable and proper in themselves, and as were adopted by others carrying on a like

business. So long as such measures only were adopted, in good faith, solely with a view to the general business of the plaintiff and the reasonable necessities of the business, the defendants had no legal cause for complaint, although a strike ensued and they lost the benefits of their contract."

The above conclusion was reached notwithstanding the contract provided that the coal company would make "every effort . . . for the fulfillment of its contract for the delivery of coal." *Ibid.*

And in *Hawkhurst S. S. Co. v. Keyser* (1897) 84 Fed. 693, affirmed without opinion in (1898) 31 C. C. A. 347, 59 U. S. App. 211, 87 Fed. 1005, it was held that an exception in case of strikes, with respect to the obligation to pay demurrage for delay in loading a vessel, included a strike induced by the employer in imposing just and reasonable terms on the employees in the performance of their duties. In this case the employers had abolished certain customs of the employees, and the court said: "If the customs in controversy are unreasonable, the demands of the merchants at that time for their abandonment would, in my opinion, be exactly analogous to a demand on the part of the baymen or stowers of timber that the said customs, supposing the same had not theretofore existed, should be observed in the future, and the merchants, deeming them unreasonable, refused to comply with said demands. A strike, occurring under these circumstances, being a refusal of a combination of all available workmen to work upon terms which must be viewed by this court as reasonable, seems to fall within the meaning of the strike clause or exception as clearly as where it results from a demand of an advance of wages." In this connection, attention is called to *Wood v. Keyser* (1897) 84 Fed. 688, affirmed in (1898) 31 C. C. A. 358, 59 U. S. App. 202, 87 Fed. 1007, which involved the same strike as that in the above case, and which discusses the question of the charterer's duty to secure other workmen, but holds that the workers'

11 A.L.R.—64.

demand was, under the particular circumstances, unreasonable, and one which the charterers were not obliged to comply with in carrying out the spirit and intention of the parties to the contract.

Although the meaning of the term "strike" was not involved, attention is called to *Miller v. Norcross* (1904) 92 App. Div. 352, 87 N. Y. Supp. 56, where the question was whether a subcontractor could excuse a delay in completion of the work which he agreed to carry forward as rapidly as permitted by the progress of the building, provided he was not obstructed or delayed "by the abandonment of the work by employees through no fault of his," in which case an extension of time should be granted. It was held that a refusal of the men longer to work for the subcontractor was not "through no default of his," where it appeared that it was due to unjustifiable language which he used to a walking delegate of the employees.

And although not on facts within the scope of the note, the court considering whether an injunction against a "strike" was sufficiently specific, attention is called to *Arthur v. Oakes* (1894) 25 L.R.A. 414, 4 Inters. Com. Rep. 744, 11 C. C. A. 209, 24 U. S. App. 239, 63 Fed. 310, 9 Am. Crim. Rep. 169, where the court said: "In our judgment the injunction was not sufficiently specific in respect to strikes. We are not prepared, in the absence of evidence, to hold as matter of law that a combination among employees having for its object their orderly withdrawal in large numbers or in a body from the service of their employers, on account simply of a reduction in their wages, is not a strike within the meaning of that word as commonly used. Such a withdrawal, although amounting to a strike, is not, as we have already said, either illegal or criminal."

In the recent case of *Cuyamel Fruit Co. v. Johnson Iron Works* (1920) — C. C. A. —, 262 Fed. 387, the question presented was whether, a strike having occurred that delayed completion of the contract for a period of time,

a showing of bad faith on the part of the employer was necessary in order to prevent him from availing himself of a strike clause in the contract, in case he precipitated it by putting into effect a new wage scale, without giving the notice required in the contract between him and his employees. The

view was taken that a showing of bad faith on the part of the employer is required to prevent him from availing himself of a strike clause in a contract, on the ground that he precipitated the strike by his own conduct in such matters as the reduction of wages.
R. E. H.

W. L. HOFF, Respt.,

v.

PURE OIL COMPANY et al., Appts.

Minnesota Supreme Court — November 19, 1920.

(— Minn. —, 179 N. W. 891.)

Libel — privilege — character of employee.

In an action to recover damages for an alleged libel, held, that a communication in the form of questions and answers concerning the standing of a former employee, to a party who by his authority requested it, is privileged, and is not a publication of any libel contained therein for which the law affords a remedy, in the absence of proof of express malice.

[See note on this question beginning on page 1014.]

Headnote by QUINN, J.

(Hallam and Dibell, JJ., dissent.)

APPEAL by defendants from a judgment of the District Court for Hennepin County (Steele, J.) in favor of plaintiff, and from an order denying a motion for judgment notwithstanding the verdict, or for a new trial, in an action brought to recover damages for an alleged libel. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Fowler, Schmitt, Carlson, & Furber, for appellants:

The letter and its publication, at the plaintiff's solicitation, were privileged, and are not actionable if made in good faith, without malice in fact, or with reasonable ground to believe that the statements therein made were true.

Froslee v. Lund's State Bank, 131 Minn. 435, 155 N. W. 619; Hebner v. Great Northern R. Co. 78 Minn. 289, 79 Am. St. Rep. 387, 80 N. W. 1128; Trebby v. Transcript Pub. Co. 74 Minn. 84, 73 Am. St. Rep. 330, 76 N. W. 961; Christopher v. Akin, 46 L.R.A. (N.S.) 104, and note, 214 Mass. 332, 101 N. E. 971.

By answering the inquiries of the Guarantee Company, at the request of the plaintiff, and mailing the answer back, the defendants did not "publish"

the letter, within the meaning of the law of libel.

Kansas City, M. & B. R. Co. v. Delaney, 102 Tenn. 289, 45 L.R.A. 600, 52 S. W. 151.

The letter in question contains no words or language that can be construed to be libelous per se.

Sweas v. Evenson, 110 Minn. 304, 125 N. W. 272.

The verdict was excessive.

Roemer v. Jacob Schmidt Brewing Co. 132 Minn. 399, L.R.A.1916E, 771, 157 N. W. 640.

Messrs. Robert M. Works and Harold W. Cox, for respondent:

If the statement is in fact false, and knowledge of the falsity is brought home to the person making it, the occasion loses its privilege.

Virtue v. Creamery Package Mfg.

Co. 123 Minn. 17, L.R.A.1915B, 1179, 142 N. W. 930, 1136.

There is evidence from which the jury would have been justified in finding that plaintiff lost his employment with the Pittsburgh Coal Company through his inability to get a bond from the Guarantee Company, and was unable to get it because of the libelous publication made by defendant.

Froslee v. Lund's State Bank, 181 Minn. 435, 155 N. W. 619.

The verdict was not excessive.

Rasten v. Calderwood, 145 Minn. 498, 175 N. W. 1007.

Quinn, J., delivered the opinion of the court:

Action to recover damages for an alleged libel contained in a communication concerning plaintiff, a former employee of the defendant, to the Guarantee Company of North America. Plaintiff had a verdict, and from an order denying their motion for judgment notwithstanding the verdict, or for a new trial, defendants appealed.

The defendant company was engaged in the sale and distribution of gasoline and oils throughout the city of Minneapolis. On June 18, 1915, the plaintiff, then in defendant's employ, took charge of one of its filling stations, and continued to manage the same until April 21, 1916. The defendant delivered gasoline at its various filling stations by means of trucks equipped with tanks mounted thereon, divided into compartments holding a specified number of gallons each. These compartments were provided with pipe connections, so that gasoline could be transmitted without waste to underground tanks at the filling stations. They were filled with gasoline, which was transferred into the underground tanks at the stations as needed. In this way the gasoline was measured out to the stations, the man in charge receipting therefor.

The rules of the company and the contract of employment required the person in charge to see that his station received the full amount of gasoline receipted for. He was then charged with the gasoline in accordance with such receipts, and re-

quired thereafter to account for the same. It was also his duty to keep an account of all business done, and report the same daily to the company. The company took an inventory of all the gasoline on hand on a certain day of each week. In case of a shortage, the amount thereof was deducted the following week from the employee's wages. During the time plaintiff was in charge of such station, there appeared a shortage in each of twenty-seven weeks, ranging from 23 cents to over \$20 a week, amounting in the aggregate to \$205.43.

Subsequent to his quitting the defendant, plaintiff entered the employ of the Pittsburgh Coal Company. He was intrusted with the handling of money belonging to his employer, and required to furnish a surety bond in the sum of \$1,000. Accordingly he made application to the Guarantee Company of North America for such a bond, and in his application referred that company to the defendant Pure Oil Company for a recommendation. Thereupon the Guarantee Company made written inquiry of the defendant, and received a reply thereto upon the same sheet of paper, which constitutes the alleged libelous article referred to in the pleadings herein, and which is as follows:

Confidential Inquiry. No. —.
The Guarantee Company of North America,
Founded by Edward Rawlings in 1872,
Montreal.
Pittsburg, Pa., Aug. 29, 1918.
To the Pure Oil Co.
Minneapolis, Minnesota.

Dear Sir:—

Mr. William L. Hoff, of Robbinsdale, Minnesota, aged twenty-seven, is an applicant to this company for a bond of suretyship in the sum of \$1,000 to guarantee his honesty as foreman and weighmaster, yard No. 2, at Minneapolis, Minnesota, to Pittsburgh Coal Company of Wisconsin.

He states he was employed by or

under Messrs. J. Hancock and E. E. Grant as selling at Minneapolis, Minnesota, from February, 1915, to May, 1917.

Your replies by return mail in the inclosed stamped envelop, to the following questions, will be appreciated, received in confidence, and not involve you in any way. The courtesy of your immediate attention is respectfully solicited.

Yours truly,

Henry E. Rawlings,

President and Managing Director.

Is he related to you? No.

How long have you known him?

From four years, 1914 to 1918.

By whom and where was he previously employed? Janney, Semple, Hill, & Company.

How long was he with you? From 1914 to 1917.

In what capacity? Filling station man.

Had he custody of money or valuables? Yes.

Were his duties performed satisfactorily? No.

If not, what cause had you for complaint? Shortage.

Were his accounts, if any, always properly kept and in a satisfactory condition when he left? No.

Why did he leave? He could not keep his accounts straight.

Was he sober? While at work, yes. And moral? —.

Do you consider him trustworthy and a proper person to bond in the position named? I do not.

Signature: John Hancock,

Vice Pres.

Date, Aug. 30th. Address and occupation: Pure Oil Company.

It is alleged in the complaint, and admitted in the answer, that plaintiff applied to the Guarantee Company of North America for a surety bond, and in his application therefor referred that company to the defendant company for reference as to his fitness for the position with the Pittsburgh Coal Company, and that in response to the inquiry made in pursuance thereof the defendant

wrote and mailed to the Guarantee Company the answers to the questions contained in the article complained of. It is also alleged in the complaint that the answers contained in such article so made by the defendants were false and malicious. No special damages are pleaded. The answer pleads justification and privilege.

It is contended by appellants that the evidence conclusively shows the answers to the question in the communication complained of to be true, and, in so far as they constitute conclusions, justified by the facts. Does the proof so show? If it does, then the defendants were entitled to a directed verdict, as requested at the close of the testimony. It is well settled that proof of the truth of an alleged libel is a complete defense in a suit for damages, where no special damages are pleaded. *Thompson v. Pioneer-Press Co.* 37 Minn. 285, 33 N. W. 856. See notes in 21 L.R.A. 504; 50 L.R.A. (N.S.) 1040; and 31 L.R.A. (N.S.) 133; 25 Cyc. 413, and cases cited.

It is conceded that the plaintiff understood and agreed, when he took the management of defendant's filling station, that he would be held responsible for all goods, including gasoline, delivered at his station, that it was his duty to see that he received the full amount of gasoline receipted for, and that in case there was a shortage the amount thereof would be deducted from his wages. It is undisputed that the defendant's records of account with the plaintiff during the time he was in charge of the filling station were made up from the plaintiff's own receipts, written daily reports, and inventories taken under his supervision.

By the communication in question defendants informed the Guarantee Company that plaintiff's duties were not performed satisfactorily on account of shortage, that his accounts were not properly kept and in a satisfactory condition when he left, that he left because he could not keep his accounts straight, and that they did not consider him trust-

worthy and a proper person to bond in the position named.

The plaintiff testified in effect that he was held for whatever shortages there were, that they had shortages practically all winter, that the shortages were taken out of his wages each week, and that he received a statement of his accounts at the time, so he could see the amount of his wages and the amount of shortage, and that he would get a check for the difference. He also testified that he quit the employ of the defendant on account of such shortages, because the last week he received no check at all. The defendant's records, including reports made by the plaintiff, were put in evidence. A summary made up from the same showed that plaintiff's account for the time he had charge of the station, a period of forty-five weeks, was short in each of twenty-seven weeks. The showing as to shortage stands unchallenged, except that it appears that a certain delivery tank was used during the last three weeks of plaintiff's service that held 11 gallons less than it was labeled, and to this extent the shortage account for that time was not correct; but this discrepancy could affect the shortage only during the last three weeks.

We think the admitted circumstances, taken into consideration with the plaintiff's own testimony, conclusively established that there was an habitual shortage in plaintiff's accounts while he was in charge of the filling station. The amount thereof was regularly deducted from his weekly wages, and no protest appears to have been made by him. From an examination of the entire record we are of the opinion that the proof establishes the truth of the answers contained in the communication, and justifies the answer to the last question therein. A communication in the form of questions and answers concerning the standing of a former employee,

Libel—privilege
—character of
employee.

to a party who by his authority requested it, in the absence of express malice, is privi-

leged, and is not a publication of any libel contained therein for which the law affords a remedy. *Kansas City, M. & B. R. Co. v. Delaney*, 102 Tenn. 289, 45 L.R.A. 600, 52 S. W. 151; 25 Cyc. 392; *Billings v. Fairbanks*, 136 Mass. 177; *Beeler v. Jackson*, 64 Md. 589, 2 Atl. 916; *Hebner v. Great Northern R. Co.* 78 Minn. 289, 79 Am. St. Rep. 387, 80 N. W. 1128. The inquiry and the reply thereto were in the nature of a confidential communication. They were so labeled and treated, so far as appears from the record. They were issued at the special instance of the plaintiff. The only publicity given the answers contained therein was in making them known to the Guarantee Company. The record presents no evidence sufficient to justify a finding of express malice. It follows that the defendants were entitled to a directed verdict.

Reversed.

Hallam, J., dissenting:

It was conceded that part of plaintiff's alleged shortage was not a shortage at all, but that the apparent shortage was the result of use of a tank not properly gauged. It is conceded that shortages were so common as to be almost habitual, on the part of other filling-station employees, and yet no charge of dishonesty. No claim is made that plaintiff ever misappropriated funds. It seems to me the jury might find from these facts that the apparent shortages were not real.

The occasion was not privileged, as the syllabus and part of the opinion states, without qualification, but only qualifiedly privileged. If the statement was maliciously made, the occasion offered no protection. *Hebner v. Great Northern R. Co.* 78 Minn. 289, 79 Am. St. Rep. 387, 80 N. W. 1128.

It seems to me that there was evidence of malice to be submitted to the jury. The facts above stated were known to defendant Hancock. In addition to this, there is evidence that Hancock was prompted by ill feeling. When asked by plaintiff, "why he could not pass me on the

bond," he answered, "You can't hire any of my men away from me without getting a comeback; I will teach you something, young fellow,"—referring evidently to the fact that, after leaving defendant Oil Company's employ, plaintiff had entered

the employ of another oil company, and had hired one of the men employed by said defendant.

Dibell, J.:

I concur in the dissent of Justice Hallam.

ANNOTATION.

Libel and slander: communications by employer to surety company regarding employee.

It will be seen that it is held in the reported case (*HOFF v. PURE OIL CO.* ante, 1010) that a communication on a blank in the form of question and answer, made to a surety company at its request by a former employer, concerning a former employee who had referred such company to such employer, is privileged, in the absence of express malice. No special damages were pleaded.

In 5 *Labatt on Master & Servant*, § 2023, p. 6275, the case of *Dundas v. Livingston* (1900) 3 Sc. Sess. Cas. 5th series, 37, is cited as holding that a statement made by the plaintiff's master to a guarantor of the plaintiff's honesty was *prima facie* privileged.

But in *Briggs v. Brown* (1908) 55 Fla. 417, 46 So. 325, where a judgment for the plaintiff was reversed on other grounds, it was held that a declaration alleging that the defendant, an officer of the plaintiff's former employer, wrote a letter to an indemnity company, which was the surety on the plaintiff's bond to such employer, stating that the plaintiff was delinquent in his duties with respect to which the bond had been given, and alleging further that the letter was falsely and maliciously sent, and was received by the indemnity company, is not demur-

rable where special injuries to the plaintiff are alleged as the result of such a publication. In this case the plaintiff alleged special damages, in the refusal of said indemnity company and other guaranty companies to become surety for him in a new employment, by reason of the defendant's acts.

In *Sunley v. Metropolitan L. Ins. Co.* (1906) 132 Iowa, 123, 12 L.R.A. (N.S.) 91, 109 N. W. 463, it was held that the presentation by an employer to the surety on his agent's bond of a claim in excess of that reported due by the officer in charge of the accounting, followed by an acknowledgment that it had not made proper credits and had in its hands sufficient unpaid salary to satisfy its demands, will justify an inference of malice by the jury so as to render the employer guilty of libel.

And it was also held in the same case that the jury may find that the loss by an employee of a situation is the direct result of the wrongful act of a former employer in reporting a fictitious claim to the surety on his bond, who then withdraws from the bond to the new employer, reporting to him the claim made, which results in the discharge of the employee.

B. B. B.

CHOCTAW COAL & MINING COMPANY, Appt.,

v.

JOHN LILLICH.

Alabama Supreme Court — October 21, 1920.

(— Ala. —, 86 So. 383.)

Libel — charge of being a slacker.

1. Falsely to publish in war time that one is a slacker is libelous per se. [See note on this question beginning on page 1017.]

Master and servant — when corporation liable for libel of agent.

2. To render a corporation answerable for a libel published by its agent, the publication must have been by its authority, ratified by it, or the agent must have acted within the scope of his authority or in the course of his employment, in furtherance of the corporation's business.

[See 17 R. C. L. 382.]

— ratification of act — failure to disapprove.

3. Failure of a corporation having notice that a libel has been published by one purporting to act on its behalf, to repudiate the act with reasonable promptness, amounts to a ratification. — evidence of authority.

4. The mere fact that an assistant superintendent of a mine writes over the list of names of absentees posted daily by the corporation the word "slackers" does not indicate that he was acting or purporting to act within his authority.

Pleading — libel — necessity of colloquium.

5. Where defamatory language is of

a certain import, and on its face applies to one complaining of it, no colloquium or setting is necessary in the complaint.

[See 17 R. C. L. 394.]

Trial — jury — meaning of innuendoes in complaint for libel.

6. The jury must determine the meaning suggested by innuendoes in a complaint for libel, if the language is capable of various meanings suggested.

Pleading — effect of unwarranted innuendoes.

7. Unwarranted innuendoes in a complaint for libel which is actionable per se do not render the complaint demurrable, since they may be treated as surplusage.

Appeal — nonreversible error — overruling demurrer to complaint.

8. Error in overruling a demurrer to a complaint which charges libel or slander in the alternative is without prejudice, where there was no evidence of slander, and other substantially similar counts were free from the objection.

[See 2 R. C. L. 246.]

APPEAL by defendant from a judgment of the Circuit Court for Walker County (Curtis, J.) in favor of plaintiff in an action brought to recover damages for alleged libel and slander. *Reversed.*

The facts are stated in the opinion of the court.

Mr. J. H. Bankhead, Jr., for appellant:

Corporations are not liable for slander for words uttered by an agent unless they authorize or ratify the act of the agent in uttering the words.

Singer Mfg. Co. v. Taylor, 150 Ala. 574, 9 L.R.A. (N.S.) 929, 124 Am. St. Rep. 90, 43 So. 210; 18 Am. & Eng. Enc. Law, 2d ed. 1058.

An alleged libel must charge a crime, or it must be shown that it was intended to disgrace or degrade the plaintiff, or to hold him up to public hatred, contempt, or ridicule, or to cause him to be shunned or avoided.

Tennessee Coal, Iron & R. Co. v. Kelly, 163 Ala. 348, 50 So. 1008.

Messrs. Leith & Powell and M. E. Nettles for appellee.

Somerville, J., delivered the opinion of the court:

The undisputed evidence shows that a typewritten sheet containing a list of the names of coal miners who did not report for work on the preceding day was each day posted

on a board at the mouth of the mines operated by the defendant company; that on or about July 18, 1918, such a list was so posted by an agent of the operating company under the caption "Employees not working July 18th," and in the list was the name of the plaintiff; that one Verg West, who was defendant's assistant superintendent, thereupon wrote on said board, with chalk or paint, above the paper sheet, the words "List of Slackers;" and that the board in that condition was seen by a number of people.

Although the witness Nicol testified that he was general superintendent for defendant company prior to July 9, 1920, and that on that day defendant company discontinued its operation of these mines and turned them over to another company, which thenceforth operated them exclusively, there was other testimony from which the jury could properly

find that defendant company continued to control and operate the mines down to a date later than July 18th.

The defendant company's responsibility for the alleged libel, assuming that it was in control of the mines at the time in question, must be based upon one of three propositions: (1) The libel must have been

Master and
servant—when
corporation
liable for libel
of agent.

published by the servant West by the authority of defendant company; or (2) it must have been thereafter ratified or approved by it; or (3) it must have been published by West while acting within the scope of his authority, or with in the course of his employment, in furtherance of defendant company's business. *Republic Iron & Steel Co. v. Self*, 192 Ala. 403, L.R.A.1915F, 516, 68 So. 328; *Southern Exp. Co. v. Fitzner*, 59 Miss. 581, 42 Am. Rep. 379; 10 Cyc. 1216, b.

It may be noted in passing that corporate liability for "oral" defamation must be grounded upon either the express authority of the servant who utters it, or upon corporate ratification thereafter. *Singer Mfg. Co. v. Taylor*, 150 Ala. 574, 9 L.R.A. (N.S.) 929, 124 Am. St. Rep. 90, 43 So. 210; 10 Cyc. 1216, 5.

There is nothing in the testimony which tends in any way to show that West was authorized by defendant company to write this offensive language over plaintiff's name on the board.

Nor is there anything in the evidence that has the slightest tendency to show that defendant company ever approved or ratified the act. It appears that the writing remained on the board for a day or two at most; and, even if the inference could be drawn that defendant company had notice or knowledge of its brief presence there, there was nothing to betray its authorship, and nothing to indicate that a servant of the company was professing to act in its behalf, or assuming authority to do so.

Had the company been advised of

the writing, and that it was done by its servant in its behalf, its failure to repudiate the act

—ratification of
act—failure to
disapprove.

with reasonable promptness would no doubt have amounted to approval and ratification. *Pennsylvania Iron Works Co. v. Henry Vogt Mach. Co.* 139 Ky. 497, 8 L.R.A. (N.S.) 1023, 139 Am. St. Rep. 504, 96 S. W. 551.

But without such knowledge of authorship and purpose, a mere failure to disclaim responsibility on the part of the company cannot generate or support the inference of corporate approval or ratification.

So far as the third basis of liability is concerned, there is nothing in the evidence to even suggest that West, as assistant superintendent or in any other capacity, was authorized to do any act in the conduct of defendant's business to which this defamatory publication was a reasonable incident; nor does it appear from the circumstances of the act itself that West was assuming to act for the company or in the accomplishment of its business ends. Indeed, so far as appears, his act was spontaneous and independent,—a mere vagrant impulse, whether of

—evidence of
authority.

sport or malice,—and a distinct departure from the company's authorized practice of publishing the names of absentee miners under an appropriate and lawful caption.

For the reasons stated, we hold that the general affirmative charge should have been given for defendant, as requested, and its refusal was prejudicial error.

Webster's New International Dictionary (1919) defines the word "slacker" as follows: "One who avoids or neglects a duty or responsibility; specifically, a person who shirks a duty or obligation to his country, especially in time of war, as by attempting to evade military service."

The word is not found in pre-war lexicons, but had its genesis as to use and meaning in the conditions following our entrance into the

World War, and in the exigencies of its successful prosecution. During the war it was unquestionably a term of the severest reproach, well understood by all men, and calculated to subject its bearer to hatred and contempt in practically every community in the land.

To falsely publish such an accusation of any person was manifestly libelous per se, and imported injury without special averment or proof. Whether or not this would be so in time of peace we need not determine.

The defamatory language being of certain import, and on its face applicable to plaintiff, no colloquium or setting was necessary in the complaint; and, being capable of each of the meanings suggested by the innuendoes, those meanings, vel non, were questions for the jury to de-

termine. *Penry v. Dozier*, 161 Ala. 292, 49 So. 909. With respect to the questions of pleading raised by demurrer to the complaint, the innuendoes, whether warranted or not, could be treated as surplusage, and did not render the complaint demurrable, since it charged a libel actionable per se. 161 Ala. 301.

Pleading—
effect of
unwarranted
innuendoes.

If there was error in overruling the demurrer to count 1, on the ground that it charged slander or libel in the alternative, the error was without prejudice to defendant, since there was no question of spoken defamation in the case as tried, and other substantially similar counts were free from that objection.

Appeal—
nonreversible
error—overrul-
ing demurrer to
complaint.

For the error noted, the judgment of the trial court will be reversed, and the cause remanded.

Anderson, Ch. J., and McClellan and Thomas, JJ., concur.

ANNOTATION.

Libel and slander: charging one with being a "slacker."

It will be seen that it is held in the reported case (*CHOCTAW COAL & MIN. CO. v. LILLICH*, ante, 1014) that to charge a person during the great war with being a "slacker" was libelous per se.

No other case on the precise point has been found. There is, however, an interesting case concerning the word "profiteer."

In *Lunn v. Littauer* (1919) 187 App. Div. 808, 175 N. Y. Supp. 657, it was held that it was libelous per se to say during the Great War, of a member of the House of Representatives, that the reason why Republicans put forward and signed his petition for the Republican nomination "is an example of unparalleled selfishness on the part of a few profiteers. The manufacturers, tanners, and wool dealers who circulated the petition felt that, through the agency of Congressman Lunn, they would be able to get, by special favor,

permission to transport to the United States, skins and wool, particularly from the Cape of Good Hope, that they might have a chance to make big money in the handling thereof. Ships today are demanded for the transport of our gallant boys to the fields of France, and to transport the enormous mass of necessary ammunition, food, and equipment. To try by favor to divert shipping from necessary war uses to carry prohibited skins and wool is an unpatriotic endeavor, unworthy of loyal American business men, and particularly reprehensible on the part of a member of our country's War Congress." The court said: "To be held out as a 'profiteer,' or the tool of 'profiteers,'—to be charged with lending oneself to the promotion of private interests at the expense of the national welfare,—is to invite the hatred and contempt of people gen-

erally. This would be true to a considerable extent in time of public tranquillity; in the presence of an aroused public sentiment, when a mere suspicion of unpatriotic or even neutral attitude was likely to excite the hostility of the unthinking, such a charge could not fail to bring the plaintiff into disgrace, and might, in many communities, have invited violence against his person."

In *Dimmitt v. Breakey* (1920) —

C. C. A. —, 267 Fed. 792, certiorari denied in (U. S. Adv. Ops. 1920-21, p. 46) — U. S. —, 65 L. ed. —, 41 Sup. Ct. Rep. 13, a case of assault and battery, the court states that the defendant "alleged that the plaintiff was a slacker; that is, a person derelict in the performance of his duty toward his country in the recent war with Germany;" and it seems also that the defendant made use of the term "slackerism." B. B. B.

STATE OF WASHINGTON, Appt.,

v.

ARTHUR REESE, Respt.

Washington Supreme Court (Dept. No. 1) — September 14, 1920.

(— Wash. —, 192 Pac. 934.)

Venue — offense committed on railroad train — statute permitting trial in any county through which train may pass — constitutionality.

Under a constitutional provision giving an accused a right to trial by a jury of the county in which the offense is alleged to have been committed, the legislature cannot make the route of a railroad train or steamboat a criminal district, and provide for trying one committing an offense on the train or boat, in any county through which the vehicle may pass or in which the trip may begin or end.

[See note on this question beginning on page 1020.]

APPEAL by the State from a judgment of the Superior Court for Spokane County (Oswald, J.) sustaining defendant's motion in arrest of judgment after conviction of grand larceny. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Joseph B. Lindsley and T. T. Grant, for the State:

The statute under which defendant was charged is not unconstitutional, and the trial court had jurisdiction of the cause.

Watt v. People, 126 Ill. 9, 1 L.R.A. 403, 18 N. E. 340; *Powell v. State*, 52 Wis. 217, 9 N. W. 17; *People v. Dowling*, 84 N. Y. 478; *Nash v. State*, 2 G. Greene, 286; 16 C. J. p. 198.

Main, J., delivered the opinion of the court:

The defendant was charged by information by the prosecuting attorney of Spokane county with the crime of grand larceny. The trial resulted in a verdict of guilty. A motion in arrest of judgment was

made and sustained. The state appeals.

The information, omitting the formal parts, is as follows: "That on or about August 31, 1919, on a railway train of the Northern Pacific Railroad arriving in and passing through Spokane county, Washington, the said defendant Arthur Reese, whose other or true name is to the prosecuting attorney unknown, then and there being, did then and there wilfully, unlawfully, and feloniously take, steal, and carry one certain gold watch of the value of \$50 and one certain gold nugget watch fob of the value of \$50, the property of, and belonging to,

Charles E. Roediger, with the intent to deprive and defraud the owner thereof."

It should be noted that in this charge it is not alleged that the offense was committed in Spokane county. Upon the trial it appeared from testimony that the respondent was a porter on the Northern Pacific train leaving Tacoma, Washington, on the evening of the 30th or 31st of August, 1919. The train arrived in Spokane the following morning. Among the passengers on the train was one C. E. Roediger, who occupied a berth in a sleeping car just in front of the car which was in charge of the respondent. Roediger retired about midnight, and at the time the train was near Yakima, Washington. At this time he had in his vest pocket a watch and fob. He awoke near Lind, Washington, and his watch and fob were missing. About a month later the respondent pawned the watch in the city of Spokane. Thereafter he was arrested, with the result as above indicated. The charge in this case is laid under § 2293 of Remington & Ballinger's Code, which provides: "The route traversed by any railway car, coach, train or other public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station or depot upon such route, shall be in any county through which said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate."

By this statute the route traversed by a railway train is attempted to be made a criminal district, and that the court in any county through which the train may pass during its trip shall have jurisdiction of any offense committed upon the train, regardless of whether at the time the crime was committed the train was in the county where the prosecution is attempted to be had. If this statute is constitutional, the judgment

of the superior court cannot be sustained. On the other hand, if the statute is unconstitutional, the trial court ruled correctly on the motion in arrest of judgment. It should be kept in mind that this is not a case where property stolen in one county is carried by the thief into another, and in the latter county is charged with having committed an offense therein. As already pointed out, the information in this case does not charge that the offense was committed in Spokane county. Neither is it a case where an act done in one county contributes to the offense in another. The question is the constitutionality of the law under which the accused was tried and convicted. The Constitution (§ 22 of art. 1) provides: "In criminal prosecutions, the accused shall have the right to . . . a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed. . . ."

Under this section of the Constitution, one accused of crime has a right to be tried in the county in which the offense is alleged to have been committed. It requires no argument to show that, the offense being alleged in a particular county, the proof must show that it was committed in that county. Comparing the provisions of the statute with the requirements of the Constitution, it appears that the statute goes beyond the constitutional limitation. Under the statute the route

Venue—offense committed on railroad train—statute permitting trial in any county through which train may pass—constitutionality.

traversed by a railway train is made a criminal district, and an offender may be prosecuted in any county in such district. Under the Constitution, he can only be prosecuted in the county where the offense has been committed. In *State v. Carroll*, 55 Wash. 588, 133 Am. St. Rep. 1047, 104 Pac. 814, 19 Ann. Cas. 1234, the court had before it a statute providing that, when property taken by burglary in one county had been brought into another county, the jurisdiction was in either county.

It was there held that the statute violated § 22 of art. 1 of the Constitution, which guaranteed to the accused a right to a trial in the county in which the offense was alleged to have been committed. While that case can hardly be said to be exactly in point upon the question presented upon this appeal, yet the analogy is very close. In 16 C. J. p. 198, it is said, speaking of statutes such as the one here under consideration, that "by the weight of authority such statutes violate no constitutional provision; but the contrary has also been held." All the cases cited in the notes in support of the texts have been carefully examined, and we find but three cases which discuss and decide the exact question. Two of these hold that such statutes are unconstitutional in that they deny to the accused the right to a trial in the county in which the offense has been committed. One holds that such statutes are constitutional, though in the latter case there was a dissenting opinion. In *State v. Anderson*, 191 Mo. 134, 90 S. W. 95, the supreme court of the state of Missouri, in a well-considered opinion, held that a similar statute was unconstitutional. The question had been before that court at prior times, and its earlier decisions were reviewed and adhered to. In *People v. Brock*, 149 Mich. 464, 119 Am. St. Rep. 684, 112 N. W. 1116, the question was before the supreme court of Michigan, and it was there held that such a statute cannot be sustained under a constitutional provision which guarantees to the accused the right to a trial in the county in which the offense has been committed. It was there said: "It would be a startling innovation should we say that the legislature

has power to subject a person charged with crime to prosecution in any one of several counties, covering a strip of territory coextensive with the length or breadth of the state, at the prosecutor's election, and yet that is what this statute authorizes, if it is valid. It cannot be said that this offense was, in 'contemplation of law,' committed in each of said counties, as in a case where property stolen in one county is carried by the thief into another, or possibly where an act done in one county contributes to the commission of the offense in another."

In *Watt v. People*, 126 Ill. 9, 1 L.R.A. 403, 18 N. E. 340, the question was before the supreme court of Illinois, and a different conclusion was there reached, though not by a unanimous court. The holding in that case seems to be influenced by the fact that the constitutional provision there being considered was less restrictive than were the similar provisions in either of the two earlier constitutions, and this fact led to the conclusion that it was the intention "to release, in some degree, the rigid rule formerly prevailing." As already stated, none of the other cases cited in the notes of *Corpus Juris*, or in the brief, discuss or decide the question here presented. Under this state of the authorities we are constrained to disagree with the writer of the text upon where the weight of authority lies. It seems to us that reason and authority both support the view that the statute cannot take away from an accused a right guaranteed by the Constitution.

The judgment will be affirmed.

Holcomb, Ch. J., and Mitchell, Parker, and Mackintosh, JJ., concur.

ANNOTATION.

Constitutionality of statute fixing venue of offense committed while upon public conveyances, or at stations or depots upon the route thereof.

There would seem to be little doubt that, in the absence of all constitutional limitation, legislation fixing the

venue of criminal prosecutions for offenses committed in or upon public conveyances in transitu in a county

other than that in which the crime was actually committed would be valid, so that the question in hand resolves itself into one of construction of the various constitutional provisions relating more or less directly to the venue of criminal prosecutions.

First taking up constitutional provisions guaranteeing trial by jury of the county in which the crime shall have been committed, we find that it has been held that the legislature of a state cannot lawfully enact that prosecutions for crime committed upon a public conveyance may be had in any county through which such conveyance passed. This was the case in *Craig v. State* (1871) 3 Heisk. (Tenn.) 227, wherein it was held that a statute conferring jurisdiction as to offenses committed within the state, or within 5 miles of the line thereof, on board a boat or vessel engaged in navigating the waters of Tennessee, upon the courts of any county through which the boat or vessel is navigated in the course of such voyage, or where such voyage shall terminate, was unconstitutional.

And a similar conclusion has been reached under less positive constitutional provisions.

Thus, in Missouri, under a constitutional provision that "no person shall be prosecuted criminally for felony or misdemeanor otherwise than by an indictment or information," it has been held that the word "indictment," as used in such provision, must be accepted and understood as having been inserted in the Constitution with the meaning attached to it at common law; that at common law an indictment signified an accusation by the oaths of grand jurors of the same county wherein the offense was committed, and that, therefore, the Constitution guarantees to every person the right to be exempt from criminal prosecution for a felony except upon an accusation or indictment preferred by a grand jury of the county where the offense was committed, so that a statute providing that an indictment for any offense committed on board of any vessel, or in any railroad car, may be found in any county through which, or

a part of which, such vessel or railroad car shall be navigated or run in the course of the same voyage or trip, or in the county where such voyage or trip shall terminate, contravenes the Constitution, and renders illegal a proceeding under such a statute in a county other than that where the offense was committed. *State v. Anderson* (1905) 191 Mo. 134, 90 S. W. 95; *State v. Clarke* (1905) 191 Mo. 148, 90 S. W. 100; *State v. Meyers* (1905) 191 Mo. 149, 90 S. W. 100; *State v. Gorman* (1905) 191 Mo. 150, 90 S. W. 100. A contrary conclusion was reached in the early Missouri case of *Steerman v. State* (1847) 10 Mo. 503, wherein it was held that a statute authorizing an indictment for any offense within the state, on board of a vessel in the course of any voyage or trip, in any county through which, or any part of which, such a vessel should be navigated in the course of the same voyage or trip, or where such voyage or trip should terminate, was sustained upon the theory that it was competent for the legislature to change, modify, or alter the common-law principle that the venue must be proved as laid.

And adopting the same theory as that laid down by the supreme court of Missouri in *State v. Anderson*, supra, the Michigan supreme court in *People v. Brock* (1907) 149 Mich. 464, 119 Am. St. Rep. 684, 112 N. W. 1116, set out and quoted in the reported case (*STATE v. REESE*, ante, 1018), has held that a statute, providing that larceny from a railroad car en route may be prosecuted in any city through which the car passes, contravenes a constitutional provision that "the right of trial by jury shall remain."

And in the reported case (*STATE v. REESE*) it was held that a constitutional provision, guaranteeing the right of trial by jury "of the county in which the offense is alleged to have been committed," prevented the lawful enactment of a statute providing for the trial of one committing an offense on a train, boat, or other public conveyance, in any county through which the conveyance passes or in which the trip begins or terminates.

On the other hand, in Illinois,

where, instead of guaranteeing the right of trial in the county or district in which the offense was committed, the Constitution provides for such trial in the county or district in which the offense is "alleged" to have been committed, it has been held (*Watt v. People* (1888) 126 Ill. 9, 1 L.R.A. 403, 18 N. E. 340) that statutes providing that "the local jurisdiction of all offenses not otherwise provided for by law shall be in the county where the offense was committed," but that "where any offense is committed in or upon any railroad car passing over any railroad in this state, or on any water craft navigating any of the waters within this state, and it cannot readily be determined in what county the offense was committed, the offense may be charged to have been committed and the offender tried in any of the counties through or along or into which such railroad car or water craft may pass or come, or can reasonably be determined to have been, on or near the day when the offense was committed,"—are constitutional, the theory being that the constitutional right is with respect to the place alleged as the locus of the crime, and not the place in which the crime was actually committed. In reaching this conclusion the court said: "It is insisted that the Constitution secures to every person accused of a criminal offense the right to a trial by an impartial jury of the county in which the offense was committed, and that the foregoing sections of the statute, being in derogation of that constitutional right, are void. At common law all criminal offenses are deemed to be local and subject to prosecution only in the county where they were committed. In the early ages of English jurisprudence jurors who were impaneled to try either civil or criminal causes were themselves the witnesses, and rendered their verdicts upon their own knowledge, and therefore, in order that they might be qualified to perform their functions, they were summoned from the visne or neighborhood of the place where the matter to be tried arose. When at a later period they were required to find their

verdicts upon the evidence of witnesses, it was still deemed important that they should come from the place where the witnesses lived and where the dispute originated, since jurors from the visne or neighborhood were regarded as more likely to be qualified to investigate and determine the truth than persons living at a distance from the scene of the transaction. It thus became a settled rule of the common law that persons accused of criminal offenses should have a right to be tried by a jury of the visne of the alleged crime. Though originally more limited, the visne or neighborhood came to be understood to be the county where the offense was committed, and such was its signification at common law at the time that system of jurisprudence was adopted in this state. 1 Chitty, Crim. Law, 177; 3 Reeves, History of Eng. Law, 476; 4 Bl. Com. 349. Undoubtedly the right to a trial by a jury of the county in which the crime charged was committed is ordinarily a substantial and important legal right. It secures to the accused a trial among his neighbors and acquaintances, and at a place where, if innocent, he can most readily make that fact to appear. But it is difficult to see how that can be the case where the offense is committed on a railway train, and the circumstances are such that it cannot be definitely located in any one of several counties through which the train passes. Those who are on the train are, for the time being, completely segregated from the communities through which they are rapidly passing, and there is ordinarily no circumstance which can make it more advantageous for a person accused of such crime to be tried in one county than in another. The right in such case to a trial in a particular county, if it exists at all, is at best a technical right, having no substantial importance or value to the accused. . . . The phraseology of that section of our present Constitution which relates to the place of trial in criminal prosecutions differs materially in one respect from that of the corresponding provisions of the Constitutions of 1818 and

1848. The Constitution of 1818 provided that, in all criminal prosecutions, the accused should have a right to 'a speedy public trial by an impartial jury of the vicinage;' and the Constitution of 1848 provided that he should have a right to 'a speedy public trial by an impartial jury of the county or district wherein the offense shall have been committed.' It must be admitted, probably, that both these constitutional provisions were susceptible of but one construction, viz., that of limiting jurisdiction in all criminal prosecutions absolutely to the county where the crime alleged was actually committed. The framers of our present Constitution, recognizing, as we may assume, the infirmity of this rule, particularly in its application to cases like the present, where it is impossible to determine in which of two or more counties a particular crime was committed, revised the section so as to make it read as follows: 'In all criminal prosecutions the accused shall have a right to . . . a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed.' This modified phraseology may fairly be regarded as evidencing an intention to relax in some degree the rigid rule formerly prevailing. The prosecution may now be had in the county where the offense is alleged to have been committed. The allegation here referred to is doubtless that made by the indictment, that being the only document in which the proper allegations as to the vicinage of the crime are ordinarily made. The Constitution then may be regarded as empowering the general assembly to provide, in its discretion, for the presentment of indictments in which the allegation as to the vicinage of the offense may not be in accordance with the actual fact. If this is not so, the words inserted in the present Constitution are meaningless, and the instrument must be interpreted precisely as though they had not been used. While at common law, and by the rule established by both our former constitutions, criminal offenses were regarded as strictly local and subject to prosecution only in the

counties where they were committed, our present Constitution vests in the general assembly the power to change that rule to such extent as it may see proper. It may now determine by law when offenses are to be deemed to be local, and when and within what limitations they are to be treated as transitory. The general assembly has accordingly, in the first section of the statute above quoted, established the general rule that jurisdiction of criminal offenses shall be local, unless otherwise provided by law, and, in the other sections quoted, provision is made for the cases where it is doubtful or cannot be readily determined in which of several counties the offense is committed, and there, as between such counties, the offense is made transitory." The Illinois statute, permitting the venue of crimes committed upon trains while in transitu to be laid in any county along the route, was again applied in *People v. Goodwin* (1914) 263 Ill. 99, 104 N. E. 1018, its constitutionality, seemingly, being assumed.

And where the Constitution guarantees a trial by jury of the "county" or "district" wherein the offense shall have been committed, it has been held that the legislative power to regulate the venue of criminal prosecutions is not restricted to the county where actually committed. Thus, in *State v. McDonald* (1901) 109 Wis. 506, 85 N. W. 502, the court, proceeding upon the theory that the word "district" must be considered as having a different meaning than the word county, held that a statute providing that counties on the shores of certain state waters should have jurisdiction in common of all offenses committed on such waters, was constitutional.

And in the New York case of *People v. Dowling* (1881) 84 N. Y. 478, the court, in applying a statute which provided that an indictment for any crime or offense in respect to freight in transitu on a railroad train might be found in any county through which such train might have passed, said that such a statute, while it changed the common-law rule, was "in the power of the legislature;" but no other

reference was made to the question of its constitutionality.

And, in a number of instances, statutes of the kind under consideration in this annotation have been applied by the courts without the question of their constitutionality having been expressly referred to in any way. In this class may be mentioned *Nash v. State* (1849) 2 G. Greene (Iowa) 286, which construed and applied a statute providing that, "when a person shall commit an offense on board of any vessel or float, he may be indicted for the same in any county through any part of which such vessel or float may have passed on that trip or voyage;" *People*

v. Hulse (1842) 3 Hill (N. Y.) 309, which involved a similar statute; *Com. v. Brown* (1919) 71 Pa. Super. Ct. 575, which applied a statute providing that the venue of offenses committed during journeys shall be in any county through which the carrier traveled during the time the felony or misdemeanor shall have been committed; *Reg. v. Sharpe* (1854) 6 Cox, C. C. (Eng.) 418, *Dears*, C. C. 415, 24 L. J. Mag. Cas. N. S. 40, which applied 7 Geo. IV. chap. 64, § 13, a similar statute; and *Reg. v. French* (1859) 8 Cox, C. C. (Eng.) 252, which involved the statute cited with the next preceding case. G. J. C.

J. L. NUZUM

v.

W. H. SHEPPARD, Plff. in Err.

West Virginia Supreme Court of Appeals — October 19, 1920.

(— W. Va. —, 104 S. E. 587.)

Checks — delay in presenting — discharge of indorser.

1. Inexcusable delay in presenting a check for payment will discharge an indorser from liability thereon if the check is not paid, whether he is in fact injured or not.

[See note on this question beginning on page 1028.]

— time for presentment.

2. The person receiving a check drawn on funds in a bank is bound to exercise reasonable diligence in making presentment thereof for payment, if he wishes to avoid discharging an indorser thereof.

[See 5 R. C. L. 503.]

Trial — question of law — diligence in presenting check.

3. As to what constitutes reasonable diligence in the presentment of a check for payment to the bank upon which it is drawn, where the facts are conceded, is a question of law for the court.

[See 5 R. C. L. 509.]

Checks — rules for presenting.

4. If the person receiving such a check and the bank upon which it is drawn are in different places, such a check must be forwarded for pre-

sentment by mail, or some other ordinary mode of transmission, on the next day after the receipt thereof at the place at which the payee resides, or does business, if reasonably and conveniently practicable, and, if not so, then upon the next day thereafter, and the same must be presented to the bank upon which it is drawn, and payment demanded, at the latest, upon the day after its receipt at the place at which such bank is located.

[See 5 R. C. L. 510.]

Payment — by check — when absolute.

5. When a check is received in conditional payment of a debt, the failure to present it for payment and give notice of dishonor within a reasonable time after its receipt operates to make such conditional payment absolute.

[See 21 R. C. L. 66.]

Headnotes by RITZ, J.

ERROR to the Circuit Court for Jackson County to review a judgment in favor of plaintiff in an action brought to enforce payment of a check indorsed and delivered by defendant to plaintiff in payment of land. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Warren Miller, Lewis Miller, and T. A. Brown, for plaintiff in error:

Delay and negligence on the part of the holder of a check, in presenting the same for payment, release the indorser.

Thornburg v. Emmons, 23 W. Va. 326; Peabody Ins. Co. v. Wilson, 29 W. Va. 528, 2 S. E. 888; Parsons, Notes & Bills, p. 72; Cox v. Boone, 8 W. Va. 507, 23 Am. Rep. 627; Ford v. McClung, 5 W. Va. 156; Brown v. Ferguson, 4 Leigh, 37, 24 Am. Dec. 707; Thompson v. Cumming, 2 Leigh, 321; Willock v. Riddle, 5 Call. (Va.) 358; Davis v. Poland, 92 Va. 225, 23 S. E. 292; Early v. Preston, Patton & H. 228; Wood v. Luttrell, 1 Call. (Va.) 282; May v. Boisseau, 8 Leigh, 181; Bank of Old Dominion v. McVeigh, 29 Gratt. 546.

What is reasonable time within which a check should be presented, when there is no dispute about the facts, is a question of law to be determined by the court.

51 Am. & Eng. Enc. Law, 1041; 3 Kent, Com. p. 91; Rosenthal v. Ehrlicher, 154 Pa. 399, 26 Atl. 435; Loux v. Fox, 171 Pa. 68, 33 Atl. 190; Mohawk Bank v. Broderick, 10 Wend. 304.

Messrs. M. C. Archer and J. L. Wolfe for defendant in error.

Ritz, J., delivered the opinion of the court:

On the 27th day of November, 1918, plaintiff made sale of his farm to the defendant at the price of \$5,000. Of this sum \$1,000 was to be paid in cash. This cash payment was made by the defendant delivering to the plaintiff a note which plaintiff owed the defendant, for the sum of \$500, by turning over to him a check which defendant had received from one O. S. Hutchinson for the sum of \$365, and the residue, \$135, by a check drawn by defendant's wife. The check of Hutchinson, above referred to, was made payable to the order of the defendant, W. A. Sheppard, and in figures the amount thereof was given as

"\$365," but the words written out in the body of the check were "three sixty-five dollars." This check was dated the 30th day of November, and was indorsed on the back in blank by the defendant at the time he turned it over to the plaintiff. It appears that the plaintiff resided about 16 or 17 miles from the town of Ravenswood, at which place was located the Jackson County Bank upon which the check was drawn, and that there was a daily mail from plaintiff's postoffice to the town of Ravenswood, leaving plaintiff's postoffice between 1 and 2 o'clock in the afternoon, and reaching the town of Ravenswood about one hour later. Plaintiff says that he sent this check to the bank upon which it was drawn on the 7th of December, just one week after its date, and that the same was not paid, but was returned to him by said bank with the notation made on the bottom of the letter with which he had inclosed it, advising him of the omission of the word "hundred" between the words "three" and "sixty" in the written part of the check. Plaintiff says that he thereupon went to the home of the defendant, and, the defendant being absent, he presented to the defendant's wife the written memorandum made by the officer of the bank above referred to, which she says she forwarded to her husband, who was then in North Carolina, and which her husband says was received by him. Plaintiff again presented this check to the bank on the 8th day of January, 1919, and demanded payment thereof, which was refused, the answer being made that there were no funds with which to pay the same. Notice of the dishonor was then given to the defendant as the indorser of said check, and upon his refusal to pay the same this suit was instituted to recover from him the amount thereof.

It is shown by the cashier of the bank that on the 30th day of November, the date of this check, the maker of the check, Hutchinson, deposited in the bank the sum of \$4,750 and that from that date until the 9th of December there were at all times sufficient funds in the bank with which to pay the check. After the 9th of December there were no funds remaining in the bank to the credit of Hutchinson. Hutchinson, it appears, failed in business in the month of January, and was adjudged bankrupt. On the trial of the case in the circuit court of Jackson county the plaintiff had a verdict for the amount of said check, with interest, upon which judgment was rendered.

The defendant insists that this judgment should be reversed, for the reason that it appears from the plaintiff's own testimony that he did not present this check for payment within a reasonable time after the date thereof, for which reason the defendant is discharged of liability as an indorser thereon.

That it is the duty of one to whom a check is delivered to present the

Checks—time
for present-
ment.

same at the bank upon which it is drawn for payment within a reasonable time is conceded. The questions we have for solution here are: First, was the presentation of the check in this case made within such reasonable time; and, second, if it was not, what was the effect of the plaintiff's failure so to present it?

That the plaintiff failed to present this check at the bank upon which it was drawn within a reasonable time admits of no doubt under our holdings. The check was dated the 30th day of November, which was Saturday. Had the bank upon which the check was drawn been located at the place of plaintiff's residence, it would have been his duty to present it at the latest on the next business day after its date, which would have been Monday, the 2d of December. The bank upon which it was drawn was not at the place of plaintiff's

residence, but at the town of Ravenswood, about 16 or 17 miles distant. What, then, was the plaintiff's duty? He would be required to forward the check to the place of payment for presentation, by mail or some other usual mode of transmission, on the next day after the receipt thereof by him, if this could reasonably and conveniently be done, and then to have the same presented for payment not later than the day following its arrival at the place of payment. This is the doctrine laid down by this court in the cases of *Lewis, H. & Co. v. Montgomery Supply Co.* 59 W. Va. 75, 4 L.R.A. (N.S.) 132, 52 S. E. 1017, and *Pinkney v. Kanawha Valley Bank*, 68 W. Va. 254, 32 L.R.A. (N.S.) 987, 69 S. E. 1012, Ann. Cas. 1912B, 115.

Applying these rules to the facts as stated by the plaintiff, we find that there was a daily mail running from plaintiff's place of residence to Ravenswood, the place of payment of the check, leaving plaintiff's place of residence between 1 and 2 o'clock in the afternoon, and arriving at Ravenswood about an hour later. This being so, it was his duty to forward this check to Ravenswood for presentation to the bank upon which it was drawn not later than the mail leaving his postoffice on the afternoon of Monday, the 2d day of December. It further appears that this train would have reached Ravenswood between 2 and 3 o'clock, so it may be said that it could not have been conveniently presented for payment on that date, but it was the plaintiff's duty to have it presented during business hours on the next day. His failure to have it presented for payment to the bank upon which it was drawn, and demand payment thereof, within the time above indicated, was a failure upon his part to exercise due diligence in the collection of said check. He did not present it within a reasonable time. The doctrine of the authorities above cited is that, where the facts are conceded, the question of what is a reasonable time is a ques-

Trial—question of law—diligence in presenting check.

tion of law for the court, and not a question to be determined by the jury, and the court in this case should have found that the plaintiff failed to present the check for payment within a reasonable time, as it was his duty to do.

But what is the effect upon the defendant, as indorser of said check, of this failure upon the part of the plaintiff? Is he discharged from his obligation as indorser? It is argued that the check might not have been paid, even had it been presented promptly, because of the apparent irregularity above noted. This defect would not justify the bank in refusing payment of the check, for the Negotiable Instruments Law provides that where there is an ambiguity in the written language of an instrument such as this, the figures will be looked to, to determine what was intended.

Again, it appears in this case that the plaintiff sent this check to the bank upon which it was drawn, thus making it his agent for the presentment thereof. It was held in *Pinkney v. Kanawha Valley Bank*, supra, that it was negligence upon the part of the holder of a check to send it to the drawee bank for presentment. The plaintiff should have selected some other agency for the purpose of making the demand for payment. But it does not appear from the evidence of the bank officer by whom the check was received for what reason payment was refused. He says that he made the notation on the letter written to the bank by the plaintiff about which the plaintiff testified, and returned the check to the plaintiff. He does not say in his testimony, however, whether he refused payment of the check because there were no funds, or because of the irregularity above noted. He did not give notice of the dishonor of the paper at that time for the reason, as he states, that the plaintiff had not requested him to do so, but simply returned it to the plaintiff. It seems to be very

well established that an inexcusable delay upon the part of a holder of a check to present it for payment within a reasonable time will discharge the indorser, whether he is in fact injured or not. So far as the drawer of the instrument is concerned, he will not be discharged unless he can show that he has been injured, and then only to the extent that he has suffered from the delay, but an indorser's obligation is different, and if the holder of the instrument fails to present it at the place of payment within a reasonable time, and give notice of its dishonor should payment be refused, the indorser will be discharged regardless of whether such failure has resulted in loss to him or not. 8 C. J. p. 545; *Coleman v. Lewis*, 183 Mass. 485, 68 L.R.A. 482, 97 Am. St. Rep. 450, 67 N. E. 603; *Mauney v. Coit*, 80 N. C. 300, 30 Am. Rep. 80; *Comer v. Dufour*, 95 Ga. 376, 30 L.R.A. 300, 51 Am. St. Rep. 89, 22 S. E. 543; *First Nat. Bank v. Miller*, 37 Neb. 500, 40 Am. St. Rep. 499, 55 N. W. 1064; *Humphries v. Bicknell*, 2 Litt. (Ky.) 296, 13 Am. Dec. 268; *Kirkpatrick v. Puryear*, 22 L.R.A. 785, and note, 93 Tenn. 409, 24 S. W. 1130; *Aebi v. Bank of Evansville*, 124 Wis. 73, 68 L.R.A. 964, 109 Am. St. Rep. 925, 102 N. W. 329; *Start v. Tupper*, 81 Vt. 19, 15 L.R.A. (N.S.) 213, 130 Am. St. Rep. 1015, 69 Atl. 151; *Veazie Bank v. Winn*, 40 Me. 60; *Martin v. Home Bank*, 160 N. Y. 190, 54 N. E. 717; *First Nat. Bank v. Mackey*, 157 Ill. App. 408; *Harris Abattoir Co. v. Maybee*, 31 Ont. L. Rep. 453, 20 D. L. R. 651.

Checks—delay in presenting—discharge of indorser.

Checks are not intended to be used as media of exchange. When one gives a check or indorses a check given to him to another, he has a right to expect that such other will present the same for payment promptly, and if he fails to do so he in effect says to the indorser, "I will no longer hold you as a party to this instrument." If such a check is turned over to one in payment of a

debt, it will not ordinarily be held to be a discharge of the debt, but if the holder fails to present it promptly, and to have notice of dishonor given in case the same is not paid, such failure will result in discharging the debt for which it is given.

Payment—by check—when absolute.

A number of instructions were given on behalf of the plaintiff which entirely ignore the duty which he was under to promptly present this check for payment, and the effect of his failure in this regard

upon the indorser. The objection to the giving of these instructions should have been sustained. The instructions offered by the defendant present the theory of discharge of the indorser by failure to present the check for payment promptly, and should have been given.

We will reverse the judgment of the Circuit Court of Jackson County, set aside the verdict of the jury, and remand the case for a new trial.

Williams, P., and Miller, J., absent.

ANNOTATION.

Discharge of indorser by delay in presenting check.

The proposition maintained in the reported case (*NUZUM v. SHEPPARD*, ante, 1024) that the indorser of a check, unlike the drawer, is relieved of liability thereon by an unreasonable delay in presenting the same for payment, whether or not he is injured by the delay, is supported by the great weight of authority.

Georgia.—*Daniels v. Kyle* (1846) 1 Ga. 304 (obiter); *Comer v. Dufour* (1895) 95 Ga. 376, 30 L.R.A. 300, 51 Am. St. Rep. 89, 22 S. E. 543 (obiter).

Illinois.—*Brown v. Schintz* (1903) 202 Ill. 509, 67 N. E. 172; *Travers v. T. M. Sinclair & Co.* (1905) 122 Ill. App. 203; *First Nat. Bank v. Mackey* (1910) 157 Ill. App. 408.

Indiana.—*Swift & Co. v. Miller* (1916) 62 Ind. App. 312, 113 N. E. 447.

Iowa.—*Northwestern Coal Co. v. Bowman* (1886) 69 Iowa, 150, 28 N. W. 496.

Louisiana.—*Miller v. Moseley* (1874) 26 La. Ann. 667.

Maine.—*Veazie Bank v. Winn* (1855) 40 Me. 60.

Mississippi.—*Parker v. Reddick* (1887) 65 Miss. 242, 7 Am. St. Rep. 646, 3 So. 575.

Missouri.—*Moody v. Mack* (1869) 43 Mo. 210.

Nebraska.—*First Nat. Bank v. Miller* (1893) 37 Neb. 500, 40 Am. St. Rep. 499, 55 N. W. 1064, affirmed on rehearing in (1895) 43 Neb. 791, 62 N. W. 195.

New York.—*Gough v. Staats* (1835)

13 Wend. 549; *Smith v. Janes* (1838) 20 Wend. 192, 32 Am. Dec. 527; *Carroll v. Sweet* (1891) 128 N. Y. 19, 13 L.R.A. 43, 27 N. E. 763; *Martin v. Home Bank* (1899) 160 N. Y. 190, 54 N. E. 717.

Tennessee.—*Kirkpatrick v. Puryear* (1894) 93 Tenn. 409, 22 L.R.A. 785, 24 S. W. 1130.

Vermont.—*Start v. Tupper* (1908) 81 Vt. 19, 15 L.R.A. (N.S.) 213, 130 Am. St. Rep. 1015, 69 Atl. 151.

Wisconsin.—*Gifford v. Hardell* (1894) 88 Wis. 538, 43 Am. St. Rep. 925, 60 N. W. 1064; *Aebi v. Bank of Evansville* (1905) 124 Wis. 73, 68 L.R.A. 964, 109 Am. St. Rep. 925, 102 N. W. 329.

Canada.—*Bank of British North America v. Haslip* (1914) 31 Ont. L. Rep. 442, 20 D. L. R. 922; *Harris Abattoir Co. v. Maybee* (1914) 31 Ont. L. Rep. 453, 20 D. L. R. 651.

The court, in *Gough v. Staats* (N. Y.) supra, says: "Upon the question of due diligence to charge an indorser, whether he has been prejudiced or not by the delay is perfectly immaterial. It is not inquired into. The law presumes he has been prejudiced." According to the court in *Carroll v. Sweet* (1891) 128 N. Y. 19, 13 L.R.A. 43, 27 N. E. 763, "presentment in due time as fixed by the law merchant was a condition upon performance of which the liability of the defendant, as indorser, depended, and this delay was not excused, although the drawer

of the check had no funds, or was insolvent, or because presentment would have been unavailing as a means of procuring payment." Only when there is affirmative proof that the indorser knew when he cashed the check that there would be no funds in the bank to meet it can the rule be avoided. Otherwise, the failure to present the check in due course for payment will discharge the indorser, even though such presentment would have been unavailing. *Start v. Tupper* (Vt.) supra.

The same rule applies whether the suit is on the indorsement or against the indorser on the original indebtedness; if there is such delay as discharges the liability on the indorsement, the original indebtedness is held to be discharged. *Carroll v. Sweet* (N. Y.) and *Kirkpatrick v. Fureyear* (Tenn.) supra.

There are two cases which seem to regard a loss to the indorser as a result of the delay a necessary condition to his release. In an official headnote appearing in the case of *State Bank v. Carroll* (1908) 81 Neb. 484, 116 N. W. 276, it is stated that mere delay on the part of the holder of a check, in presenting it for payment to the bank on which it is drawn, will not relieve the indorser of the check from liability, unless such delay caused a loss. It does not appear, however, from the facts of that case that there was any delay; the negligence complained of consisted of something else. In *Fleig v. Sleet* (1885) 43 Ohio St. 53, 54 Am. Rep. 800, 1 N. E. 24, which was an action by a vendor of goods against his purchaser on the account, in which the purchaser defended on the theory that the account had been paid by a bank check, or draft, which he had purchased and had indorsed to the seller, it appeared that the drawer of the draft had no funds with the

drawee subject to the payment of the check at the time it was drawn, or afterwards. It appeared that the vendor had delayed in presenting the check for payment. In holding that the action might be maintained, the court says that, if by the delay of the vendors in presenting the check for payment any prejudice had resulted to the defendant, a different question might have arisen in this case, but no such prejudice was shown. There were no funds in the hands of the drawee passing to the payment of the check at the time it was drawn, or subsequent thereto. It would not have been paid if presented at the close of banking hours on the day it was received. Although this was an action on the original account, no point is made of this fact by the court. It appears from the foregoing that these courts were of the opinion that an injury to the indorser is necessary to his discharge. It is doubtful, however, whether the courts would so hold were the question fairly presented to them, especially in view of the fact that such a holding is contradicted by all well-considered decisions. In *Mohawk Bank v. Broderick* (1834) 13 Wend. (N. Y.) 133, 27 Am. Dec. 192, where an indorser was held relieved by failure to make presentment within a reasonable time to the drawee bank, the court states that from the facts found by the special verdict there is reason to believe that the loss of the amount due upon the checks might not have occurred if reasonable diligence had been used in presenting the check for payment. The court, however, does not state that such a loss is a necessary condition of the release of the indorser.

What amounts to a delay in the presentation of a check is beyond the scope of this note. W. A. E.

PRINCE ELLIS et al., Appts.,
v.
COMMONWEALTH OF KENTUCKY.

Kentucky Court of Appeals — January 13, 1920.

(186 Ky. 494, 217 S. W. 368.)

Burglary — contraband whisky as goods, wares, and merchandise.

1. That the sale of whisky is prohibited by law does not deprive it of its character as goods, wares, and merchandise, and a thing of value, within the meaning of a statute providing for punishment of one breaking a storehouse and taking therefrom goods, wares, and merchandise or other thing of value.

[See note on this question beginning on page 1032.]

— taking thing of no value.

2. Breaking a warehouse and carrying away therefrom a thing of no value, and which is not goods, wares, or merchandise, is not burglary under a statute providing for punishment of

anyone who feloniously breaks a storehouse and takes therefrom any goods, wares, or merchandise, or other thing of value.

[See 4 R. C. L. 437.]

APPEAL by defendants from a judgment of the Circuit Court for Fayette County convicting them of feloniously breaking into a storehouse with intent to steal, and with taking property therefrom with intent to convert it to their own use. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. Frank L. McCarthy, for appellants:

Whisky cannot be classed as "goods, wares, and merchandise."

Dyott v. Letcher, 6 J. J. Marsh. 541; *Flanders v. Com.* 140 Ky. 38, 130 S. W. 809.

Whisky is not a "thing of value."

International Harvester Co. v. Kentucky, 234 U. S. 216, 58 L. ed. 1284, 34 Sup. Ct. Rep. 853; *Polin v. Com.* 19 Ky. L. Rep. 453, 40 S. W. 927.

Messrs. Charles H. Morris and Charles I. Dawson, Attorneys General, for the Commonwealth.

Carroll, Ch. J., delivered the opinion of the court:

The appellants, Ellis and Connor, were indicted by the grand jury of Fayette county, charged with "unlawfully and feloniously breaking and entering into the storehouse of Z. Kafogolis on October 8, 1919, with the fraudulent and felonious intent to take, steal, and carry away therefrom articles of value, and did then and there unlawfully and feloniously take, steal, and carry away

therefrom one case of whisky, of the value of \$36 and the property of Z. Kafogolis, with the felonious and fraudulent intent to convert the same to their own use and to permanently deprive the owner of his property therein."

On a joint trial they were each found guilty; their punishment being fixed at confinement in the state penitentiary for a term of three years.

The indictment was found under § 1164 of the Kentucky Statutes, providing in part that "if any person shall feloniously, in the night or day, break any . . . storehouse, . . . with intent to steal, or shall feloniously take therefrom or destroy any goods, wares, or merchandise, or other thing of value, . . . he shall be confined in the penitentiary not less than one nor more than five years."

On this appeal the argument of counsel for Ellis and Connor is that the motion made in arrest of judg-

ment should have been sustained, because the indictment, as well as the evidence, showed that the accused had not committed a public offense. This argument is rested on the ground that the whisky was not, at the time of the breaking and stealing complained of, a thing of value, or goods, wares, or merchandise, within the meaning of the statute; and of course, if this were so, the accused, although the evidence clearly establishes that they broke into the place of Kafogolis and carried away therefrom a case of whisky did not commit any offense

**Burglary—
taking thing of
no value.**

under the statute, because no offense under the statute can be committed unless the thing taken is "goods, wares, or merchandise," and has some value, however small it may be.

It is true, as argued by counsel, that at the time the whisky was taken the manufacture and sale of whisky were prohibited by what is known as the "Federal War Prohibition Act" (Act Nov. 21, 1918, chap. 212, 40 Stat. at L. 1045), and also true that the owner of the whisky could not at that time sell it on the market or otherwise; but the fact that the whisky was not the subject of lawful traffic, or the fact

**—contraband
whisky as
goods, wares,
and merchandise.**

that its sale was prohibited by law, did not deprive it of its character as "goods, wares, or merchandise," within the meaning of the statute, or of its value as goods or merchandise.

Webster defines "merchandise:" "To trade or traffic in" "whatever is usually bought or sold in trade or market, or by merchants; wares; goods; commodities." "Goods" are defined as "wares; chattels; merchandise."

One definition of "wares" is: "Articles of merchandise, goods, or commodities." It will thus be seen that the words "goods, wares, and merchandise," in their common and ordinary usage and according to their established definitions, em-

brace every species of tangible personal property. Whisky, of course, was property and a thing of value before its sale was made unlawful, and plainly it did not lose its nature as property or as a thing of value by the prohibition of its sale. It yet remains an article of property, and property of value to the owner, who had the legal right to keep and use it for his personal purposes. It is not necessary, to constitute goods, wares, or merchandise property of value, that the article should be one that it was lawful to trade or traffic in, because an article of tangible personal property may be a thing of value to the owner, although he may not be permitted to sell or dispose of it in the manner he might sell or dispose of other articles of personal property.

So that in its last analysis the question raised by counsel comes to the point whether an article of personal property, which it is unlawful to sell or dispose of, may be the subject of larceny or robbery in the sense that a person who steals or carries it away may be punished under the statute. The statute was designed to prevent and punish the unlawful taking of the property of another, and it is not material whether the owner was prohibited from having it in possession or denied the right to sell it. No inquiry will be made into the purpose for which the owner has or holds the property that is stolen. The crime is complete when personal property, consisting of goods, wares, or merchandise, or other thing of value, is stolen or taken away unlawfully, whether the offense is technically larceny, housebreaking, or robbery.

In determining the innocence or guilt of the accused in such a case, the nature or character of the goods, wares, or merchandise, or the use to which it may or can be put, is not material, if it is a thing of value. The robber or the thief cannot justify, mitigate, or excuse his crime upon the ground that the owner, whose property was taken, was pro-

hibited by law from having it in possession, or selling or disposing of it. The offense committed by the owner in having the possession of a thing that it is unlawful to possess will not be allowed to set off or obliterate the offense committed by the thief. If the owner has violated the law, he may be punished in the manner provided by the law. His offense, if any, is entirely separate and distinct from that committed by the person who unlawfully took the property from his possession. The unlawful taking is one offense; the unlawful possession of the thing taken is another.

In *Smith v. State*, 187 Ind. 253, L.R.A.1918D, 688, 118 N. E. 954, Smith was charged with stealing a gambling device, and his defense was that property owned and used for gambling purposes, contrary to the statute, was not the subject of larceny; but the court, citing many cases, held that such property was the subject of larceny. In *Osborne v. State*, 115 Tenn. 717, 92 S. W. 853, 5 Ann. Cas. 797, the court said: "It is also well settled that a chattel kept for an unlawful purpose, such as intoxicating liquors kept for sale in violation of law, or gambling paraphernalia, the possession of which is prohibited, may be the subject of larceny."

In *State v. May*, 20 Iowa, 305, the court, in considering the question whether a person who stole whisky

that was kept in violation of law was guilty of larceny, said: Larceny "is a distinct crime from keeping liquors for sale contrary to the provisions of the statute; both, to be sure, are violations of law, but each has its own specific and appropriate penalty, and each must be dealt with by itself. Although liquor as an article of traffic is prohibited, and is liable when kept as such to be seized and destroyed, nevertheless, until this is done, it is in its essential nature property. It may at any time be withdrawn, as an article of trade, and kept exclusively for private use. It is also confessedly property in the hands of him who keeps it alone for medicinal, mechanical, or sacramental purposes. Besides, it is a principle or rule of property, as old as common law itself, that the possession of one is good against all others who cannot show a better right of possession. Hence he who steals a stolen article of property from a thief may himself be convicted, notwithstanding the criminality of the possession by his immediate predecessor in crime."

To the same effect are *Com. v. Smith*, 129 Mass. 104; *Bales v. State*, 3 W. Va. 685.

Many other cases might be cited, but the ones mentioned are sufficient, as there is no conflict in the authority on this subject.

Wherefore the judgment is affirmed.

ANNOTATION.

Outlawed liquors as subject of larceny.

The duration of the period of outlawry of intoxicating liquors is not sufficiently extended to have produced many cases upon this subject up to the present time.

In *Kreiter v. Nichols* (1874) 28 Mich. 496, the larceny was not of outlawed liquor, for the court says by statute in this state, as well as by the common law, beer, which was the beverage in controversy, is recognized as property, and if one steals it from

the owner he may be punished for it.

In *State v. May* (1866) 20 Iowa, 305, the court says although liquor as an article of traffic is prohibited, and is liable, when kept as such, to be seized and destroyed, nevertheless, until this is done, it is in its essential nature property. The court further says that it is true that the statute renders all contracts founded upon a liquor consideration void, but it seems to be illogical to hold that because this is so

the stealing of liquor may not be criminally punishable by indictment.

In *State v. Sego* (1913) 161 Iowa, 71, 140 N. W. 802, the court says even if the liquor was purchased for an unlawful purpose, it would not justify accused in taking it from the owner by force and violence.

In *Com. v. Coffee* (1857) 9 Gray (Mass.) 139, the court, in holding that intoxicating liquor possessed for illegal sale was subject to larceny, said the thing was property and the subject of larceny. The owner might forfeit and lose the property if upon proper legal process it should appear that it was procured and held for an illegal purpose, but only upon such proof and in the methods the law points out.

In *Osborne v. State* (1905) 115 Tenn. 717, 92 S. W. 853, 5 Ann. Cas. 797, which was a prosecution for larceny of a pistol, the court in argument says it is well settled that a chattel kept for an unlawful purpose, such as intoxicating liquors kept for sale in violation of law, may be the subject of larceny.

In *State v. Donovan* (1919) 108 Wash. 276, 183 Pac. 127, the court held that, although the whisky was outlawed so that the law would not afford relief to anyone making claim to property therein, it might be the subject of larceny.

In *Com. v. Smith* (1880) 129 Mass. 104, which was a case of embezzlement by the agent of the proceeds of unlawful sales of intoxicating liquor, the court, in upholding a conviction, says, in argument, that liquor held for illegal sale is subject to larceny.

In *Fears v. State* (1897) 102 Ga. 279, 29 S. E. 463, the court, in establishing the existence of a property right in intoxicating liquor, cites cases to the effect that such liquors are subject to larceny.

And the general rule to that effect is laid down in *August v. State* (1912) 11 Ga. App. 798, 76 S. E. 164; *Mance v. State* (1908) 5 Ga. App. 229, 62 S. E.

1053. And the same result is reached in case of burglary, in the reported case (*ELLIS v. COM.* ante, 1030).

The argument in *Com. v. Rourke* (1852) 10 Cush. (Mass.) 397, which was a case of larceny of the money received for an illegal sale of intoxicating liquor, has been so frequently referred to as furnishing the basis for the decisions holding liquors to be subject of larceny, that it is set out for the benefit of the reader, as follows: "If, looking beyond the mere question of property, we pass to considerations of public policy, this may be regarded in two points of view: One, of convenience in the administration of justice; the other, of higher ethical relation. As to the former point, it is not easy to conceive anything which would more seriously embarrass the public ministers of justice, and obstruct its administration, than if it were held that any element of illegality in the acquisition of property rendered it incapable of being the subject of larceny, and if, as a consequence, the necessity followed in every case to go into the inquiry how the party complaining acquired the property. As to the latter point, if the question be put in the form most favorable to the argument for the defendant here, it stands thus: Of the alternative moral and social evils, which is the greater: To deprive property unlawfully acquired of all protection as such, and thus to discourage unlawful acquisition, but encourage larceny; or to punish and so discourage larceny, though at the possible risk of thus omitting so far forth to discourage unlawful acquisition? The balance of public policy, if we thus attempt to estimate the relative weight of alternative evils, requires, it seems to us, that the larceny should be punished. Each violation of law is to be dealt with by itself. The felonious taking has its appropriate and specific punishment; so also has the unlawful acquisition." H. P. F.

**FOURTH NATIONAL BANK OF MONTGOMERY, Plff. in Err.,
v.
W. G. BRAGG.**

Virginia Supreme Court of Appeals — March 13, 1920.

(— Va. —, 102 S. E. 649.)

Bank — crediting draft — ownership.

1. A bank which credits the amount of a draft to the depositor, and permits him immediately to draw against it, becomes the owner of it and the bill of lading which is attached to it, although it reserves the right to charge back the amount in case the draft is not paid.

[See note on this question beginning on page 1043.]

Assignment — bill of lading — effect.

2. A bona fide assignment or transfer of a bill of lading vests in the assignee or transferee the title of the shipper of the goods covered by the bill.

[See 4 R. C. L. 32.]

— effect of payment of draft.

3. When a bank takes an assignment of a bill of lading and pays the accompanying draft of the shipper for the value of the goods, the bank becomes a bona fide holder, and no attachable interest in the goods or proceeds thereof remains in the shipper.

Conflict of laws — rights created by deposit of draft.

4. The contract arising from the deposit of a draft in a bank, with the understanding that it may be checked against and charged back if not paid, is to be construed by the law of the state where the bank depositor resides and the draft was drawn, and not by that of the state of the drawee.

[See 3 R. C. L. 1142; 5 R. C. L. 964, 965.]

Trial — question of law and fact — foreign law.

5. The question what is the law of another state is one of fact, but the interpretation of a foreign statute or judicial decision is a question of law,

[See 10 R. C. L. 1113; 11 R. C. L. 595; 25 R. C. L. 953.]

Evidence — foreign decision.

6. A decision of a foreign court not introduced in evidence cannot be considered as evidence, but the court may look to it as an authoritative repository of legal principles for guidance in the interpretation of decisions which were introduced in evidence.

Bank — right to charge back unpaid draft.

7. A bank crediting a draft to a depositor's account as cash has, as matter of law, a right to charge it back if not paid.

[See 3 R. C. L. 522.]

Bills and notes — effect of form of indorsement.

8. The title of a bank to a draft which it has credited to its depositor's account as cash is not affected by placing an indorsement upon it that it indorses solely for collection, and does not guarantee the title, possession, delivery, quality, quantity, or other condition of the goods mentioned in the attached bill of lading.

Garnishment — priority of right — proceeds of draft.

9. The title of a bank to the proceeds of a draft against a bill of lading which it has credited to the depositor's account as cash, and forwarded for collection, is superior to that of one attaching the proceeds as creditor of the drawer.

ERROR to the Circuit Court of the City of Richmond (Scott, J.) to review a judgment overruling intervenor's motion to set aside the verdict in favor of plaintiff in a proceeding for the attachment of the proceeds of a draft in satisfaction of a demand by plaintiff against defendant. *Reversed.*

The facts are stated in the opinion of the court.

Mr. George Bryan, for plaintiff in error:

If the intention of the parties was that at the time the item was deposited it should be treated as cash, then title to it passed to the bank.

Fayette Nat. Bank v. Summers, 105 Va. 689, 7 L.R.A.(N.S.) 694, 54 S. E. 862; National Commercial Bank v. Miller, 77 Ala. 73, 54 Am. Rep. 50; Lynchburg Mill. Co. v. National Exch. Bank, 109 Va. 639, 64 S. E. 980; Greensburg Nat. Bank v. Syer, 113 Va. 53, 78 S. E. 438; Miller v. Norton, 114 Va. 609, 77 S. E. 452; Buckeye Nat. Bank v. Huff, 114 Va. 1, 75 S. E. 769; American Nat. Bank v. Henderson, 123 Ala. 612, 82 Am. St. Rep. 147, 26 So. 498; Cosmos Cotton Co. v. First Nat. Bank, 171 Ala. 392, 32 L.R.A.(N.S.) 1173, 54 So. 621, Ann. Cas. 1913B, 42; 4 R. C. L. 33, 34; American Thresherman v. Citizens Bank (American Thresherman v. De Tamble Motors Co.) 154 Wis. 366, 49 L.R.A.(N.S.) 644, 141 N. W. 210.

Mr. Alexander H. Sands, for defendant in error:

Where a drawer of a draft indorses it to a bank when depositing it for collection, and a bank credits the drawer with the amount thereof on his deposit account, the bank does not, by such act alone, become the purchaser of the draft; before the bank becomes the owner thereof so as to eliminate the title and ownership of the depositor, there must be an agreement, express or implied, by which the depositor parts unconditionally with the ownership in said draft, and the bank acquires unconditional ownership therein.

Morris v. Alabama Carbon Co. 139 Ala. 620, 36 So. 764; Stone River Nat. Bank v. Lerman Mill. Co. 9 Ala. App. 322, 63 So. 776; Eufaula Grocery Co. v. Missouri Nat. Bank, 118 Ala. 412, 24 So. 389; Greensburg Nat. Bank v. Syer, 113 Va. 53, 73 S. E. 438; St. Louis & S. F. R. Co. v. Johnston, 133 U. S. 566, 33 L. ed. 683, 10 Sup. Ct. Rep. 390.

Kelly, P., delivered the opinion of the court:

On December 7, 1917, W. F. Covington, trading as Covington Manufacturing Company, at Montgomery, Alabama, drew a sight draft for \$1,740.21 on Manchester Mills, Richmond, Virginia, and attached thereto a bill of lading for a shipment of corn. This draft, with the bill of

lading attached, was deposited by Covington in the Fourth National Bank of Montgomery, where he had a regular account. The item was not entered for collection, but was treated as cash, and, along with other cash items deposited at the same time (the total deposit being \$1,875.23), was placed immediately to Covington's credit and subject to his check. His account at the bank continued thereafter in the usual course of such accounts until some time in April, 1918, when it became overdrawn and was discontinued. In the meantime, however, although the account had been active and Covington's balance at times substantial, the balance had fluctuated, and shortly after the deposit of the draft above mentioned, to wit, on December 11, 1917, the balance was reduced to about \$600, on December 15 to about \$300, and on January 14, 1918, to less than \$25. It thus appears that to all substantial intents and purposes the full amount placed to his credit on account of the draft was paid out upon his checks.

It was the custom and usage of the banks in Montgomery to take out-of-town drafts as cash, giving the depositor credit therefor and allowing him to check upon the amount at once; but in such cases the deposit had first to be approved by some officer of the bank authorized for that purpose. In this case the deposit appears to have been approved by the cashier of the bank, an officer having such authority. It was always understood that, if such drafts were not paid by the drawee, they would be charged back, or the depositor otherwise held ultimately liable therefor.

The draft was forwarded by the bank to its correspondent, the American National Bank, in Richmond, by which it was presented, and, after the deduction of a small amount, which was authorized by the bank with the approval of Covington, the same was paid on February 2, 1918, there having been some delay and negotiations with

reference thereto between its presentation and payment.

The day the draft was paid to the American National Bank, the proceeds were attached by W. G. Bragg for the satisfaction of an unliquidated demand against Covington, which he was then asserting in a foreign attachment proceeding in the circuit court of the city of Richmond. The Fourth National Bank intervened by petition, claiming to have been the holder in due course of the draft, and as such the owner of the proceeds of the bill of lading. The case was tried by the court and a jury. There was a verdict and judgment in favor of Bragg, and the case is here upon a writ of error.

It is a platitude of the law merchant that a bona fide assignment or

**Assignment—
bill of lading—
effect.**

transfer of a bill of lading vests in the assignee or transferee the title of the shipper to the goods covered by the bill. Smith, Mercantile Law, p. 378; 4 R. C. L. p. 32, and cases cited in note 19. Equally familiar and well settled is the proposition that, where a bank takes an assignment of a bill of lad-

**—effect of
payment of
draft.**

ing and pays the accompanying draft of the shipper for the value of the goods, the bank thereby becomes a bona fide holder, and no attachable interest in the goods or proceeds thereof remains in the shipper. *Buckeye Nat. Bank v. Huff*, 114 Va. 1; 7, 75 S. E. 769; *Walsh, B. & Co. v. First Nat. Bank*, 228 Ill. 446, 81 N. E. 1067.

The important question in this and all similar cases is whether it can be said that the draft with the bill of lading attached has been taken by the bank in such way as to constitute an assignment of and payment for the bill. The answer here depends upon the manner in which the draft, as the medium both of the assignment of and the payment for the bill, was deposited in and handled by the bank; and the case thus presents the very common, but very important, and not altogether simple, question as to the circumstances un-

der which a bank, in taking from a customer a check or draft in the usual course of the banking business, will become the owner of such check or draft, as distinguished from a mere collecting agent for the customer. The authorities upon the question are multitudinous and not altogether harmonious, but they may be safely said to clearly preponderate in favor of the view that, under the facts of this case, the bank became the owner of the draft by purchase, and accordingly the owner of the bill of lading and its proceeds.

**Bank—crediting
draft—owner-
ship.**

Some general discussion of the authorities seems desirable, since the question, precisely as it arises here, can hardly be said to have been definitely settled either in this state or in the state of Alabama, where the draft was drawn and deposited.

In 3 R. C. L. p. 524, § 152, it is said: "When a check or other commercial paper is deposited in bank indorsed for collection, or where there is a definite understanding that such is the purpose of the parties at the time of deposit, there is no question that the title to the paper remains in the depositor. So checks deposited as checks do not give rise to the relation of debtor and creditor, and the title to them remains in the depositor, the bank merely acting as an agent of the depositor for the purpose of collection. If, on the other hand, there is a definite understanding at the time of the deposit that such paper is deposited as cash, it is clear that the title passes to the bank. But where a check indorsed in blank is deposited, without any definite understanding as to the way it is to be treated, but is credited by the bank to the depositor as cash, and is so entered upon the depositor's pass book, the question frequently arises whether the title to the check passes immediately to the bank, or remains in the depositor. Prima facie, according to the weight of authority, the passing to the credit of the depositor of a check bearing an in-

dorsement not indicating that it was deposited for collection merely, passes the title to the bank"—citing numerous cases.

In *Burton v. United States*, 196 U. S. 283, 49 L. ed. 482, 25 Sup. Ct. Rep. 243, the following observations, pertinent here, were made by Mr. Justice Peckham, who delivered the opinion of the court, concurred in by all of the justices except Mr. Justice Harlan: "There was no oral or special agreement made between the defendant and the bank at the time when any one of the checks was deposited and credit given for the amount thereof. The defendant had an account with the bank, took each check when it arrived, went to the bank, indorsed the check, which was payable to his order, and the bank took the check, placed the amount thereof to the credit of the defendant's account, and nothing further was said in regard to the matter. In other words, it was the ordinary case of the transfer or sale of the check by the defendant, and the purchase of it by the bank, and upon its delivery to the bank under the circumstances stated, the title to the check passed to the bank and it became the owner thereof. It was in no sense the agent of the defendant for the purpose of collecting the amount of the check from the trust company upon which it was drawn. From the time of the delivery of the check by the defendant to the bank it became the owner of the check; it could have torn it up, or thrown it in the fire, or made any other use or disposition of it which it chose, and no right of the defendant would have been infringed. The testimony of Mr. Brice, the cashier of the Riggs National Bank, as to the custom of a bank, when a check was not paid, of charging it up against the depositor's account, did not in the least vary the legal effect of the transaction; it was simply a method pursued by the bank of exacting payment from the indorser of the check, and nothing more. There was nothing whatever in the evidence showing any agreement or un-

derstanding as to the effect of the transaction between the parties—the defendant and the bank—making it other than such as the law would imply from the facts already stated. The forwarding of the check 'for collection,' as stated by Mr. Brice, was not a collection for defendant by the bank as his agent. It was sent forward to be paid, and the Riggs Bank was its owner when sent."

The case of *Ditch v. Western Nat. Bank*, 79 Md. 192, 23 L.R.A. 164, 47 Am. St. Rep. 375, 29 Atl. 72, 138, is instructive and much in point. Shyrock & Company drew their check on the Third National Bank of Baltimore, payable to the order of one Reese, who indorsed it to the order of Ditch & Brother, and the latter in turn indorsed it "for deposit to the credit of" themselves. There was no special arrangement made between the depositor and the bank with reference to checking on the deposit, but the evidence shows that the effect of the transaction was to give to Ditch & Brother a credit with the bank, and the unconditional right to check upon it. The court said in the course of the opinion: "If Nicholson & Sons [the bankers] had paid to Ditch & Brother the full amount of the check in coin or currency when it was delivered to them, it is supposed that there would have been no question about the nature and effect of the transaction. But they gave Ditch & Brother what was preferred to the coin or currency; they gave them the unconditional right to get the coin or currency at any time they might see fit to call for it, thus relieving them from the trouble and risk attending the care and custody of it. Now, it is extremely difficult to see on what principle or by what process Ditch & Brother could retain any interest in this check after they had delivered it to a blank indorsee and had received full and valuable consideration for it. It will not be alleged by anyone that the banker did not give a consideration valuable in the eye of the law, and

sufficient to maintain the transfer of the check, when he made an absolute and unconditional contract with the depositor to pay his checks to the amount of the deposit."

In Freeman's note to *Ditch v. Western Nat. Bank*, supra, 47 Am. St. Rep. 389, it is said: "The law, therefore, is that checks, drafts, or other evidences of debt received by a bank in good faith as deposits, and credited as so much money, become the property of the bank; and it becomes legally liable to the depositor as for so much money deposited as of the date of the credit [citing a multitude of cases]. And our understanding is that this rule is not confined to cases where checks are drawn upon the same bank which credits them as cash, but that a bank which receives and credits as cash checks drawn upon some other bank is entitled to the same rights and incurs the same liability as if the checks were drawn upon itself, and so credited [citing cases]. The transaction is, in legal effect, a transfer to the bank upon an implied contract on the part of the latter to repay the amount of the deposit upon the checks of the depositor."

Again, in a note in 86 Am. St. Rep. 781, the same learned author says: "We have already seen that a general deposit of money with a banker transfers the title to such money to the bank, and creates the relation of debtor and creditor between the banker and the depositor. The same rule applies with equal force to checks or drafts deposited by a customer, and it is established beyond doubt that whenever paper is deposited, and is regarded by both parties as amounting to so much cash, the title to such paper passes immediately, and the relation of debtor and creditor arises. The transaction is equivalent to a purchase of the check or draft by the banker, and he becomes responsible to the depositor for the amount thereof" [citing many cases].

In a note to the Virginia case of *Fayette Nat. Bank v. Summers*, 7 L.R.A.(N.S.) 694, it is shown that

by the clear weight of authority, where a check or draft is taken for deposit and treated as cash, as distinguished from a deposit for collection, the relation of debtor and creditor is established at once between the depositor and the bank, the bank becoming the owner of the check or draft, and the depositor the owner of the proceeds placed to his credit. To be sure, the general rule is that this result is prima facie only, and may be rebutted by proof showing that the parties contemplated a different relationship at the time of the deposit. But when nothing else appears than the mere fact of the deposit and the credit thereof as cash, which the depositor may withdraw at will, the law implies and establishes between the bank and the depositor the relationship of vendor and purchaser as to the paper, and of creditor and debtor as to the proceeds thereof.

In 2 Michie on Banks & Banking, p. 914, it is said: "A deposit in a bank of a bill, check, draft, or other evidence of debt in the ordinary course of business, whereby the depositor receives a credit against which he may draw, operates to transfer the title to the bank, in the absence of usage, custom, or of any oral or other agreement that the effect of the transaction shall be otherwise," etc.

And the same author says, at page 917, that "this is the rule, although the bank has the right to charge dishonored paper to the depositor, instead of proceeding against the maker."

See also to same effect, 2 Morse on Banks & Banking, 5th ed. § 577, and cases cited.

The Virginia cases, so far as they have gone, appear to be substantially in accord with the result of the authorities as indicated above.

In *Fayette Nat. Bank v. Summers*, 105 Va. 689, 7 L.R.A.(N.S.) 694, 54 S. E. 862, the court approved the following instruction:

"The court instructs the jury that, if they shall believe from the evidence that the plaintiff bank re-

ceived the check which is the subject of this suit as a deposit to be treated as cash, and that such was the intention of the parties . . . at the time the check was received and deposited, then title to said check passed to the bank at that time. But if the jury shall believe from the evidence that the parties intended that the bank should not receive said check as cash, but only as an agent for collection, then title to said check did not vest in the bank at the time of the deposit.

"The court further tells the jury the question as to whether the parties intended the check when deposited to be treated as cash or merely for collection, is one of fact for the jury, under all the facts and circumstances proven in the case relating thereto and throwing light thereon."

It is true the court in that case thought there was enough evidence to carry to the jury the question of the intention of the parties, or, to express it differently, enough evidence to justify the jury in finding that the prima facie presumption, to which we have referred, was rebutted; but the importance of the case in its application to the one in hand is that it distinctly recognizes the practically universal doctrine that a deposit of a check or draft, which the parties intend to be treated as cash, passes the title of the check or draft to the bank.

It is interesting and pertinent to note that, in this case of *Fayette Nat. Bank v. Summers*, Judge Keith cited and quoted with approval the Alabama case of *National Commercial Bank v. Miller*, 77 Ala. 173, 54 Am. Rep. 50, which likewise expressly recognized the same doctrine.

The result of the decision of this court in *Fayette Nat. Bank v. Summers*, and of the Alabama case of *National Commercial Bank v. Miller*, undoubtedly is that the question is one of intention of the parties, and both of these cases, as well as the other cases in Virginia and Alabama to which our attention has

been directed, show a strong tendency to leave the question to the jury wherever there is any evidence to rebut the prima facie presumption that a cash deposit is intended to vest in the bank the title to the instrument pursuant to which the cash deposit is made. None of the cases in either state, however, go far enough, as we construe them, to conflict with the general doctrine, overwhelmingly established by authority elsewhere, that the deposit of a check or draft as cash, in the absence of other evidence, passes title in the check or draft to the bank as a matter of law.

In *Greensburg Nat. Bank v. Syer*, 113 Va. 53, 73 S. E. 438, the same general rule is recognized. It was held there that "if, when a draft is deposited in bank, it is the intention of both the depositor and the bank that it shall be treated as cash, the title thereto passes to the bank; but that if it was the intention of the parties that it should not be received as cash, but only for collection, . . . then the title does not pass to the bank."

The case of *Lynchburg Mill. Co. v. National Exch. Bank*, 109 Va. 639, 64 S. E. 980, was a case in which there was a contest between the payee of a bill of exchange and the drawer thereof, or a creditor of the drawer, over the proceeds of the draft. The exact question involved in the case in hand did not arise in that case, but a judgment in favor of the bank was sustained, and Judge Whittle, in the course of his opinion, said: "The Negotiable Instruments Act (Va. Code 1904, § 2841a, 24) declares that 'every negotiable instrument is deemed prima facie to have been issued for a valuable consideration, and every person whose signature appears thereon to have become a party thereto for value.'"

In *Miller v. Norton*, 114 Va. 609, 77 S. E. 452, the substance of the opinion, in so far as directly applicable to this case, is accurately stated by the reporter as follows:

"Where there is a general deposit of money in a bank, the title to and

beneficial ownership of the money is vested in the bank, and the relation between it and the depositor is that of debtor and creditor. So, likewise, where a check drawn on a particular bank is presented to that bank for general deposit, and the bank gives the depositor credit therefor, the relation between the bank and the depositor is that of debtor and creditor, since the giving of credit under such circumstances is practically and legally the same as if the bank had paid the money to the depositor, and had received it again on deposit.

"Where a check on one bank is deposited in another for collection, the ownership of the check is not transferred to the receiving bank, but it is the agent of the depositor until collection is made, and not until then does it become the debtor of the depositor. But if the check is deposited in exchange for credit given the depositor, then the transaction is in effect a sale of the check to the bank, and it becomes the beneficial owner of the check and the debtor of the depositor."

In the course of the opinion in this case of *Miller v. Norton* it is said: "In this country, though the rule seems to be different in England, it is settled that the mere giving of credit to a depositor's account, of a check, does not constitute the bank a holder for value, but in order to have that effect the credit must be drawn upon."

If this expression had to be taken at its face value, without the qualification appearing in other parts of the opinion, the facts of the instant case would fully measure up to it, because the deposit was not only checked upon, but practically exhausted by the checks of the depositor. It is manifest, however, from the opinion as a whole, that the court intended to decide that, wherever the credit given for the deposit carried with it the right of the depositor to draw checks thereon and the obligation of the bank to pay them, the title to the paper in exchange for which the credit was given passed to the bank. The last

sentence quoted above from the syllabus is taken literally from the body of the opinion, is supported by the authorities cited therein, as well as by the great weight of authority generally, and is a correct statement of the law as we understand it to be declared in that opinion, and as we intend to declare it here.

In *Buckeye Nat. Bank v. Huff*, 114 Va. 1, 75 S. E. 769, a case involving a draft with bill of lading attached, the effect of the decision pertinent here is correctly stated by the syllabus as follows:

"Where a bank takes, by indorsement, a bill of lading, and pays the draft of the shipper for the value of the goods, the bank becomes the owner of the goods covered by the bill of lading until the draft is paid; and this is true, although the transfer be not to give the permanent ownership, but to furnish security for the advance of money or discount of commercial paper. After such transfer, no attachable interest in the goods remains in the shipper.

"The law presumes that the transfer of a bill of lading, with a draft attached, is for a valuable consideration, and the burden of proving the contrary is upon him who denies it.

"The assignment of a bill of lading for goods operates to transfer to the holder the legal title to the goods and the possession thereof, as effectually as if there were a physical delivery of the goods to a purchaser. After such assignment, the levy of an attachment on the goods for a debt due by the shipper is a conversion of the goods, for which the holder of the bill of lading may bring either an action for damages resulting from the wrongful seizure, or an action of trover, and in either case the measure of damages is practically the same. The holder of the bill of lading is not limited to a recovery of the value of the goods sold in the attachment proceedings and the costs incident to the sale. The conversion is complete, and in such case the injury suffered is, as a rule, the value of the property con-

verted, and the holder of the bill of lading, with a draft attached for the price of the goods, is entitled to recover at least the amount of the draft."

It is contended, however, by the defendant in error, and so held by the lower court, that the contract between Covington and the bank must be interpreted, and the title of the

Conflict of laws
—rights created
by deposit of
draft.

bank to the proceeds accordingly determined, by the law of the state of

Alabama. This proposition appears to be entirely sound and well settled. No question as to the right or liability of the drawee is involved. As between the drawer and the holder of the draft, the law of the place in which it was made determines the question of title to the proceeds, unless it appears that the parties had in contemplation the law of some other place as the proper law. As stated in *Bigelow on Bills & Notes*, 2d ed. p. 281: "That question, it is clear, must be decided by the law of the state or country in which the bill was drawn, unless it appears that the law of some other country was contemplated."

See also to the same effect, *Am-sinck v. Rogers*, 189 N. Y. 252, 12 L.R.A. (N.S.) 875, 121 Am. St. Rep. 858, 82 N. E. 134, 12 Ann. Cas. 450; *Brownell v. Freese*, 35 N. J. L. 285, 10 Am. Rep. 239; *Briggs v. Latham*, 36 Kan. 255, 59 Am. Rep. 546, 13 Pac. 393; *Hunt v. Standart*, 15 Ind. 33, 77 Am. Dec. 79; 3 R. C. L. p. 1142, § 357; 5 R. C. L. 964, 965, § 47.

As evidence of the law of the state of Alabama, the official reports of the cases of *Morris v. Alabama Carbon Co.* 139 Ala. 620, 36 So. 764, and *Stone River Nat. Bank v. Lerman Mill. Co.* 9 Ala. App. 322, 63 So. 776, were introduced and used under a stipulation of counsel.

A consideration of these cases leads us to the conclusion, foreshadowed in what has already been said, that the law of Alabama is in accord with the law of Virginia, and generally elsewhere. Both of

11 A.L.R.—66.

the Alabama cases relied on clearly recognize the controlling distinction between a deposit for collection and an unqualified and unconditional deposit for credit treated as cash. In the one case the title remains in the depositor, and in the other it passes to the bank.

The first case relied upon, *Morris v. Alabama Carbon Co.*, gives rise to no difficulty whatever, because the report of the case shows that the item involved was a draft drawn in favor of the cashier of a bank merely for the purpose of enabling the collector of the bank to apply the proceeds thereof to the drawer's credit, and was inclosed in a letter to the cashier, requesting him to collect the draft and place it to his credit. The decision plainly draws the distinction between a deposit for collection and a purchase by the bank, and shows that the bank "took the paper, not as a purchaser, but in the capacity of a collecting agent for the forwarding bank."

The case of *Stone River Nat. Bank v. Lerman Mill. Co.*, the other case relied upon by the defendant in error, is in its facts more nearly like the case at bar, and goes further than the former case in sustaining the contention that under the Alabama law the Fourth National Bank did not take title to the draft, but merely took it as the collecting agent of Covington. It seems pertinent to observe that this decision was rendered by an intermediate, and not by the supreme, court of Alabama. Furthermore, it is apparent that the opinion throughout proceeded upon the assumption that the bank, as a matter of fact, received the deposit for collection, and accepted it "merely as the agent of the defendants for collection," and "the claimant was not a purchaser of the draft, and had no interest whatever in it." The court further says: "The case would be different if claimant bank had purchased the draft, which would have happened if it had at the time actually paid the defendants the cash, or other equivalent consideration for it, or

had, by agreement with defendants, credited the amount of it on a debt owed claimant by defendants. In any such case, the claimant would have been a purchaser of the draft, and could not rightfully be deprived of its proceeds by another creditor of defendants."

In the case at bar counsel for defendant in error asked an officer of the bank, who was on the stand, this question: "Mr. Joseph, you don't buy those checks or drafts? It is not your understanding that you buy them?" And the answer was: "It is my understanding that we buy them with recourse on the depositor."

We are the more ready to construe the law of Alabama as being the same as the law of Virginia because that construction is in accord with the great weight of authority elsewhere, and with the sound policy of promoting efficiency and preserving uniformity in the application and operation of the Negotiable Instruments Law. The question of what is the law of another state is one of

fact, but the interpretation of a foreign statute or judicial decision is a question of law. 10 R. C. L. § 319, p. 1113; *De Sobry v. DeLaistre*, 2 Harr. & J. 191, 3 Am. Dec. 535. The case of *National Commercial Bank v. Miller*, 77 Ala. 173, 54 Am. Rep. 50, cited by this court in *Fayette Nat. Bank v. Summers*, 105 Va. 689, 7 L.R.A. (N.S.) 694, 54 S. E. 862, throws light upon the proper interpretation of the Alabama law, and while we may not

resort to that case as evidence, because it was not introduced at the trial, we may look to it as an authoritative repository of legal principles for our guidance in the interpretation of the decisions which were introduced in evidence. That case, as already pointed out, is in line with the current of authority.

On behalf of the defendant in error, stress is laid upon the fact that the bank officials testified that, in cases of this kind, they would al-

ways have recourse on the depositor if the drawee failed to pay the draft. That is not only true in this case, under the practice of the Montgomery bank and its understanding with its customers, but it is

Bank—right to charge back unpaid draft.

true everywhere as a matter of law. The existence and recognition of such a right do not in any way affect the title of the bank to the paper in question. *Burton v. United States*, 196 U. S. 283, 49 L. ed. 482, 25 Sup. Ct. Rep. 243; *Ditch v. Western Nat. Bank*, 79 Md. 192, 23 L.R.A. 164, 47 Am. St. Rep. 375, 29 Atl. 72, 138; *Michie, Banks & Bkg. supra*.

Nor do we attach any importance to the form of the indorsement placed upon the draft by the Montgomery bank before forwarding the same to its correspondents for collection. That indorsement was as follows: "The Fourth National Bank of Montgomery indorses this draft solely for the purposes of collecting it, and does not, in receiving payment or otherwise, guarantee the title, possession, delivery, quantity, quality, or other condition of the goods mentioned in the attached bill of lading and will not be responsible in any way therefor."

Bills and notes—effect of form of indorsement.

This was a precautionary measure which the bank had the right to adopt, without affecting the contract between it and the depositor. As said by Mr. Justice Peckham in *Burton v. United States*, *supra*: "The forwarding of the check 'for collection,' as stated by Mr. Brice, was not a collection for defendant by the bank as his agent. It was sent forward to be paid, and the Riggs Bank was its owner when sent."

It is manifest that the Montgomery bank, forwarding this draft as its own property, wished to protect itself against any question that might arise as to the title, quantity, or quality of the goods. Such questions do arise in cases where the title of the forwarding bank to the draft itself is undisputed. See 4 Va.

Trial—question of law and fact—foreign law.

Evidence—foreign decision.

L. Reg. 391; Brinkley & Co. v. Carlyle, M. & G. Co. 6 Va. L. Reg. 778.

Under the law, as applied to the facts of this case, we are of opinion that the Montgomery bank is entitled to the proceeds of the draft in question, and that the evidence is such that no verdict or judgment to the contrary could be sustained. The facts are fully before the court, and there is no reason to suppose that upon another trial any new or different evidence might be introduced which ought to affect the result. Section 6365 of the Code of 1919 prescribes the following rule of decision in this court: "The appellate court shall affirm the judgment, decree or other

Garnishment—
priority of
right—pro-
ceeds of draft.

order if there be no error therein, and reverse the same in whole or in part if erroneous, and enter such judgment, decree or order as to the court shall seem right and proper, and shall render final judgment upon the merits whenever in the opinion of the court the facts before it are such as to enable the court to attain the ends of justice. A civil case shall not be remanded for a trial de novo except where the ends of justice require it."

In our opinion the only proper result in this case is a judgment for the plaintiff in error, and, pursuant to the section just quoted, we will enter here a final order to that effect.

Reversed.

ANNOTATION.

Title to commercial paper deposited by the customer of a bank to his account.

- I. Introductory, 1043.
- II. Rule where paper is taken for collection:
 - a. In general, 1046.
 - b. Effect of giving credit, and right to charge back, 1050.
- III. Rule where paper is deposited "as paper," or where it is deposited "as cash," 1053.
- IV. Rule where there is no agreement that paper is taken for collection:
 - a. Doctrine that title remains in the depositor:
 1. In general, 1054.

I. Introductory.

The question whether a bank which credits the proceeds of negotiable paper to a holder's deposit account is a holder in due course has been discussed in the note in 6 A.L.R., at page 252. It is apparent that, to give the indorsee of negotiable paper the character of a holder in due course, he must have title to the paper. The cases, therefore, which fall within the scope of the note just referred to, either assume or hold that the indorsee did have title. The cases in which that was assumed are not cited herein, but those in which any question arose as to whether or not the title had

IV. a—continued.

2. Effect of the right to charge back, 1058.
3. Effect of actually drawing on the credit, 1058.
- b. Doctrine that title passes to the bank:
 1. In general, 1060.
 2. Effect of right to charge back, 1067.
 3. Theory, 1069.
- c. Rule in case of paper payable directly to bank, 1071.
- V. Effect of notice in the depositor's pass book, or on deposit slips, 1071.

passed to the bank are included. The two questions, however, must not be confused, for they are entirely distinct. In some cases involving the question of bona fides, it is not altogether clear whether it was contended that the bank did not have title at all, or merely that it was not a bona fide holder. Cases of this character have generally been included in the present note in so far as they relate to the question of title, but not in so far as they relate to the question of bona fides.

Two general limitations have been placed upon the extent of the present investigation. By one of them the

annotation is limited to cases in which the paper is deposited by a customer of a bank, or by one bank with another, where the customer or remitting bank has an account with the bank to which it is sent, with the intention that credit be given on the account therefor, either at the time of deposit or when the paper is finally collected and the proceeds received by the bank. In accord with this limitation, cases of paper sent to a bank for collection and remittance, in the absence of an account, have been excluded. The other limitation relates to so much of the annotation as has to do with checks. The annotation has been confined, so far as it relates to checks, to those drawn upon a bank other than the one of deposit. In the discussion relating to the effect of an indorsement "For collection," as well as other forms of restrictive indorsement, cases have been included in which it does not clearly appear that there was a credit, or an intended credit. Cases involving the deposit of notes for collection in a bank in which they are made payable have been excluded. Cases involving the rights of depositor as against a bona fide holder are also excluded. Although, as between the depositor and his bank, there may be no question that the title to the check remained in the depositor, yet he may have placed himself in such a position that he cannot enforce his claim to the check as against a third party. Such a situation frequently arises where the depositor indorses paper in blank and deposits with the bank, and that bank sends it to another bank indorsed for collection, and by the custom of the banks the amount is credited on the books of the second bank to the first, to be drawn upon at will by the first bank. In some cases, as in *Cody v. City Nat. Bank* (1884) 55 Mich. 379, 21 N. W. 373, it may be difficult to determine whether the case really turns upon the question of the title to the check as between the depositor and the bank, or upon the question of the estoppel of the depositor.

The present note does not consider title to the proceeds of the paper ex-

cept so far as title to the proceeds follows title to the paper itself. It is a theory followed in many cases that, although title to the paper itself does not pass, if it is intended that the relation of debtor and creditor shall arise when the collection is made, title to the proceeds may pass. 3 R. C. L. p. 362, § 261. This intention may be evidenced by an express or implied agreement to this effect. As raising an implied agreement, the custom of banks to credit the remitting bank with the proceeds has quite generally been relied upon.

Investigation of the question under annotation is rendered difficult, by the failure of the courts to use the term "for collection" accurately. In a popular sense, paper drawn on one bank which is deposited by the owner in another is always deposited for collection,—that is, the bank of deposit sends the paper to the bank on which it is drawn and receives from it the money thereon or credit therefor; but in a legal sense the term "for collection" has a definite meaning, that is, that the bank with which the paper is deposited is the mere agent of the owner for the purpose of obtaining the funds thereon. An illustration of this inaccurate use of the term is found in *Hazlett v. Commercial Nat. Bank* (1890) 132 Pa. 118, 19 Atl. 55. In that case, according to the statement of facts, the plaintiff, a banker at Washington, Pennsylvania, mailed to the defendant bank at Philadelphia, with which he had an account of some years' standing, his draft on a bank in Pittsburg, drawn by himself to his own order and indorsed, to be placed to his credit. The draft was received by the defendant bank, credit given to the plaintiff for the amount thereof as cash, and the draft transmitted to the drawee bank. In other words, the transaction was the ordinary one of the deposit of paper in the bank and receipt of credit therefor by the depositor. Yet when the court, in the opinion in this case, comes to characterize the transaction, it says that the plaintiff drew his check on the Pittsburg bank, and deposited the check with the Philadelphia bank "for

collection." It is apparent, however, that the court uses the term in the popular sense, so that its holding that the relation of principal and agent was created between the bank and its depositor is something more than a holding that that relation is created where the paper is indorsed "for collection," or is deposited upon an express agreement that it is for collection. Another instance of the use of the words "for collection" in their popular sense appears in *Balbach v. Frelinghuysen* (1883) 15 Fed. 675, where it is quite consistently stated that the check was deposited with the bank "for collection;" but from the whole case it seems evident that the transaction there involved was the ordinary case of a deposit and receipt of credit with right to draw thereon, without any special agreement with reference thereto.

Another difficulty arises from a use of the terms "as cash," "as paper," or "as checks." These terms are used as synonymous with the passing of title, the expression "as cash" being used as the equivalent of saying that the title has passed, while the expression "as paper," or "as checks," is treated as the equivalent of saying that the title has not passed. An instance of this use is found in *First Nat. Bank v. Armstrong* (1889) 39 Fed. 231, where a draft is said to have been credited by the receiving bank to the remitting bank "as cash," and this is stated to have given the remitting bank the right to draw upon the same "as cash," and to establish the fact that the title had passed, notwithstanding there was a uniform custom and understanding that, when any draft should be returned to the receiving bank unpaid, it should be charged back to the remitting bank and returned to it, and notwithstanding the draft involved in this case was indorsed "For collection for" the remitting bank. In distinguishing this case from a case having precisely similar facts, the court in *First Nat. Bank v. Armstrong* (1890) 42 Fed. 193, bases its difference in holding upon the exceedingly attenuated distinction that in the case reported in 39 Fed., at page 231, the deposit was

made as cash, while in the case reported in 42 Fed., at page 193, it was not deposited as cash.

There is no dissent from the proposition that the passing of title to commercial paper upon a transfer thereof to a bank by which it is credited to the depositor's account at the time of deposit, or is to be credited when the proceeds are received, is fundamentally a question of intention. Where direct evidence of such intent can be obtained, such as a contract expressly providing as to the passing of title, the question is relatively simple. Some cases have gone no farther than to ascertain the intent. In *Bank of Gunterstown v. Webb* (1895) 108 Ala. 132, 19 So. 14, a deposit by the payee of a sight draft with a bill of lading attached was held a sale and sufficient to pass title, although the drawer afterwards paid part of the draft to the payee, and the deposit slip was indorsed, "To be paid when collected," where the depositor could not read the deposit slip, and the bank paid a portion of the draft to him upon his check at the time of the deposit, and he claimed that the understanding with the bank at the time was that it was to be considered a sale. In *Southwest Nat. Bank v. House* (1913) 172 Mo. App. 197, 157 S. W. 809, the bank accepted for deposit a large check from the payee, who had been a depositor for a period of only nine days, immediately sent the check to the bank upon which it was drawn to learn if it was good, but allowed the depositor to draw part of the proceeds out before getting a reply, which it received in fifteen minutes; he absconded, and it turned out that his title to the check was fraudulent. It was held that the bank had not intended that title to the check should immediately pass to it, so that it had no standing to collect its loss from the maker of the check. In *Second Nat. Bank v. Cummings* (1891) 89 Tenn. 609, 18 S. W. 115, 24 Am. St. Rep. 618, drafts were held to have been taken for collection where they were left by the drawer and payee with the bank, entered upon a deposit ticket as if for deposit as a cash item, and sent with the indorsement "For

deposit only to credit of" the payee, and where the bank did not discount the draft or give credit to the holders upon their deposit account, but entered the same as having been received for collection and transmitted in pursuance thereof. The drafts in question were payable three days after sight, and an agreement entered into between the depositors and the bank, some years before, that the bank should receive and collect checks and sight drafts without charge, and credit them as cash, was held not to extend to time paper. Where a bank took drafts at a value fixed by itself, and credited the depositor with this amount, and kept the draft as its own property, the title passes according to the intention. *Taylor v. Vossburg Mineral Springs Co.* (1911) 128 La. 364, 54 So. 907.

The court, in *Brigance v. Bank of Cooter* (1918) — Mo. App. —, 200 S. W. 668, treats that case as the ordinary one of a customer depositing paper to his credit, and gives no weight to facts which seem to make an entirely different case. An agent who purchased three cars of grain drew three drafts, one for each car, with bills of lading attached, on his company and payable to the defendant bank. The defendant's cashier called up the grain company by phone and was assured that the drafts would be paid, whereupon the amount of the drafts was placed to the credit of the agent, who thereupon gave to the seller of the grain a check for the purchase price. The payee of this check (plaintiff) deposited it with the bank, which placed the same to his credit. Other checks were given to other persons selling grain which went into the cars. Upon dishonor of the draft, the plaintiff, upon notice from the bank, gave to the bank his check covering the amount placed to his credit. The bank was held not liable to the plaintiff.

The usual course of business is immaterial, where there is an express contract between the parties. *Fay v. Strawn* (1863) 32 Ill. 295.

Where there is no direct evidence as to the intent of the parties as to the

passing of title, the question must be answered from what the parties have done. It must be remembered that the question is one of intent, so that while a certain result may be assigned to certain circumstances in the absence of evidence as to intent, where evidence of intent is introduced the result may be changed.

In this connection it should be noted that even indorsements for collection have been held to pass such title to the bank as to authorize it to bring suit in its own name. See *Freeman's Nat. Bank v. National Tube Works Co.* (1890) 151 Mass. 413, 8 L.R.A. 42, 21 Am. St. Rep. 461, 24 N. E. 779. At least, a bank which holds checks by an unrestricted indorsement may sue thereon, even though it is an indorsee for collection. *Citizens State Bank v. E. A. Tessman & Co.* (1913) 121 Minn. 34, 45 L.R.A. (N.S.) 606, 140 N. W. 178. Such cases are beyond the scope of this discussion. Reference is made to them at this point that the reader may see that notwithstanding the title has not passed to the bank, at least, not the beneficial title, it may be that the bank may sue and recover on the paper.

II. Rule where paper is taken for collection.

a. In general.

The courts are practically unanimous in holding that the title to paper that is deposited for the special purpose of collection does not pass to the bank.

United States.—*Richardson v. Louisville Bkg. Co.* (1899) 36 C. C. A. 307, 94 Fed. 442; *Richardson v. Continental Nat. Bank* (1899) 36 C. C. A. 815, 94 Fed. 450; *Clark Sparks & Sons Mule & Horse Co. v. Americus Nat. Bank* (1916) 230 Fed. 738.

Alabama. — *National Commercial Bank v. Miller & Co.* (1884) 77 Ala. 168, 54 Am. Rep. 50; *Morris v. Alabama Carbon Co.* (1903) 139 Ala. 620, 36 So. 764.

Connecticut.—*Lawrence v. Stonington Bank* (1827) 6 Conn. 521.

Georgia.—*Cronheim v. Postal Teleg. Cable Co.* (1911) 10 Ga. App. 716, 74 S. E. 78; *Southern Bank & T. Co. v.*

Tellers (1916) 18 Ga. App. 599, 89 S. E. 1094 (draft payable to drawer's bank).

Michigan.—Garrison v. Union Trust Co. (1905) 139 Mich. 392, 70 L.R.A. 615, 111 Am. St. Rep. 407, 102 N. W. 978, 5 Ann. Cas. 813.

Missouri.—Northwestern Nat. Bank v. Bank of Commerce (1891) 107 Mo. 402, 15 L.R.A. 102, 17 S. W. 982; Midland Nat. Bank v. Brightwell (1898) 148 Mo. 358, 71 Am. St. Rep. 608, 49 S. W. 994.

New York. — Yerkes v. National Bank (1877) 69 N. Y. 382, 25 Am. Rep. 208; Commercial Bank v. Marine Bank (1867) 1 Abb. App. Dec. 405, 3 Keyes, 337.

North Carolina.—Boykin v. Bank of Fayetteville (1896) 118 N. C. 566, 24 S. E. 357; National Citizens' Bank v. Citizens' Nat. Bank (1896) 119 N. C. 307, 25 S. E. 971.

North Dakota. — National Bank v. Johnson (1896) 6 N. D. 180, 69 N. W. 49.

Ohio.—Jones v. Kilbreth (1892) 49 Ohio St. 401, 31 N. E. 346.

Oregon.—Security Sav. & T. Co. v. King (1914) 69 Or. 228, 138 Pac. 465.

Pennsylvania.—First Nat. Bank v. Gregg (1875) 79 Pa. 384; Rapp v. National Security Bank (1890) 136 Pa. 426, 20 Atl. 508.

South Dakota. — Fanset v. Garden City State Bank (1909) 24 S. D. 248, 123 N. W. 686.

Texas.—City Bank v. Weiss (1887) 67 Tex. 331, 60 Am. Rep. 29, 3 S. W. 299; Hobart Nat. Bank v. Fordtran (1909) — Tex. Civ. App. —, 122 S. W. 413.

Washington. — Morris-Miller Co. v. Von Pressentin (1911) 63 Wash. 74, 114 Pac. 912.

That the title does not pass is clear where the paper is indorsed "For collection," and it is so held in many cases.

United States. — Sweeny v. Easter (1863) 1 Wall. 166, 17 L. ed. 681; Commercial Nat. Bank v. Armstrong (1892) 148 U. S. 50, 37 L. ed. 363, 13 Sup. Ct. Rep. 533; Old Nat. Bank v. German American Nat. Bank (1895) 155 U. S. 556, 39 L. ed. 259, 15 Sup. Ct. Rep. 221; Bank of Metropolis v. First

Nat. Bank (1884) 22 Blatchf. 58, 19 Fed. 301; First Nat. Bank v. Bank of Monroe (1887) 33 Fed. 408; Commercial Nat. Bank v. Hamilton Nat. Bank (1890) 42 Fed. 880; Peck v. First Nat. Bank (1890) 43 Fed. 357; National Exch. Bank v. Beal (1892) 50 Fed. 355, affirmed in (1893) 5 C. C. A. 304, 5 U. S. App. 376, 55 Fed. 894; United States v. American Exch. Nat. Bank (1895) 70 Fed. 232.

Louisiana.—Moore v. Louisiana Nat. Bank (1892) 44 La. Ann. 99, 32 Am. St. Rep. 332, 10 So. 407.

Maryland.—Cecil Bank v. Farmers Bank (1864) 22 Md. 148.

New York. — Bank of Syracuse v. Wisconsin M. & F. Ins. Co. Bank (1891) 36 N. Y. S. R. 584, 12 N. Y. Supp. 952.

North Carolina.—Boykin v. Bank of Fayetteville (1896) 118 N. C. 566, 24 S. E. 357; National Citizens' Bank v. Citizens' Nat. Bank (1896) 119 N. C. 307, 25 S. E. 971.

Texas.—City Bank v. Weiss (1887) 67 Tex. 331, 60 Am. Rep. 29, 3 S. W. 299.

It is not necessary, to preserve title in the depositor, expressly to indorse "For collection." The title to paper does not pass to a bank to which it is delivered for collection, although indorsed in blank or by unrestricted indorsement.

United States.—Richardson v. New Orleans Coffee Co. (1900) 43 C. C. A. 583, 102 Fed. 785.

Iowa.—Claffin v. Wilson (1879) 51 Iowa, 15, 50 N. W. 578.

Kansas. — Prescott v. Leonard (1884) 32 Kan. 142, 4 Pac. 172.

Minnesota.—Re State Bank (1893) 56 Minn. 119, 45 Am. St. Rep. 454, 57 N. W. 336.

New York. — Stark v. United States Nat. Bank (1886) 41 Hun, 506; Arnold v. Clark (1848) 1 Sandf. 491.

Pennsylvania.—Hackett v. Reynolds (1886) 114 Pa. 328, 6 Atl. 689.

Rhode Island. — Blaine v. Bourne (1875) 11 R. I. 119, 23 Am. Rep. 429.

Washington. — Morris-Miller Co. v. Von Pressentin (1911) 63 Wash. 74, 114 Pac. 912.

But this principle has been held not to apply as against a bona fide holder

to whom the paper is afterwards indorsed. See *Continental Nat. Bank v. First Nat. Bank* (1904) 84 Miss. 103, 36 So. 189, 2 Ann. Cas. 116. The rights as against a bona fide holder, however, are not considered herein.

Where the paper is deposited for collection, title does not pass even though it is intended for credit when collected. *Armstrong v. National Bank* (1890) 90 Ky. 431, 9 L.R.A. 553, 14 S. W. 411, approved in *Commercial Nat. Bank v. First Nat. Bank* (1914) 158 Ky. 392, 165 S. W. 398 (where the draft was made payable to the bank); *National Bank v. Johnson* (1896) 6 N. D. 180, 69 N. W. 49.

Indorsement of a note for collection and credit does not pass title to the note. *Bury v. Woods* (1885) 17 Mo. App. 245.

The conclusion that the title does not pass where the paper was deposited for collection, although intended eventually for credit, has been reached under various forms of indorsements. That the title does not pass has been held true where the paper was indorsed "For credit of account of" the depositor. *Stone River Nat. Bank v. Lerman Mill. Co.* (1913) 9 Ala. App. 322, 63 So. 776, certiorari denied in (1914) 185 Ala. 673, 64 So. 1019. An indorsement of a check or draft, "For collection for account of" the remitting bank, does not pass title to the receiving bank. *Central R. Co. v. First Nat. Bank* (1884) 73 Ga. 383; *First Nat. Bank v. First Nat. Bank* (1881) 76 Ind. 561, 40 Am. Rep. 261; *Tyson v. Western Nat. Bank* (1893) 77 Md. 412, 23 L.R.A. 161, 26 Atl. 520; *National Park Bank v. Seaboard Bank* (1889) 114 N. Y. 28, 11 Am. St. Rep. 612, 20 N. E. 632; *National Butchers' & D. Bank v. Hubbell* (1889) 117 N. Y. 384, 7 L.R.A. 852, 15 Am. St. Rep. 515, 22 N. E. 1031. The indorsement of a check sent for one bank to another, in the form "Collect for account of" the remitting bank, does not pass title to the paper except to enable the receiving bank to demand payment and enforce collection. *Branch v. United States Nat. Bank* (1897) 50 Neb. 470, 70 N. W. 34 (the receiving bank had, in this case, credited the remitting

bank with the amount of the check, but this was held not to change the rule). Indorsement of a note "For collection for account of" the remitting bank, in sending it to another bank for collection, does not pass title to the note. *Re Armstrong* (1886) 33 Fed. 405 (no credit was given nor charges made in this case until after insolvency). The title to a note which is delivered to a bank indorsed "For collection for" the payee, or other holder, does not pass to the bank. *Third Nat. Bank v. Clark* (1877) 23 Minn. 263; *Merchants' Nat. Bank v. Hanson* (1884) 33 Minn. 40, 53 Am. Rep. 5, 21 N. W. 849. In *Manufacturers' Nat. Bank v. Continental Bank* (1889) 148 Mass. 553, 2 L.R.A. 699, 12 Am. St. Rep. 598, 20 N. E. 193, a contract between banks by which one bank engaged to make collections for the other, and to credit sight items at par, subject to payment, was held not to contemplate the passing of title upon a check which was indorsed "For collection for" the remitting bank. The court states that the credit given for a check under this arrangement was merely provisional until the check was paid. An indorsement of a bank check by one bank in sending it to another, to pay to the receiving bank, "account of" the sender, does not pass title to the check. *First Nat. Bank v. Reno County Bank* (1880) 1 McCrary, 491, 3 Fed. 257. An indorsement of a draft by a bank in sending it to another for collection, to pay to such other "or order on account of" the remitting bank, not only prevents the passing of title, but charges any subsequent holder of the draft with knowledge that it belongs to the remitting bank. *Blairne v. Bourne* (1875) 11 R. I. 119, 23 Am. Rep. 429. An indorsement of a draft, "For account of" the remitting bank, does not pass title to the draft. *Armour Bros. Bkg. Co. v. Riley County Bank* (1883) 30 Kan. 163, 1 Pac. 506; *Freeman's Nat. Bank v. National Tube Works Co.* (1890) 151 Mass. 413, 8 L.R.A. 42, 21 Am. St. Rep. 461, 24 N. E. 779.

But in some cases, even though the paper is indorsed "For collection," title has been held to pass where it is

deposited and credited as cash subject to check. *First Nat. Bank v. Armstrong* (1889) 39 Fed. 231. Compare with *St. Louis & S. F. R. Co. v. Johnston* (1898) 133 U. S. 566, 33 L. ed. 683, 10 Sup. Ct. Rep. 390, *infra*. And the same has been held where the indorsement was, "For collection and credit." *Midland Nat. Bank v. Roll* (1895) 60 Mo. App. 585 (so held in case of a check sent by one bank to another, and credited immediately by the receiving bank, and upon dishonor charged back). In *First Nat. Bank v. Armstrong* (Fed.) *supra*, drafts and checks were sent by one bank to another, indorsed "For collection for" the remitting bank. According to an agreement between the banks this paper was, upon its reception, credited to the remitting bank as cash, so that the remitting bank had the right to draw upon the credit. It was also the understanding that, should any paper be returned unpaid, it should be charged back to the remitting bank and returned to it. In holding that the title passed notwithstanding the indorsement "For collection," the court, after referring to the fact of the credit in favor of the remitting bank, with the right in such bank to draw against it, says: "Now suppose that the Fidelity National Bank [the bank to which the paper was sent] had not failed; upon the collection of the draft to whom would the proceeds belong? Could a creditor of the Elkhart Bank have reached them by process in attachment in the hands of the collecting bank, before they were transmitted to the Fidelity Bank? Clearly not. The Fidelity National Bank had given the Elkhart Bank credit for the amount of the drafts as cash, and if the drafts were paid that ended the transaction as between the Fidelity Bank and the Elkhart Bank. No other entry would be necessary in the account between the two banks, and I am not able to see that the indorsement 'For collection,' under these circumstances, affected the result or reserved to the Elkhart [Bank] any title to the proceeds of the draft. The agreement that the draft should be

charged back, if not paid, did not operate to change this result, for the indorsement and the arrangement for credit to the Elkhart Bank must be taken together, and while it is true that the indorsement 'For collection' did not of itself transfer the title, I am quite clear that the credit to the Elkhart Bank, together with the indorsement, did transfer the entire interest in the proceeds of the draft to the Fidelity Bank, and that the agreement to charge back if any draft was not paid did not affect the character of the transaction." The court, in support of its holding, relies largely upon the fact that a credit had been given to the remitting bank. The weight thus given to this fact is contradicted by a long line of Federal decisions as well as decisions in other courts. It is admitted that the question of the passing of title is one of intention on the part of the parties to the transaction, but no express intention beyond the indorsement appears in the *Armstrong Case*, the court relying, as above stated, upon the credit. It was stated in *Midland Nat. Bank v. Roll* (1895) 60 Mo. App. 585, that while ordinarily an indorsement, "For collection," or an indorsement, "For collection and credit," does not carry the title to the paper, yet, when such an indorsement is made in pursuance of an understanding and dealings between the parties, whereby the check is taken, credited, and treated as a cash deposit subject to the check, the ordinary rule does not obtain, and the title passes; and the charging back to the account of the depositor of the amount of such check does not necessarily reinvest the title in the depositor, nor conclude the bank upon the question of title.

Where the proceeds, when collected, were not intended to be credited to the depositor, it is clear that the title does not pass. Thus a customer of a bank, who deposited with it a draft with instructions to collect and notify him, and not for credit, does not lose title to the draft. *Guignon v. First Nat. Bank* (1899) 22 Mont. 140, 55 Pac. 1051, 1097.

b. Effect of giving credit, and right to charge back.

It is settled by a number of decisions that the giving of credit by the bank to the depositor is not inconsistent with ownership remaining in him; in other words, where the paper is deposited for collection,—using the term “for collection” in its legal sense,—title remains in the depositor, even though the face value of the check or draft is entered as a deposit credit to its owner. *Richardson v. Louisville Bkg. Co.* (1899) 36 C. C. A. 307, 94 Fed. 442; *Richardson v. Continental Nat. Bank* (1899) 36 C. C. A. 315, 94 Fed. 450; *Jefferson County Sav. Bank v. Hendrix* (1905) 147 Ala. 670, 1 L.R.A.(N.S.) 246, 39 So. 295; *Stone River Nat. Bank v. Lerman Mill. Co.* (1913) 9 Ala. App. 322, 63 So. 776, certiorari denied in (1914) 185 Ala. 673, 64 So. 1019; *Rapp v. National Secur. Bank* (1890) 136 Pa. 426, 20 Atl. 508. That the title does not pass in case of paper sent by one bank to another for collection is true although the receiving bank credits the remitter with the amount of the check as cash, and so informs the remitter. *Tyson v. Western Nat. Bank* (1893) 77 Md. 412, 23 L.R.A. 161, 26 Atl. 520; *National Park Bank v. Seaboard Bank* (1889) 114 N. Y. 28, 11 Am. St. Rep. 612, 20 N. E. 632; *National Butchers' & D. Bank v. Hubbell* (1889) 117 N. Y. 384, 7 L.R.A. 852, 15 Am. St. Rep. 515, 22 N. E. 1031. See, contra, *First Nat. Bank v. Armstrong* (1889) 39 Fed. 231, and *Midland Nat. Bank v. Roll* (1895) 60 Mo. App. 585. That title does not pass has also been held true although the receiving bank has credited the remitting bank, and the remitting bank charged the receiving bank with the amount thereof. *First Nat. Bank v. Reno County Bank* (1880) 1 McCrary, 491, 3 Fed. 257. The relation of principal and agent was held to exist between the depositor and bank in *Bank of Commerce v. Ingram* (1912) 33 Okla. 46, 124 Pac. 64, where a depositor, having received a check upon another bank after the drawer had removed his account therefrom to the bank of deposit, took it to the bank

of deposit where it was credited on his pass book. That a bank receiving commercial paper for collection permits the holder to draw the amount of it before the collection is made does not change the relation of the parties to it, is held in *Winchester Mill. Co. v. Bank of Winchester* (1908) 120 Tenn. 225, 18 L.R.A.(N.S.) 441, 111 S. W. 248. Where a bank receives by mail from the payee a certificate of deposit issued by a distant bank, the payee stating in the accompanying letter that it is for deposit to his credit, and asking for a deposit slip and two or three checks, the said payee never having had any previous account or dealings with the bank, and the bank responds by mail acknowledging receipt of the certificate and advising that credit has been given his account, inclosing a slip showing that the certificate has been deposited to the payee's credit, and also two checks, no other request being made or answer given, the transaction does not, in law, amount to a purchase of the certificate by the bank, but a receipt of the same for collection only. *Hilsinger v. Trickett* (1912) 86 Ohio St. 286, 99 N. E. 305, Ann. Cas. 1913D, 421.

That the title remains in the depositor is especially true if the credit is entered subject to payment, or where the credit may be charged off in case of the dishonor of the paper. *Fifth Nat. Bank v. Armstrong* (1889) 40 Fed. 46; *First Nat. Bank v. Armstrong* (1890) 42 Fed. 193. It has been stated that although it is credited to the depositor, it may be charged back to him in case it proves worthless. *Union Safe Deposit Bank v. Strauch* (1902) 20 Pa. Super. Ct. 196. A credit of checks deposited for collection, and the issuance of a deposit slip stating that all cash items not actual cash are entered subject to payment, entitles the bank to charge back the check if it proves uncollectable. *Givan v. Bank of Alexandria* (1898) — Tenn. —, 47 L.R.A. 270, 52 S. W. 923. A bank in which the holder of a check upon another bank has deposited it for credit and collection may, upon the dishonor of the check, charge it back to its customer, or re-

cover the amount, where he has, in the meantime, withdrawn the money, if it is without fault. *Pinkney v. Kanawha Valley Bank* (1910) 68 W. Va. 254, 82 L.R.A. (N.S.) 987, 69 S. E. 1012, Ann. Cas. 1912B, 115. In *Merchants' Nat. Bank v. Townsend* (1912) — Tex. Civ. App. —, 147 S. W. 617, where it was claimed that a draft was sold to a bank and credited to the depositor's account, the court proceeds upon the theory that if the draft was sold to the bank the only remedy the bank would have would be upon the indorsement, and that it would not be authorized to charge the depositor's account with the amount paid by it for the draft, upon its dishonor, but that, if, on the other hand, the draft was only taken for collection and the depositor given credit therefor, the bank had the right, when the draft was dishonored, to charge the depositor's account with the amount and return the draft to him. In *Bank of Big Cabin v. English* (1910) 27 Okla. 334, 111 Pac. 386, the defendant bank had entered credit on its books and in plaintiff's pass book upon receiving advice from a distant bank that the defendant bank had been given credit with its correspondent bank for the amount of a draft for the use of the plaintiff. On the principle here considered, it was held that the defendant bank had the right to charge back the item upon discovering the insolvency of the correspondent bank. In *Belsheim v. First Nat. Bank* (1914) 77 Wash. 552, 137 Pac. 1055, the bank received for collection a check drawn on another bank by a purchaser of real estate; a part of the proceeds of this check was to be credited to brokers who effected the sale; upon being requested to do so by one of the brokers, the plaintiff in the case, the bank passed to his credit the sum due him, but subsequently, upon dishonor of the check, charged the same back, whereupon the broker brought action against the bank, and was held to have no right to recover.

That the title remains in the depositor, where the depositor receives credit therefor, subject to check, with the understanding that the bank is to

charge back the credit in case of dishonor, is true in case the check is indorsed in blank. *Morris-Miller Co. v. Von Pressentin* (1911) 63 Wash. 74, 114 Pac. 912. But see *Vickers v. Machinery Warehouse & Sales Co.* (1920) — Wash. —, 191 Pac. 869, *infra*.

The theory upon which the courts proceed can best be understood from the language used by them. The supreme court of Minnesota has said that it is not "conclusive upon the question of ownership of the paper that before collection the amount of it is credited to the customer's account, against which he has the privilege of drawing by check. It has been frequently held, with the approval of the best text-writers, that if paper is delivered by a customer to a bank for collection, or 'for collection and credit,' a credit of the amount to the customer before and in anticipation of collection will be deemed merely provisional, and the privilege of drawing against it merely gratuitous, and that the bank may cancel the credit or charge back the paper to the customer's account if it is not paid by the maker or drawee." *Re State Bank* (1894) 56 Minn. 119, 45 Am. St. Rep. 454, 57 N. W. 336. The court in *Tyson v. Western Nat. Bank* (1893) 77 Md. 412, 23 L.R.A. 161, 26 Atl. 520, after stating that an indorsement, "For collection for account of" the indorser, does not pass the title, continues: "No other way has been shown in this case by which it could have been passed. Entering the amount represented by these papers as cash to the credit of Tyson & Rawls is very far from having such an effect. It was the clear understanding that this was not an absolute and unconditional credit, but that it was to be charged back to the depositors in case the paper should not be paid at maturity. The paper was not sent to Nicholson & Sons to be discounted or to be purchased by them, but it was intrusted to them as agents to collect it; and Nicholson & Sons could not treat it as a discount or purchase except by making an agreement to that effect with their correspondents. It probably suited their mutual interest and

convenience to make these qualified entries. The depositaries probably had sufficient confidence in the pecuniary ability of these depositors to give them a credit for the short time that would intervene before the maturity of sight drafts. It is a very common practice with bankers to deal in this manner with their customers who are in good credit. In the argument, this entry was likened to a collection of the commercial paper by the depositary. It was not in point of fact a collection. Nor was it similar in its effects and consequences. When a collection is made the proceeds are placed absolutely and unconditionally to the credit of the depositor, and he is no longer under any responsibility on account of the paper deposited, as that question has been irrevocably settled by payment. In point of fact, when collected, the paper has lost its vitality by the settlement and satisfaction of all rights which can arise from it. It would have been perfectly competent for Nicholson & Sons to agree with Tyson & Rawls that they would consider this paper as collected, and pay them the amount of it, and relieve them from all responsibility on account of it. But no such agreement was made; their contract was entirely different. . . . It may be objected that, as the check and draft were actually paid at maturity, the contingent responsibility of the depositors had not accrued. But we must judge of legal rights by the state of the facts which exist at the time they arrive, and not by events which occur afterwards." In *National Park Bank v. Seaboard Bank* (1889) 114 N. Y. 28, 11 Am. St. Rep. 612, 20 N. E. 632, where one bank, in sending for collection a draft to another, indorsed it "For collection for account of" itself, and where the bank to which it was sent immediately credited it upon receipt, it was claimed that the entry of the credit proved that it belonged to the receiving bank, while, on the other hand, it was claimed that the restrictive indorsement prevented any change of title, and simply created an agency for collection. The court states: "A question of fact thus arose as to the

intention of the parties to the transaction, to be determined by considering their words and acts, their course of business, and all of the surrounding circumstances. We think that the decision of this question in favor of the defendant, by the trial court acting in the place of a jury, is conclusive upon us. Moreover, it seems to be settled that the title to commercial paper received for collection by a bank and forwarded to its correspondent in the usual course of business, without any express agreement in reference thereto, does not vest in such correspondent even if it has remitted upon the general account in anticipation of collection. *Dickerson v. Wason* (1872) 47 N. Y. 489, 7 Am. Rep. 455. Title passes only by a contract to that effect, to be either expressly proved, or inferred from an unequivocal course of dealing. *Scott v. Ocean Bank* (1861) 23 N. Y. 289." In *National Butchers' & D. Bank v. Hubbell* (1889) 117 N. Y. 384, 7 L.R.A. 852, 15 Am. St. Rep. 515, 22 N. E. 1031, the receiving bank immediately credited to the account of the remitting bank demand checks and drafts at their face value; if any of the paper was protested it was charged back to the remitting bank, and returned to it, and the expense of the protest charged to it. This manner of doing business had been carried on for a number of years. In holding that title had not passed to the receiving bank, the court says: "Nor does the finding of the learned justice at special term, as to the custom pursued between the parties, alter the law in regard to the title to the paper before the funds arising from the payment thereof were actually received by the firm. The finding shows that the credit was a provisional one only. It was a mere matter of book-keeping. It would seem to have been more in the form of a memorandum of the different pieces of paper received, because, if any were not paid, such as went to protest were at once charged back upon the books of the firm against the plaintiff, and returned to it with the expenses of protest charged to it. The firm never became absolutely responsible to the plaintiff for the

amount of these collections until the collections were actually made and the proceeds received by them. The property in these different pieces of paper, therefore, never vested in the firm, and the firm never purchased them or advanced any money upon them; hence, the firm never owned them." The court, in *Fifth Nat. Bank v. Armstrong* (1889) 40 Fed. 46, says: "In the opinion of the court, the true criterion, in a case such as is last stated, for determining the question of title to the paper before the same is actually collected, and before the credit has been drawn against, is whether the depositor intended to part with title, and whether the receiving bank intended to purchase the paper, and assume the risk of payment, and give an absolute credit therefor, as in cases of discount. Viewing the matter in that light, I have little difficulty in finding, in the case at bar, that the title to the two drafts and their proceeds remained in the Portsmouth bank and Staunton bank, respectively, up to the time the Fidelity Bank failed, and the government took possession of its assets. The indorsements placed on the drafts in question, when forwarded to the Fidelity Bank, are persuasive evidence, notwithstanding the previous course of dealing, that neither the Portsmouth bank nor Staunton bank intended to part with its title to the drafts in question, or to enable the Fidelity Bank to deal with the same as its own. It was a restrictive indorsement, and it must be assumed that that form of indorsement was adopted for a well-defined purpose. It may well be doubted whether the legal effect of that form of indorsement can be controlled or modified by the proof of a usage existing to credit such items as cash and permit the credit so given to be drawn against, it being conceded that in the present case neither of the depositors saw fit to avail themselves of such privilege. But, be that as it may, it is also apparent that the Fidelity Bank did not intend to purchase the drafts in question and give its customers an absolute credit for the par value thereof. In its letter acknowledging

the receipt of the Shelby draft, the Fidelity Bank stated that it credited the same, 'subject to payment.' This must be understood as meaning that the credit was merely provisional,—that is, conditional on payment,—and that it did not intend to assume the risk of payment, or give an absolute credit, or put itself in any other relation to the paper than that of an agent for collection. This seems to me to be the proper interpretation of the transaction, looking at it merely with a view of determining what the parties thereunto intended."

In England, there was a custom of entering bills short, that is, of not carrying out the proceeds to the customer's credit until actually collected, although the bills were entered immediately to the customer's account. Such bills were held to remain the property of the customer. *Ex parte Harford* (1814) 2 Rose (Eng.) 163.

But the banker had a lien thereon for advances. *Ibid*.

But other cases take the view that the writing of a bill short is evidence, and not conclusive. *Ex parte Pease* (1812) 1 Rose (Eng.) 232. At least, the failure to write the bill short does not necessarily pass title to the bank. *Ex parte Sargeant* (1810) 1 Rose (Eng.) 153. In this case, the court says: "That they [the bills] were not written short amounts to nothing, unless there be a concurrence manifested at the time, or to be inferred from the habits of dealing between the parties, that they were to be considered as cash; if they were there with the petitioner's knowledge, as cash, and he drawing or entitled to draw upon them as having that credit in cash, he would thereby be precluded from recurring to them specifically."

III. Rule where paper is deposited "as paper," or where it is deposited "as cash."

Some cases have held that the question of the passing of title depends upon the answer to the question whether the paper is deposited as "paper," or as "cash." A crediting of a check by the bank as paper, and not as cash, has been held to manifest a clear intent not to assume the relation of

debtor to the depositor; hence title does not pass. *Bailie v. Augusta Sav. Bank* (1895) 95 Ga. 277, 51 Am. St. Rep. 74, 21 S. E. 717. The mere fact that the depositor is allowed to check against the credit does not change the import of the transaction. At least, it does not prevent the bank from charging back the amount of the credit if the check is not paid. *Ibid.* Nor can the depositor recover of the bank on the theory of a sale to it. *Spooner v. Bank of Donalsonville* (1916) 144 Ga. 745, 87 S. E. 1062, where the bank, to the knowledge of the depositor, used deposit slips which contained a provision that the customer, in depositing items for collection or credit, agreed that he would not hold the bank liable for said items until the cash for each had been paid to the bank. In making the deposit in question the depositor had sent the draft by mail, but, as stated above, he had notice of the form of deposit slip used by the bank. It further appeared that the deposit of the check was entered on a slip of that character made out by the cashier, and that he mailed to the plaintiff either a duplicate of the slip or a card acknowledging the receipt of the check and stating that the amount of it had been credited to the plaintiff's account, and that on this card was the statement: "All items sent to us are credited subject to payment." This was held to show beyond controversy that the check was not sold to the bank unconditionally, and that the credit was not absolute, but contingent upon payment. It was accordingly held that the depositor was not entitled to recover of the bank the amount of the credit, on the theory of a sale of the check to it.

Compare with cases discussed in subd. IV. *infra*, relating to notices in pass books and deposit slips.

If, on the other hand, there is a definite understanding at the time of the deposit that such paper is deposited as cash, it is held to be clear that the title passes to the bank. *Strong v. King* (1864) 35 Ill. 9, 85 Am. Dec. 336 (obiter); *American Trust & Sav. Bank v. Gueder & P. Mfg. Co.* (1894) 150 Ill. 336, 37 N. E. 227; *Mudd v. Farm-*

ers' & M. Bank (1914) 175 Mo. App. 398, 162 S. W. 314.

IV. Rule where there is no agreement that paper is taken for collection.

a. Doctrine that title remains in the depositor.

1. In general.

In the great majority of cases there is no express agreement as to the passing of title, nor is there an express agreement that the paper is deposited merely for collection. The paper is deposited by the customer and entered in his pass book by the bank, and the depositor is given the right to draw on the credit thus received. It is generally held that, upon dishonor of the paper, the bank has the right to charge back the credit thus received. This right to charge back is sometimes the result of an express agreement. The courts are not agreed as to the title to the paper in such a situation.

It is held generally in some cases, without anything being said as to credit, right of depositor to draw, or right of bank to charge back upon dishonor, that, in the absence of a special agreement, when a check is deposited in the usual course of business it is taken generally for collection, and the title does not pass to the bank. *Baldwin State Bank v. National Bank* (1915) 144 Ga. 181, 86 S. E. 538 (see discussion *infra*); *First Nat. Bank v. McMillan Bros.* (1914) 15 Ga. App. 319, 83 S. E. 149 (obiter); *Louisiana Ice Co. v. State Nat. Bank* (1881) *McGloin (La.)* 181. It is stated obiter in *Strong v. King* (1864) 35 Ill. 9, 85 Am. Dec. 336, that if a check is deposited in the usual course of business, the presumption is that it is for collection merely, and not as money, but that if a banker receives a check as and for so much money, and gives the depositor credit therefor, the title passes to the banker. This seems to have been the theory of *National Commercial Bank v. Miller* (1884) 77 Ala. 168, 54 Am. Rep. 50. In *Merchants' Nat. Bank v. Dorchester* (1911) — *Tex. Civ. App.* —, 136 S. W. 551, where the payee of a check deposited it with others, and received credit therefor

from the bank, it is stated that the relation of principal and agent was created between the depositor and the bank. In *Cronheim v. Postal Tele. Cable Co.* (1912) 10 Ga. App. 716, 74 S. E. 78, the check was indorsed, "For collection and credit to his individual account with said Neal Bank for deposit;" but the court said: "Where it is deposited generally upon an indorsement in blank, and nothing more appears, it will be presumed that the deposit was made in the usual course of business, and that the depositor intended to appoint the bank as his agent to collect the proceeds and deposit them to his credit;" and the language used in the indorsement was said to strengthen the presumption of agency rather than weaken it. The particular question was as to depositor's right to stop payment on the check on learning of the insolvency of the bank, and the suit was against a telegraph company for damages caused by its negligent failure to transmit his message stopping payment of the check.

This doctrine is followed and it is held that title does not pass to the bank, where paper is deposited in the usual course of business, and without any express agreement as to the passing of title, although credit is given the depositor. *Beal v. Somerville* (1892) 17 L.R.A. 291, 1 C. C. A. 598, 5 U. S. App. 14, 50 Fed. 647; *Philadelphia v. Eckels* (1896) 98 Fed. 485; *United States Nat. Bank v. Geer* (1897) 53 Neb. 67, 41 L.R.A. 439, 73 N. W. 286; *Hazlett v. Commercial Nat. Bank* (1890) 132 Pa. 118, 19 Atl. 55 (see comment *supra*, I.; and in *Morris v. First Nat. Bank* (1902) 201 Pa. 160, 50 Atl. 1000, *infra*, IV. b, 1). See *Miller v. Norton* (1913) 114 Va. 609, 77 S. E. 452, referred to in the reported case (*FOURTH NAT. BANK v. BRAGG*, *ante*, 1034). The chief question involved in *Alleman v. Sayre* (1917) 79 W. Va. 763, L.R.A. 1917D, 1002, 91 S. E. 805, was whether the depositor could rescind the transaction after the insolvency of the bank, and recover a check deposited by him and credited to his account, where, at the time of depositing the check, he

drew a check on the account and had it certified by the bank, but afterwards returned the certified check and had it canceled. In the course of the opinion the court says that the transaction above set out did not necessarily establish the relation of debtor and creditor between the bank and its customer. In *Beal v. Somerville* (1892) 17 L.R.A. 291, 1 C. C. A. 598, 5 U. S. App. 14, 50 Fed. 647, there was no absolute right on the part of the depositor to draw against the credit thus received, and this is an important element in the decision.

See *Re Jarmulowsky* (1918) L.R.A. 1918E, 634, 161 C. C. A. 327, 249 Fed. 319. And in some cases it is held that the title does not pass to the bank, even though the amount is credited to the depositor with the right to draw thereon. *Louisiana Ice Co. v. State Nat. Bank* (1881) *McGloin* (La.) 181. It seems that the right to draw on the account is assumed in the cases above which speak merely of credit having been given the depositor. The court in *Louisiana Ice Co. v. State Nat. Bank* (La.) *supra*, said: "Checks, like drafts, bills, or notes, so deposited with the bank, are placed for collection, and not sold, exchanged, or otherwise made the subject of a contract calculated to transfer title. It is hard to imagine any advantage which could exist, calculated to induce a bank to assume ownership and responsibility for such paper. The fact that, owing to the short course such paper has to run, these institutions usually permit their customers to draw against the amount of checks deposited, does not of itself alter the relations between the parties. The credit is only conditional, and may be canceled and the check returned, should the latter be dishonored. The depositor remains owner of the paper, and the bank merely the agent."

In *St. Louis & S. F. R. Co. v. Johnston* (1890) 133 U. S. 566, 33 L. ed. 683, 10 Sup. Ct. Rep. 390, where a draft drawn by one railway company upon another, and sent by the drawer to its bank, was entered on a certificate of deposit as "checks," but by the bank received as cash and entered on the

credit ledger as such, but not with the knowledge or by the request of the drawer, the court, in indicating an opinion that the title to the draft had not passed, notices the fact that the railway company might have drawn on such paper, although in five years of business between it and the bank it had never done so, and says that mere liberty to draw does not make out a bargain that the title shall pass, particularly where, as in this case, interest was allowed by the banker upon the bills only from the time their amount was received. It is further stated that the question of passing title is one of fact rather than of law, and the court says there should be something more in the evidence tending to establish that the bank had become the owner of the property than mere credit for convenience. It is further stated that the evidence leaves no doubt that, as to out-of-town drafts for large amounts, the bank kept track of them and reserved the right to charge the exchange, and also interest for the average time taken to collect them, notwithstanding its agreement to pay interest from the date it balanced, and says further that "this was not consistent with the theory of an understanding between the bank and the company that the title to this and similar drafts should pass absolutely to the bank. If the draft had not been paid, the bank could have canceled the credit, as it clearly accepted no risk on the paper."

See *Giles v. Perkins* (1807) 9 East, 12, 103 Eng. Reprint, 477, *infra*, IV. a, 3.

The conclusion that title does not pass to the bank is by some cases based largely upon the right of the bank to charge back the credit in case of dishonor of the paper. *Balbach v. Frelinghuysen* (1883) 15 Fed. 675; *Armour Packing Co. v. Davis* (1896) 118 N. C. 548, 24 S. E. 365; *Alpine Cotton Mills v. Weil* (1901) 129 N. C. 452, 40 S. E. 218 (amount was charged back in this case); *Murchison Nat. Bank v. Dunn Oil Mills Co.* (1909) 150 N. C. 718, 64 S. E. 885 (draft payable to bank, obiter; but see subsequent cases from this state, *infra*); *W. J. Barton Seed,*

Feed & Implement Co. v. Mercantile Nat. Bank (1913) 128 Tenn. 320, 160 S. W. 848 (but see *Guggenheimer v. Queen Bee Flour Mills Co.* (1916) 136 Tenn. 488, 190 S. W. 455, *infra*, IV. b, 1); *Washington Brick, Lime & Mfg. Co. v. Traders Nat. Bank* (1907) 46 Wash. 23, 123 Am. St. Rep. 912, 89 Pac. 157 (draft payable to bank); *American Sav. Bank & T. Co. v. Dennis* (1916) 90 Wash. 547, 156 Pac. 559. And see IV. a, 2, *infra*. The Washington cases are overruled in the recent case of *Vickers v. Machinery Warehouse & Sales Co.* (1920) — Wash. —, 191 Pac. 869.

In *Armour Packing Co. v. Davis* (1896) 118 N. C. 548, 24 S. E. 365, *supra*, the custom of the bank was, upon the dishonor of paper, to notify the depositor, and when the next deposit was made the amount of such unpaid paper would be deducted from the aggregate of the deposit slip of that day, and the dishonored paper delivered to the depositor.

There was a provision on the deposit slip in *American Sav. Bank & T. Co. v. Dennis* (Wash.) *supra*, that the bank, in receiving checks or drafts on deposit or for collection, acted only as the agent of the depositor; but this provision is not given much weight in the decision.

In *W. J. Barton Seed, Feed & Implement Co. v. Mercantile Nat. Bank* (Tenn.) *supra*, there was an express agreement between the depositor and the bank that, if any of the paper so deposited should be returned at any time uncollected, the bank had the right to charge back such item. The court, without any discussion, regarded the bank as having the right to charge the credit back, although the paper had been collected, but was attached by a creditor of the depositor while in the hands of a correspondent bank. It was not shown that the depositor had ever drawn on the deposit, or that the sum to his credit in the bank was at any time less than the amount of the credit.

The position of the early North Carolina cases has been somewhat modified by the decision in *Worth Co. v. International Sugar Feed No. 2 Co.*

(1916) 172 N. C. 335, 90 S. E. 295. The evidence in this case showed the ordinary case of a depositor depositing a draft in his bank and receiving credit therefor, without any specific agreement as to the situation and rights of the parties. A bank official testified that in case of dishonor of paper thus deposited it was customary for the bank to get a check for the paper thus dishonored, but in the event that a depositor refused to give a check, the bank would charge it back to the depositor's account. The bank official, as well as an official of the depositor, testified that the draft in question was sold to the bank, the official of the depositor testifying that there was no agreement that it should be charged back in case of dishonor, and that the depositor did not expect to pay the draft unless compelled to do so by law. The court says: "Was it the mutual understanding and intention that the title should pass unconditionally to the bank, with no right to charge back except by reason of the indorsement, or was it the intention of the parties that the title should only pass conditionally, and that credit should be given temporarily for the convenience of the parties, with the right arising, by express or implied agreement, to charge back? If the first, the bank would be a purchaser for value and the owner; and, if the second, it would be an agent for collection. In passing upon the question of the intention of the parties, it is competent to consider the course of dealing, the rate of discount, the state of the account, and other relevant circumstances." In the subsequent case of *Sternberg v. Crohon & R. Co.* (1916) 172 N. C. 731, 90 S. E. 935, the question was treated as one of intention of the parties.

Various forms of indorsement have been involved in the cases holding that title does not pass. That the title does not pass has been held true although the paper was indorsed for deposit. *Beal v. Somerville* (1892) 17 L.R.A. 291, 1 C. C. A. 598, 5 U. S. App. 14, 50 Fed. 647; *Louisiana Ice Co. v. State Nat. Bank* (1881) *McGloin* (La.) 181. And this is held where the paper was

indorsed "For deposit to the credit of" the depositor. *Freeman v. Exchange Bank* (1891) 87 Ga. 45, 13 S. E. 160; *Baldwin State Bank v. National Bank* (1915) 144 Ga. 181, 86 S. E. 538. The legal import of an indorsement "For deposit to the credit of" the depositor is that ownership of the bill is retained by the depositor. *Freeman v. Exchange Bank* (Ga.) *supra*. This is *prima facie* merely. *Baldwin State Bank v. National Bank* (Ga.) *supra*. An indorsement of a draft sent by one bank to another, "For account of" the remitting bank, does not pass title to the receiving bank. *Williams v. Jones* (1884) 77 Ala. 294. The indorsement of a check sent by one bank to another, "For account of" the remitting bank, does not pass title to the check. *People's Bank v. Jefferson County Sav. Bank* (1894) 106 Ala. 524, 54 Am. St. Rep. 59, 17 So. 728.

In *First Nat. Bank v. Smith* (1882) 132 Mass. 227, where the only question involved was one of the sufficiency of notice of nonpayment of a note sent to a bank, which, in sending it to another bank, indorsed it "For account of" the remitting bank. The court says: "It cannot be doubted that the purpose and effect of this indorsement were to negotiate the note to the bank in Boston, so as to enable it to demand and receive payment of the maker. The words 'for account of' merely indicate the relation which the two banks hold to each other in the transaction. At the most, they show that the note was indorsed to the bank in Boston, not upon a valuable consideration, but for collection."

And in *United States Nat. Bank v. Geer* (1897) 53 Neb. 67, 41 L.R.A. 439, 73 N. W. 266, it was held that an indorsement upon a certificate of deposit, directing payment to the order of a cashier of a bank "For account of" the remitting bank, was ambiguous, and that the effect of such indorsement depended solely upon the intent of the parties. But upon a rehearing in (1898) 55 Neb. 462, 41 L.R.A. 444, 70 Am. St. Rep. 390, 75 N. W. 1088, it was held that such an indorsement was a restrictive indorsement, and not ambiguous, and vested

no general property to the paper in the indorsee, but merely constituted him an agent for the purpose of collection; and parol evidence was not admissible to establish that the transfer to the title was absolute.

2. Effect of the right to charge back.

According to the cases which adhere to the rule that the title remains in the depositor the right to charge back upon dishonor is inconsistent with ownership in the bank. *Balbach v. Frelinghuysen* (1883) 15 Fed. 675; *Re Jarmulowsky* (1918) L.R.A.1918E, 634, 161 C. C. A. 327, 249 Fed. 319; *Armour Packing Co. v. Davis* (1896) 118 N. C. 548, 24 S. E. 365; *Washington Brick, Lime & Mfg. Co. v. Traders Nat. Bank* (1907) 46 Wash. 23, 123 Am. St. Rep. 912, 89 Pac. 157.

The court in *Washington Brick, Lime & Mfg. Co. v. Traders Nat. Bank* (Wash.) supra, says that if the bank relies absolutely upon the draft, and gives the drawer of the draft unconditional credit, then the relation of debtor and creditor is established; that "the draft is the property of the bank, and the credit is the property of the maker of the draft, who has no further interest in the draft nor responsibility for it. But this cannot be, even if the maker of the draft is permitted to check against it, if the understanding is that if the bank fail to collect the draft the amount is to be charged back to the maker, for the credit in such case is really given to the maker, who is held responsible ultimately, and the permission to check against it is simply an accommodation extended to the maker, and the draft is taken only as additional security, indicating to some extent the responsibility of the maker."

The court in *W. J. Barton Seed, Feed & Implement Co. v. Mercantile Nat. Bank* (1913) 128 Tenn. 320, 160 S. W. 848, said: "We are of the opinion that the agreement to charge back in case the paper should be returned is a controlling consideration. It is irreconcilable with absolute ownership on the part of the bank. An agreement in advance to charge back on failure of collection affords, neces-

sarily, only a limited ownership, as in case of bailment. Under the most extreme view, the drawing of the draft in favor of the bank, under the facts stated, amounts only to an agreement for the conditional sale of the paper; that is, that the property should belong to the bank in case collection should be made, but, in case it should not be made, then the paper should revert to the drawer. At least, this would be but an indirect way of stating a collection contract, when considered in connection with the deposit of the face amount of the draft, and the right accorded by the bank to check on the deposit. The substance of the transaction would be a loan and credit by the bank for the face value of the paper, based on the paper as security therefor, to be paid out of the collection, when made; if not made, the paper to be returned and the indebtedness to stand in favor of the bank, to be made good otherwise by the customer."

The right to charge back paper after dishonor, after a full apparent credit on deposit, is inconsistent with any intent on the bank's part to become the owner of such paper. *Re Jarmulowsky* (1918) L.R.A.1918E, 634, 161 C. C. A. 327, 249 Fed. 319. According to the court in *Armour Packing Co. v. Davis* (1896) 118 N. C. 548, 24 S. E. 365, if the bank has the right to charge back the paper on dishonor, the transaction stands unmistakably as a bailment for collection, and the title does not pass to the bank.

That the right to charge back is inconsistent with ownership seems to be the opinion in *Hazlett v. Commercial Nat. Bank* (1890) 132 Pa. 118, 19 Atl. 55.

3. Effect of actually drawing on the credit.

As shown above, it is the rule of the cases now under consideration that title does not pass to the bank, although the depositor is given credit with the right to draw thereon. The right to draw against a credit so obtained is held to be a mere gratuitous privilege. When the depositor has actually drawn upon his account,

however, some courts, adhering generally to the rule that title does not pass, have held that it does pass in such a situation. It has been held that, if the depositor checks out the credit thus received, title passes to the bank. *Standard Trust Co. v. Commercial Nat. Bank* (1914) 166 N. C. 112, 81 S. E. 1074; *Franklin Nat. Bank v. Roberts Bros. Co.* (1915) 168 N. C. 473, 84 S. E. 706 (notes discounted and placed to depositor's credit); *W. J. Barton Seed, Feed & Implement Co. v. Mercantile Nat. Bank* (1913) 128 Tenn. 320, 160 S. W. 848. That an exception to the general rule that title does not pass is created, where the depositor actually draws on the account, is the opinion of the court in *Baldwin State Bank v. National Bank* (1915) 144 Ga. 181, 86 S. E. 538. In the earlier case of *Fourth Nat. Bank v. Mayer* (1892) 89 Ga. 108, 14 S. E. 891, discussed *infra*, the Georgia court held that under the circumstances of the case the title had passed to the bank. That case is distinguished by the court in *Baldwin State Bank v. National Bank*, as follows: "There a regular customer deposited with the bank his own draft, payable to his own order, and indorsed 'for deposit to the credit of' himself, and the same was entered to his credit on the books of the bank, and the draft was forwarded by the bank to another bank for collection. The drawer, 'by the course of dealings,' with the bank, had the right to check on such deposit, and his checks were honored. It was held in that case, under those circumstances, that the title to the draft passed to the first bank. But the presumption of law in the present case as to the draft itself, with the entries thereon, is that the title to the draft under the *Freeman Case* (1891) 87 Ga. 45, 13 S. E. 160, *supra*, was in the drawers of the draft; and that presumption has not been overcome by the plaintiff's proof. The evidence of the plaintiff fails to show any 'course of dealing,' or custom of the bank, or express or implied contract with the depositor, whereby the title to the draft should pass to the plaintiff bank. *Prima facie*, the draft was deposited for col-

lection. The plaintiff might go further, and show, if it could, either such a 'course of dealing' with the bank as that the title was to be in the bank, a custom to that effect, or an express or an implied contract that the title was to be in the bank. But so far as the record discloses this was not done; and the presumption being that the draft was deposited for collection, and that the title was to remain in the drawee, the court erred in directing a verdict for the plaintiff." It seems, in this case, that the depositor was given a credit on the books of the bank at the time of the deposit; at any rate, the cashier so testified. This testimony was held incompetent, the books of the bank being the highest and best evidence as to the giving of credit. Whether, if it had been established that credit was given at the time of the deposit, the court would have held title to have passed, is problematical.

But in *Winchester Mill. Co. v. Bank of Winchester* (1908) 120 Tenn. 225, 18 L.R.A.(N.S.) 441, 111 S. W. 248, the court treats as a deposit for collection a case in which, according to the statement of facts, the customer indorsed a check payable to his order, to the bank, and deposited it to his credit as cash in the bank, and checked out the proceeds. There does not, however, seem to have been any dispute on the point under annotation in that case.

And it has been held, in North Carolina, that where a draft payable to a bank is deposited by a customer indebted to the bank, and is discounted and the net proceeds placed to the depositor's credit in extinguishment of his debt, the bank acquires title to the draft; the fact that, upon the dishonor of the draft, it is charged back to the customer's account, does not as a matter of law deprive the bank of the security of the draft and an attached bill of lading; such charging back is some evidence of a cancellation of the transaction, but not conclusive. *Latham v. Spragins* (1913) 162 N. C. 404, 78 S. E. 282. In this case the depositor had overdrawn to the amount of the draft; hence the credit he received paid a pre-existing

debt; when the draft, with bill of lading attached, was not paid, the bank, as a mere matter of bookkeeping, charged the item back, but held the draft and bill of lading as its own; it was held that the bank was the owner of the draft and bill of lading, as between it and the attaching credit of the depositor, if the jury should find the facts as here stated, but if it be found that the depositor, not being indebted to the bank, merely received credit, and the bank had authority to charge back the item, which it did, the title never passed to the bank.

In case the depositor actually draws against the account, the right of the bank seems to be little more than a lien, according to some courts. *Balbach v. Frelinghuysen* (1883) 15 Fed. 675.

That the receiving bank may obtain a lien on commercial paper thus indorsed, by making advances on the faith of its possession, is held in *Williams v. Jones* (1884) 77 Ala. 294.

Where a customer of a bank delivered to it notes for collection, with the intention that the proceeds of the notes, when paid, should be placed to the credit of the customer, and the bank regarded the notes as collateral for what the customer owed it, it has been held that the bank has a lien upon the notes. *Studebaker Bros. Mfg. Co. v. First Nat. Bank* (1897) — Tex. Civ. App. —, 42 S. W. 573.

In England, it has been held that a banker with whom time bills had been deposited before due, and who had entered the bills in a gross sum with cash or paper which was immediately payable to the credit of the customer, giving him either cash or the liberty to draw to the amount of the bills, and who considered the bills as his own, did not acquire title thereto which prevented a recovery thereof by the customer, upon the insolvency of the banker before maturity of the bills, where the banker had made no advances thereon. *Giles v. Perkins* (1807) 9 East, 12, 103 Eng. Reprint, 477. Lord Ellenborough, Ch. J., says that such a banker has a lien upon the bill if the customer's account is overdrawn, and also has his

legal remedy upon the bill by the indorsement, but that he cannot have a lien on such bill until the account is overdrawn.

b. Doctrine that title passes to the bank.

1. In general.

According to the majority of cases, where there is no definite understanding between the depositor and bank as to the ownership of paper, but the paper is indorsed by an unrestricted indorsement and deposited in the usual course of business with the bank, which gives credit to the depositor for the amount thereof, with the right to draw thereon, title passes to the bank.

United States. — *Security Nat. Bank v. Old Nat. Bank* (1917) 154 C. C. A. 1, 241 Fed. 1; *National Bank v. Bradley* (1920) 264 Fed. 700.

Arkansas. — *Southern Sand & Material Co. v. People's Sav. Bank & T. Co.* (1911) 101 Ark. 266, 142 S. W. 178; *Cox Wholesale Grocery Co. v. National Bank* (1913) 107 Ark. 601, 156 S. W. 187; *Sanders v. W. B. Worthen Co.* (1916) 122 Ark. 104, 182 S. W. 549; *Brown v. Yukon Nat. Bank* (1919) 138 Ark. 210, 209 S. W. 734, approved in *Farmers' State Bank v. First State Bank* (1920) — Ark. —, 218 S. W. 847 (where the draft was made payable to the bank).

California. — *Plumas County Bank v. Bank of Rideout, S. & Co.* (1913) 165 Cal. 126, 47 L.R.A. (N.S.) 552, 131 Pac. 360; *Newmark Grain Co. v. Merchants Nat. Bank* (1913) 166 Cal. 203, 135 Pac. 958; *Gonyer v. Williams* (1914) 168 Cal. 452, 143 Pac. 736.

District of Columbia. — *Dirnfield v. Fourteenth Street Sav. Bank* (1911) 37 App. D. C. 11.

Georgia. — *Rawls v. Saulsbury* (1881) 66 Ga. 394; *Spooner v. Bank of Donalsonville* (1914) 142 Ga. 236, 82 S. E. 625. But see *supra*, III. for second appeal.

Illinois. — *American Trust & Sav. Bank v. Gueder & P. Mfg. Co.* (1894) 150 Ill. 336, 37 N. E. 227; *Doppelt v. National Bank* (1898) 175 Ill. 432, 51 N. E. 753; *American Exch. Nat. Bank v. Gregg* (1890) 37 Ill. App. 425, reversed on another point in (1891) 138

Ill. 596, 32 Am. St. Rep. 171, 28 N. E. 839; *Sears v. C. C. Emerson & Co.* (1913) 182 Ill. App. 522.

Indiana.—*Downey v. National Exch. Bank* (1912) 52 Ind. App. 672, 96 N. E. 403.

Kansas.—*Noble v. Doughten* (1905) 72 Kan. 356, 3 L.R.A. (N.S.) 1167, 83 Pac. 1048; *Scott v. W. H. McIntyre Co.* (1914) 93 Kan. 508, L.R.A. 1915D, 139, 144 Pac. 1002 (draft payable to bank).

Maryland.—*First Denton Nat. Bank v. Kenney* (1911) 116 Md. 24, 81 Atl. 227, Ann. Cas. 1913B, 1337 (obiter); *Auto & Accessories Mfg. Co. v. Merchants' Nat. Bank* (1911) 116 Md. 179, 81 Atl. 294 (draft payable to bank).

Massachusetts.—*Brooks v. Bigelow* (1886) 142 Mass. 6, 6 N. E. 766 (recognizing this as the rule in New York); *Taft v. Quinsigamond Nat. Bank* (1899) 172 Mass. 363, 52 N. E. 387.

Missouri.—*Ayres v. Farmers & M. Bank* (1883) 79 Mo. 421, 49 Am. Rep. 235; *Dymock v. Midland Nat. Bank* (1896) 67 Mo. App. 97; *Hendley v. Globe Refinery Co.* (1904) 106 Mo. App. 20, 79 S. W. 1163; *Citizens State Bank v. Ferson* (1919) — Mo. App. —, 208 S. W. 136; *Haas v. Kings County Fruit Co.* (1916) — Mo. App. —, 183 S. W. 676; *Renfrow Commission Co. v. W. B. Northrup Co.* (1920) — Mo. App. —, 222 S. W. 487; *Ayres v. Farmers & M. Bank*, *supra*, is approved and followed in *Ayres v. Lebold* (1883) 79 Mo. 426; *Bullene v. Coates* (1883) 79 Mo. 426; *Flannery v. Coates* (1883) 80 Mo. 444; and *Kavanaugh v. Farmers' Bank* (1894) 59 Mo. App. 540.

Nebraska.—*National Bank v. Bossemeyer* (1917) 101 Neb. 96, L.R.A. 1917E, 374, 162 N. W. 503.

New Jersey.—*Hoffman v. First Nat. Bank* (1884) 46 N. J. L. 604. But see other cases from this state, *infra*.

New York. — *Clark v. Merchants' Bank* (1849) 2 N. Y. 380; *Ætna Nat. Bank v. Fourth Nat. Bank* (1871) 46 N. Y. 82, 7 Am. Rep. 314; *Justh v. National Bank* (1874) 56 N. Y. 478; *Market Bank v. Hartshorne* (1866) 3 Keyes, 137; *Metropolitan Nat. Bank v. Loyd* (1882) 90 N. Y. 530; *Cragie v. Hadley* (1885) 99 N. Y. 131, 52 Am. Rep. 9, 1 N. E. 537; *People v. St.*

Nicholas Bank (1894) 77 Hun, 159, 28 N. Y. Supp. 407; *Riverside Bank v. Woodhaven Junction Land Co.* (1898) 34 App. Div. 359, 54 N. Y. Supp. 266; *American Trust & Sav. Bank v. Austin* (1898) 25 Misc. 454, 55 N. Y. Supp. 561, affirmed without opinion in (1900) 47 App. Div. 635, 62 N. Y. Supp. 1131; *Jaffe v. Weld* (1911) 132 N. Y. Supp. 505, affirmed in (1912) 149 App. Div. 942, 133 N. Y. Supp. 1127, s. c. on subsequent appeal in (1913) 155 App. Div. 110, 139 N. Y. Supp. 1101, which was affirmed without opinion in (1913) 208 N. Y. 593, 102 N. E. 1104; *Krafft v. Citizens' Bank* (1910) 139 App. Div. 610, 124 N. Y. Supp. 214; *German Nat. Bank v. Carnegie Trust Co.* (1916) 172 App. Div. 158, 158 N. Y. Supp. 222, affirmed without opinion in (1918) 224 N. Y. 552, 120 N. E. 863. See *Lyons v. Union Exchange Nat. Bank* (1912) 150 App. Div. 493, 135 N. Y. Supp. 121; *National Citizens' Bank v. Howard* (1886) 3 How. Pr. N. S. 511; *Moore v. Riverside Bank* (1899) 25 Misc. 720, 55 N. Y. Supp. 615; *Walton v. Riverside Bank* (1899) 29 Misc. 304, 60 N. Y. Supp. 519; *American Nat. Bank v. Warren* (1916) 96 Misc. 265, 160 N. Y. Supp. 413; *Adams v. McCann* (1851) 27 Jones & S. 59, 13 N. Y. Supp. 424; *People v. Fowler* (1914) 31 N. Y. Crim. Rep. 95, 152 N. Y. Supp. 672.

Ohio. — *Howe v. Akron Sav. Bank* (1905) 16 Ohio C. C. N. S. 320.

Tennessee.—*Friberg v. Cox* (1896) 97 Tenn. 550, 37 S. W. 283; *Williams v. Cox* (1896) 97 Tenn. 555, 37 S. W. 283.

Texas. — *Chrisman v. Lumberman's Nat. Bank* (1914) — Tex. Civ. App. —, 163 S. W. 651; *Howe Grain & Mercantile Co. v. A. B. Crouch Grain Co.* (1919) — Tex. Civ. App. —, 211 S. W. 946.

Vermont.—*Walker v. D. W. Ranlett Co.* (1915) 89 Vt. 71, 93 Atl. 1054.

Virginia. — *FOURTH NAT. BANK v. BRAGG* (reported herewith) ante, 1034.

Washington.—*Vickers v. Machinery Warehouse & Sales Co.* (1920) — Wash. —, 191 Pac. 869; *National Bank v. Hines* (1920) — Wash. —, 192 Pac. 899.

Wisconsin.—*Aebi v. Bank of Evans-*

ville (1905) 124 Wis. 73, 68 L.R.A. 964, 109 Am. St. Rep. 925, 102 N. W. 329.

In *Morris v. First Nat. Bank* (1902) 201 Pa. 160, 50 Atl. 1000, where the draft was indorsed "For deposit," and entered to the depositor's credit in the bank, the court says that so long as the amount remained in the depositor's account to his credit "the bank was the owner, and the title did not revert to him (the depositor) until the draft was returned unpaid and charged back to the debit side of his account." Compare with *Hazlett v. Commercial Nat. Bank* (1890) 132 Pa. 118, 19 Atl. 55, 1, *supra*.

The contrary statement in *National Gold Bank & T. Co. v. McDonald* (1875) 51 Cal. 64, 21 Am. Rep. 697, to the effect that, when checks on another bank are deposited with the receiving teller and the credit for them entered on the pass book, it cannot be contended that they are received as cash, or otherwise than for collection, is overruled by the foregoing decision.

In *First Nat. Bank v. Dickson* (1889) 6 Dak. 301, 50 N. W. 124, certificates of deposit had been received and credited as cash in a bank, and while on their way for collection were attached by a creditor of the depositor, upon hearing which the bank charged them back to the depositor. In an action for the value of the certificates, the court held that the title was not revested in the depositor by the act of the bank.

The passing by one bank of the amount of a time draft to the credit of the remitting bank, when the draft came to maturity, was held to pass title to the draft to the bank thus crediting, in *Pacific Bank v. Mitchell* (1845) 9 Met. (Mass.) 297.

The fact that a serial number is assigned to a draft thus taken upon credit by a bank cannot affect the question of title, where it is plainly shown by other evidence that the title was intended to pass to the bank, although it may be a custom of banks to assign such a serial number only to items received for collection, and not to those accepted as cash. *Stott v. W. H. McIntyre Co.* (1914) 93 Kan. 508, L.R.A.1915D, 139, 144 Pac. 1002.

It is stated generally in *Re Franklin Bank* (1828) 1 Paige (N. Y.) 249, 19 Am. Dec. 413, that the checks or bills which the customer of a bank deposits in the bank become the property of the bank, and he becomes the creditor.

The general rule is stated in *Re State Bank* (1893) 56 Minn. 119, 45 Am. St. Rep. 454, 57 N. W. 336, as follows: "Upon a deposit being made by the customer in a bank, in an ordinary course of business, of money, drafts, or other negotiable paper received and credited as money, the title vests in the bank, and the money, draft, or other paper immediately becomes the property of the bank, and the bank becomes debtor of the depositor for the amount." But it is recognized in this state that the intention of the parties governs, and it is held in this case that the intention of the parties, as shown by a notice in the depositor's pass book and the course of business, was that the bank was to act, and did act, merely as the agent of the depositor in the collection of the paper. This statement of the rule is approved in subsequent cases. *Security Bank v. Northwestern Fuel Co.* (1894) 58 Minn. 141, 59 N. W. 987; *South Park Foundry & Mach. Co. v. Chicago G. W. R. Co.* (1899) 75 Minn. 186, 77 N. W. 796. See holding, *infra*, V.

At least, title passes to the bank when the depositor actually draws on the credit thus received. *Vaughn v. Farmers & M. Nat. Bank* (1910) 59 Tex. Civ. App. 380, 126 S. W. 690; *Old Nat. Bank v. Gibson* (1919) 105 Wash. 578, 6 A.L.R. 247, 179 Pac. 117. And see *North Carolina and Tennessee cases*, *supra*, IV. a, 3. Title was held to pass to the bank in *Vaughn v. Farmers & M. Nat. Bank* (Tex.) *supra*, where the depositor had drawn on the credit received from the deposit of the draft, although, upon the dishonor of the draft, the credit thus received was charged back to the depositor. The depositor testified that this was done without his authority, and the court states that, at most, it was but a circumstance upon an issue

of fraud, to be considered together with all other circumstances, by the court trying the cause, and the conclusion was reached that on the whole the trial court's ruling was correct.

Some of the New Jersey decisions seem to require, as a condition precedent to the passing of title to paper, that the depositor be already indebted to the bank, or that he be given the right to draw—a right which he has exercised by actually drawing. *Perth Amboy Gaslight Co. v. Middlesex County Bank* (1900) 60 N. J. Eq. 84, 45 Atl. 704; *Titus v. Mechanics' Nat. Bank* (1871) 35 N. J. L. 588. This is the view taken by the Federal circuit court for the district of New Jersey, in *Balbach v. Frelinghuysen* (1883) 15 Fed. 675. If these conditions are not present, the title does not pass. *Middlesex County v. State Bank* (1880) 32 N. J. Eq. 467; *Balbach v. Frelinghuysen* (Fed.) supra. The rule is stated in *Perth Amboy Gaslight Co. v. Middlesex County Bank* (N. J.) supra, as follows: "If a depositor deposits a check or draft on a third party with the understanding, either expressed or implied, that he is to draw against it at once as if it were cash, and the bank agrees to accept it and treat it as cash, and the depositor draws against it before the amount is realized by the bank, then it is properly treated as a deposit of cash. Or if the depositor is already indebted to the bank, and the deposit is received in whole or partial payment, the same result follows. But in the absence of an understanding or situation of this kind, it is a mere bailment." This seems to be the theory of *Titus v. Mechanics' Nat. Bank* (N. J.) supra, although this case contains some expressions which indicate that the mere giving of credit is sufficient to pass title to the bank. The discussion referred to is as follows: "Then, if there was evidence from which the jury might infer that these checks were received as cash, the cause should have been submitted to them. I think there was such evidence. They were received and credited in a cash account as cash; in part as payment of an overdraft, and in part to be

drawn against. They were received and credited in the same way as bills or notes of other banks. By such crediting the bank became the owner of these bills, as they do of legal tender notes or bank bills so deposited. And had the defendants failed the next day, the plaintiffs could not have demanded these identical checks as their property, left for collection, against a receiver or an assignee in bankruptcy; the plaintiffs had received the price of these checks by having it credited on their overdrafts, and by drawing for it." In *Middlesex County v. State Bank* (N. J.) supra, where the state treasurer, on hearing that one of his depository banks was embarrassed, drew on that bank, and deposited the draft in another bank, for which he was given credit as cash on its books, it was held that the bank, by such credit, did not in any wise make the draft its own, as it was the intention of the treasurer merely to have his check collected, the bank acting solely as his agent.

But see *Hoffman v. First Nat. Bank* (1884) 46 N. J. L. 604, supra.

The fact that the bank charges interest on any sums advanced to the customer, from the date of the advancement until the paper is actually paid, does not make the bank a collector or conditional owner of the paper. *Vickers v. Machinery Warehouse & Sales Co.* (1920) — Wash. —, 191 Pac. 869.

It is sometimes said that, when a check not indicating that it was indorsed for collection is deposited in a bank which credits the depositor with the amount thereof, the rule that title passes to the bank is *prima facie* merely, and yields to the intention of the parties. *Sanders v. W. B. Worthen Co.* (1916) 122 Ark. 104, 182 S. W. 549; *Downey v. National Exch. Bank* (1912) 52 Ind. App. 672, 96 N. E. 403; *Walker v. D. W. Ranlett Co.* (1915) 89 Vt. 71, 93 Atl. 1054; *Aebi v. Bank of Evansville* (1905) 124 Wis. 73, 68 L.R.A. 964, 109 Am. St. Rep. 925, 102 N. W. 329. The mere fact that the bill is indorsed in blank when deposited by the customer has been held to raise a *prima facie* case of title passing to bank.

Clark v. Merchants' Bank (1849) 2 N. Y. 380. It is clear that the question is one of intention, and whenever this can be ascertained the title to the paper is determined.

It has been held that unless the depositor is credited with the paper, title does not pass, and this seems clear. Thus, the facts that a depositor kept an account in the defendant bank, made from time to time remittances to it, and drew drafts upon it, and had an arrangement with it whereby he was allowed interest upon his average balances, were held in Scott v. Ocean Bank (1861) 23 N. Y. 289, not sufficient to show that a bill of exchange deposited with the bank became its property, where it was not shown that the bill had been credited to the depositor, or was intended to be so credited as cash until the same should be paid. That the title does not pass, where no credit is given and the check is in the possession of the bank when it closes its doors and is taken possession of by the receiver, is held in Showalter v. Cox (1896) 97 Tenn. 547, 37 S. W. 286.

Whatever may have been the rule in Virginia prior to the decision in the reported case (FOURTH NAT. BANK v. BRAGG, ante, 1034), the rule is settled by that case in accord with the majority rule. In Miller v. Norton (1913) 114 Va. 609, 77 S. E. 452, the indorsement was in blank and the credit properly entered, but not drawn upon; the draft was collected by a correspondent bank after the appointment of a receiver for the home bank, and the receiver had collected the amount from the correspondent as assets of the insolvent bank; there were some conditions as to the bank's not being liable for acts of its agents, etc., on the deposit slip, but the decision rests upon the broad proposition that the mere giving of credit to a depositor's account of a check does not constitute the bank a holder of the check. The court holds that this is not inconsistent with its former holdings in Fayette Nat. Bank v. Summers (1906) 105 Va. 689, 7 L.R.A.(N.S.) 694, 54 S. E. 862, and Greensburg Nat. Bank v. Syer (1912) 113 Va. 53, 73 S. E. 438, where

it was held that all of the circumstances should be considered by the jury in determining the intention of the parties, since in the instant case there were no circumstances to take the case out of the rule of law.

Various facts appear in the foregoing cases. The title to a draft indorsed in blank and sent by one exchange broker to another, between whom there were mutual accounts, passes to the receiving broker, although in a letter inclosing the remittance the draft is stated to be for collection. Clark v. Merchants' Bank (N. Y.) supra. And where a person deposited a check in a bank, and had the amount placed in a pass book by the officers of the bank, and took possession of the pass book as his own, it was held, in Rawls v. Saulsbury (1881) 66 Ga. 394, that the relation of debtor and creditor existed between the depositor and the bank, the bank becoming the depositor's debtor to the amount charged in the bank book. In Dirnfield v. Fourteenth Street Sav. Bank (1911) 37 App. D. C. 11, there was a credit entered in favor of the depositor, the check having been indorsed in blank, and there was a dispute as to other facts bearing upon the intention of the parties. The action was by the depositor against the bank for damages caused by its refusal to honor a negotiable note depositor had drawn upon it, the amount of which was covered by the credit he had obtained upon the check, which check had not been paid at the time the note was presented. It was held error to direct a verdict for defendant, since the presumption on the undisputed facts was that title to the check passed to the bank, and the disputed questions should have been left to the jury. In Downey v. National Exch. Bank (1911) 52 Ind. App. 672, 96 N. E. 403, the check had been indorsed in blank and the amount credited to deposit account of payee; the check was forwarded through other banks for collection; the drawer stopped payment thereon and it was returned in due course, and the depositor received the same, and his account was charged with the amount; his action was

against one of the banks through which it had been forwarded, on the allegation of negligence; it was held that since title passed to the forwarding bank when it credited depositor with the check, there was no privity of contract between depositor and defendant; that when he received the check again there was a resale. The paper in question in *Auto & Accessories Mfg. Co. v. Merchants' Nat. Bank* (1911) 116 Md. 179, 81 Atl. 294, was a draft with bill of lading attached which the bank had credited to depositor, allowing him to check against the account. It forwarded the draft, etc., to defendant for collection; after defendant had collected the amount, but before forwarding proceeds, the fund was attached as that of the depositor. The decision went in favor of the garnishee, on the ground that a check indorsed in blank and passed to the credit of the depositor at once becomes the property of the bank. In *American Trust & Sav. Bank v. Gueder & P. Mfg. Co.* (1894) 150 Ill. 336, 37 N. E. 227, where a check was indorsed, "For deposit," and was received by the bank through the mail, and, upon receipt of the check, the bank gave the depositor credit for its amount on the depositor's account the same as though it had been cash, and the depositor became entitled at once to draw upon the amount, it was held that the deposit was, in legal effect, a negotiation of the check so as to vest the legal title thereto in the banker, with the right on his part to charge it back to the depositor in case it was not paid. Although the right of the bank to charge back the amount would appear to indicate that the transaction was a bailment, the court said: "The transaction, then, was one which, in the absence of fraud, would have passed the title irrevocably to" the bank.

In various cases having unusual facts, this rule has been applied. In *Guggenheimer v. Queen Bee Flour Mills Co.* (1916) 136 Tenn. 488, 190 S. W. 455, a draft drawn by the Queen Bee Flour Mills Company and payable to the Security National Bank was deposited in the bank by the United

Flour Mills Company, and credit given to the latter, with the right to draw thereon. The draft was sent to a bank in Chattanooga, Tennessee, and was paid, and the proceeds of the draft attached in the hands of the Chattanooga bank as the property of the Queen Bee Flour Mills Company. The Queen Bee Flour Mills Company was the regular selling agent of the United Flour Mills Company, and the course above outlined was followed between the mills, and a credit given to the Queen Bee Mills by the United Mills upon its books, a transaction which was assumed to be bona fide. Upon this state of facts the court held that the title to the draft was in the Security National Bank. Compare with *W. J. Barton Seed, Feed & Implement Co. v. Mercantile Nat. Bank* (1913) 128 Tenn. 320, 160 S. W. 848, *supra*. In holding that an averment in an indictment charging a United States Senator with having received certain checks at St. Louis, Missouri, as compensation for services rendered before the Postoffice Department, in violation of the United States statute, and alleging the payment to him of the money thereon at that place, is not supported by evidence that the checks drawn on a St. Louis Trust Company were received by him in the city of Washington, and were by him there indorsed and deposited with a local bank, and were afterwards paid at St. Louis, and that the amount of each check was immediately upon deposit the account of defendant, who had the credited by the Washington bank to right to draw against the account without waiting for payment at St. Louis, the court approves of the rule now under consideration, saying that the payment in this case took place at Washington. *Burton v. United States* (1905) 196 U. S. 303, 49 L. ed. 482, 25 Sup. Ct. Rep. 243. Title to checks payable to a depositor and indorsed to the bank was held to have passed to the bank, where the checks were forwarded by mail to the bank with the intention that they should be collected, and the proceeds thereof, when collected, credited to the account of the depositor, and the bank upon

receipt of the check credited the account of the depositor with the face amount thereof, subject to the right to charge back against the account of the depositor any of the checks which were not collected, although between the mailing and the receipt of the check the depositor had been declared an insolvent. *Chapman v. Mills & Gibb* (1917) 241 Fed. 715, affirmed without opinion (1918) 162 C. C. A. 661, 250 Fed. 1018. Where a bank agreed to finance a business to a certain percentage of the value of each carload of its products shipped, and, in accord with its agreement, credited to one who sold the raw products to the manufacturer the percentage due such seller upon an order from the manufacturer, accompanied by a bill of lading for the car shipped, the relation of debtor and creditor was at once established between the seller and the bank, and the bank could not charge back the credit thus given, upon failure to collect from the consignee for the products thus shipped. *People's State Bank v. Davis* (1915) — Tex. Civ. App. —, 178 S. W. 671. Where tax receipts were received by a bank in good faith as deposits, and credited as so much money, it was held, in *Wasson v. Lamb* (1889) 120 Ind. 514, 6 L.R.A. 191, 16 Am. St. Rep. 342, 22 N. E. 729, that the bank became at once legally liable to the depositor as for so much cash deposited. The court said: "Upon principle, there can be no reason why, if parties choose to treat a deposit of paper or other securities as cash, so that it is available to the depositor as cash, the transaction should not be regarded as equivalent to a deposit of money." In *Gordon v. Rasines* (1893) 5 Misc. 192, 25 N. Y. Supp. 767, a depositor who deposited with a bank for collection three notes on the day they fell due, which notes were collected and passed to the depositor's credit in like manner as checks deposited and collected on that day would have been passed, was held to have no right to a preference in the assets of the bank after insolvency. The court states that the depositor was only to be credited with the proceeds of the collection that he

might draw against the same as he might have drawn against the proceeds of checks deposited in like manner. A bank which discounted and placed to the credit of a customer the proceeds of a time draft was assumed to become the owner of the draft in *First Nat. Bank v. Crawford* (1872) 13 Ohio Dec. Reprint, 807, the question in that case being whether the bank became a bona fide holder. The bank in *Bank of British North America v. Warren & Co.* (1908) 19 Ont. L. Rep. 257, was assumed to become the owner of a check which a depositor, whose account was overdrawn, sent to the bank with a request that it be placed to his credit,—a request which was complied with. The main question in this case was whether or not the bank had become a holder in due course.

The rule that title passes to the bank has been adhered to in case of paper indorsed in various ways. Title to a check indorsed "For deposit," which is credited to the depositor by the bank the same as though cash had been received, passes to the bank. *American Trust & Sav. Bank v. Gueder & P. Mfg. Co.* (1894) 150 Ill. 336, 37 N. E. 227; *Morris v. First Nat. Bank* (1902) 201 Pa. 160, 50 Atl. 1000. At least, it passes prima facie, especially where the depositor has a right to draw thereon. *National Commercial Bank v. Miller & Co.* (1884) 77 Ala. 168, 54 Am. Rep. 50. This case is cited with approval in *Metropolitan Nat. Bank v. Merchants Nat. Bank* (1899) 182 Ill. 367, 74 Am. St. Rep. 180, 55 N. E. 360, a case involving a bank draft. In *National Commercial Bank v. Miller & Co.* (Ala.) supra, it was held, where a check was indorsed, "For deposit," and the depositor had for some time previously kept a deposit account with the banker, to the credit of which he was accustomed to deposit checks payable to him, entries of which were made in his pass book, and to draw against such deposits, that such an indorsement, in the absence of a different understanding, was presumptive of more than a mere agency or authority to collect, and that the effect of the indorsement was

to vest the bank with the title to and control of the check. And so, where the check is indorsed "For deposit to the credit of" the depositor, title passes to the bank. *Ditch v. Western Nat. Bank* (1894) 79 Md. 192, 23 L.R.A. 164, 47 Am. St. Rep. 375, 29 Atl. 72, 138; *Security Bank v. Northwestern Fuel Co.* (1894) 58 Minn. 141, 59 N. W. 987; *National Park Bank v. Levy Bros.* (1892) 17 R. L. 746, 19 L.R.A. 475, 24 Atl. 777.

See *American Trust & Sav. Bank v. Gueder & P. Mfg. Co.* (1894) 150 Ill. 336, 37 N. E. 227, *infra*.

Such an indorsement is not restrictive. *Security Bank v. Northwestern Fuel Co.* (1894) 58 Minn. 141, 59 N. W. 987.

The title to a draft payable to the depositor's order, and indorsed "For deposit to the credit of" the depositor, and credited to him on the books of the bank, with the right in him to check against the account, passes to the bank. *Fourth Nat. Bank v. Mayer* (1892) 89 Ga. 108, 14 S. E. 891. The holding in *Fourth Nat. Bank v. Mayer* (Ga.) *supra*, as appears in the court's headnote, is as follows: "Where a regular customer of the bank deposits with the bank his draft, payable to his own order and indorsed 'For deposit to the credit of' the drawer, and the same is entered to his credit on the books of the bank and forwarded by the bank to another bank for collection, the drawer by the course of dealing having the right to check against such deposit, and in fact checking against it, and his checks being honored, the title to the draft passes to the first bank, and when collected by the second the proceeds are not subject to garnishment at the instance of a creditor of the drawer, such proceeds being the property, not of the drawer, but of the first bank." That the circumstances of the *Mayer* Case constitute an exception to the general rule that title does not pass is held by the court in the subsequent case of *Baldwin State Bank v. National Bank* (1915) 144 Ga. 181, 86 S. E. 538. Just what circumstance, however, creates the exception, is not made clear in the *Baldwin State Bank* Case.

The right of the bank to charge back the amount of the credit was denied in *Spooner v. Bank of Donalsonville* (1914) 142 Ga. 236, 82 S. E. 625. But upon a second appeal facts were shown in evidence upon which the court held differently. See *supra*, III. The title to a draft sent by one bank to another between which there were mutual accounts indorsed "for account of" the remitting bank has been held to pass to the receiving bank. *Wyman v. Colorado Nat. Bank* (1879) 5 Colo. 30, 40 Am. Rep. 133.

2. Effect of right to charge back.

These cases proceed upon the theory that the fact that the bank has the right to charge back the amount of the check upon dishonor is not inconsistent with ownership in the bank. See especially the following: *Plumas County Bank v. Bank of Rideout, S. & Co.* (1913) 165 Cal. 126, 47 L.R.A. (N.S.) 552, 131 Pac. 360; *Noble v. Doughten* (1905) 72 Kan. 336, 3 L.R.A. (N.S.) 1167, 83 Pac. 1048; *Scott v. W. H. McIntyre Co.* (1914) 93 Kan. 508, L.R.A. 1915D, 139, 144 Pac. 1002; *Brusegaard v. Ueland* (1898) 72 Minn. 283, 75 N. W. 228; *Ayres v. Farmers & M. Bank* (1883) 79 Mo. 421, 49 Am. Rep. 235; *Hendley v. Globe Refinery Co.* (1904) 106 Mo. App. 20, 79 S. W. 1163; *Burrton State Bank v. Pease-moore Mill Co.* (1912) 163 Mo. App. 135, 145 S. W. 508; *National Bank v. Bossemeyer* (1917) 101 Neb. 96, L.R.A. 1917E, 374, 162 N. W. 503; *Walker v. D. W. Ranlett Co.* (1915) 89 Vt. 71, 93 Atl. 1054; *Vickers v. Machinery Warehouse & Sales Co.* (1920) — Wash. —, 191 Pac. 869.

In *Howe Grain & Mercantile Co. v. A. B. Crouch Grain Co.* (1919) — Tex. Civ. App. —, 211 S. W. 946, it was held that the title passed to the bank, although it appeared that in case of dishonor the bank would have charged back the credit.

The right to charge back is, in strictness, the right of an indorsee against an indorser. *Noble v. Doughten* (1905) 72 Kan. 336, 3 L.R.A. (N.S.) 1167, 83 Pac. 1048; *Ayres v. Farmers & M. Bank* (1883) 79 Mo. 421, 49 Am. Rep. 235. The court in *Scott v. W. H.*

McIntyre Co. (1914) 93 Kan. 508, L.R.A.1915D, 139, 144 Pac. 1002, says: "We cannot regard the right of a bank receiving a draft for deposit, to charge the amount back to the depositor if payment is refused, as having a determining influence. Such a right on the part of the bank would seem to be an ordinary incident even of a deposit which is accepted as cash. The transaction is based upon the supposition that the draft is going to be paid. A guaranty of payment often results from the indorsement, but, however evidenced, it should not militate against the theory of the passing of the title. The fact that the depositor has guaranteed the payment of a draft with a bill of lading attached should not prevent the bank from holding the goods or their proceeds and looking first to them, as against the depositor or any claimant under him, such as an attaching creditor." The right to charge back checks not paid does not prevent the title to the checks from vesting in the bank, according to *Brusegaard v. Ueland* (1898) 72 Minn. 283, 75 N. W. 228, because "the condition was for the benefit of the bank, not for the benefit of appellant; and the title to the checks vested in the bank at the time it received them, subject to the condition that, if they were not paid on presentation, they should be charged back against his account and the title of the bank would thereupon be divested. This condition never became operative, and therefore the title acquired by the bank on receipt of the check had never been divested, even if it appears, as appellant contends, that the bank closed its doors before the checks were actually collected. If the title to the checks once vested in the bank, the closing of its doors would not, in the absence of fraud, divest that title." The court in *Walker v. D. W. Ranlett Co.* (1915) 89 Vt. 71, 93 Atl. 1054, says: "The finding that, in the event of failure to collect the draft, the claimant was to charge it up to defendant's account, does not rebut the presumption that title to the draft and its proceeds was in the claimant, but was consistent with it. It was, or may well have been,

simply a method adopted by the bank to collect from the drawer in case the draft was dishonored. It was a circumstance to be considered on the question of title; but the right to charge back, either by express agreement or custom of bankers, is generally recognized where title has passed, and so is not deemed controlling on that question."

It seems not to have been the custom of the bank in *Ditch v. Western Nat. Bank* (1894) 79 Md. 192, 23 L.R.A. 164, 47 Am. St. Rep. 375, 29 Atl. 72, 138, to charge back the checks upon dishonor; at least, there was testimony in the case that it was not the custom of the bank to charge the checks back, but to return the checks to the depositor and get the money refunded.

It being only the right of an indorsee against his indorser, it seems that the steps necessary to charge an indorser should appear, and so it is held in *Aebi v. Bank of Evansville* (1905) 124 Wis. 73, 68 L.R.A. 964, 109 Am. St. Rep. 925, 102 N. W. 329, holding the depositor discharged by delay in presentment.

Although the New York cases adhere generally to the doctrine now under discussion, there is a singular paucity of authority in this state as to the effect upon the passing of title, of the right to charge back the paper to the depositor in case of dishonor. That the bank has the right to charge back in case of dishonor is assumed in *American Trust & Sav. Bank v. Austin* (1898) 25 Misc. 454, 55 N. Y. Supp. 561, affirmed in (1900) 47 App. Div. 635, 62 N. Y. Supp. 1131. And in *Riverside Bank v. Woodhaven Junction Land Co.* (1898) 34 App. Div. 359, 54 N. Y. Supp. 266, the bank actually charged the amount back, although the action in that case was sustained on the theory that the bank still had title to the paper. But in *First Nat. Bank v. Stengel* (1918) 169 N. Y. Supp. 217, affirmed without opinion in (1918) 185 App. Div. 906, 171 N. Y. Supp. 1085, and this decision affirmed without opinion in (1920) 227 N. Y. 659, 126 N. E. 906, where the deposit slip contained a provision that checks and drafts on other banks were credited

subject to payment, the court held that the reservation by the bank of the right to charge back to the depositor's account any dishonored checks or drafts was inconsistent with the theory of absolute ownership on the part of the bank, saying that "the credit given is conditional in character, in anticipation of collection. It is not the absolute credit given in the case of a purchase, but a mere bookkeeping credit for convenience. If the depositor is permitted to draw, it is not a right on its part, but a mere favor extended by the bank. The relation existing between the bank and the depositor is not debtor and creditor, but agent and principal. In order to establish the relation of debtor and creditor by purchase, the credit must be absolute and unconditional." This, however, seems contrary to the general theory of the other New York cases, all of which seem to recognize the right of a bank to charge back to the depositor in case of dishonor.

3. Theory.

As bearing upon the passing of the title, the right to draw upon the account is emphasized in the following cases: *Spooner v. Bank of Donalsonville* (1914) 142 Ga. 236, 82 S. E. 625; *American Trust & Sav. Bank v. Gueder & P. Mfg. Co.* (1894) 150 Ill. 336, 37 N. E. 227; *Sears v. Emerson* (1913) 182 Ill. App. 522; *Ditch v. Western Nat. Bank* (1894) 79 Md. 192, 23 L.R.A. 164, 47 Am. St. Rep. 375, 29 Atl. 72, 138; *Security Bank v. Northwestern Fuel Co.* (1894) 58 Minn. 141, 59 N. W. 987; *Ayres v. Farmers & M. Bank* (1883) 79 Mo. 421, 49 Am. Rep. 235; *Citizens' State Bank v. Ferson* (1919) — Mo. App. —, 208 S. W. 136. See *First Nat. Bank v. Armstrong* (1889) 39 Fed. 231, *supra*, II. a.

In *Fourth Nat. Bank v. Mayer* (1892) 89 Ga. 108, 14 S. E. 891, where a regular customer of a bank deposited with the bank his draft, payable to his own order and indorsed, "For deposit to the credit of" the drawer, and the same was entered to his credit on the books of the bank, and the drawer, by course of dealing, had the right to draw against such deposit, and in fact

did draw against it, and his checks were honored, it was held that the title to the draft passed to the first bank, and, when collected by the second, the proceeds were not subject to garnishment at the instance of a creditor of the drawer, such proceeds being the property, not of the drawer, but of the first bank. This case distinguished *Freeman v. Exchange Bank* (1891) 87 Ga. 45, 13 S. E. 160, where the facts were almost identical, except that in the latter case it did not appear that the depositor had the right to draw against the proceeds of the check before they were collected. The court in *Ditch v. Western Nat. Bank* (1894) 79 Md. 192, 23 L.R.A. 164, 47 Am. St. Rep. 375, 29 Atl. 72, says that if the bank had paid to the depositor the full amount of the check in coin or currency, when it was delivered to them, there would have been no question about the nature and effect of the transaction, and continues: "But they [the bank] gave *Ditch & Brothers* [the depositor] what was preferred to the coin or currency. They gave them the unconditional right to get the coin or currency at any time they might see fit to call for it, thus relieving them from the trouble and risk attending the care and custody of it. Now it is extremely difficult to see on what principle, or by what process, *Ditch & Brothers* could retain any interest in this check after they had delivered it to a blank indorsee and had received full and valuable consideration for it. It will not be alleged by anyone that the banker did not give a consideration valuable in the eye of the law, and sufficient to maintain the transfer of the check, when he made an absolute and unconditional contract with the depositor to pay his checks to the amount of the deposit." In *Metropolitan Nat. Bank v. Loyd* (1882) 90 N. Y. 530, certain checks were deposited in a bank for collection, and, at the same time, others were deposited and entered as cash on the depositor's pass book; and, as to the latter checks, it was held that the title passed to the bank, and that they were not again subject to the depositor's control. The court said: "It is true no express

agreement was made, transferring the check for so much money; but it was delivered to the bank and accepted by it, and the bank gave Murray credit for the amount, and he accepted it. That was enough. The property in the check passed from Murray and vested in the bank. He was entitled to draw the money so credited to him, for as to it the relation of debtor and creditor was formed, and the right of Murray to command payment at once was of the very nature and essence of the transaction. . . . If, as the appellant insists, the check had been deposited for a specific purpose,—for collection,—the property would have remained in the depositor, but there is no evidence upon which such fact could be established, nor is it consistent with the dealings between the parties, or with any of the admitted circumstances. These show that it was the intention of both parties to make the transfer of the check absolute, and not merely to enable the bank to receive the money upon it as Murray's agent."

In some cases the fact that the depositor has checked on the credit has been emphasized. *National Bank v. Bradley* (1920) 264 Fed. 700; *Sanders v. W. B. Worthen Co.* (1916) 122 Ark. 104, 182 S. W. 549; *Williams v. Cox* (1896) 97 Tenn. 555, 37 S. W. 282; *Walker v. D. W. Ranlett Co.* (1915) 89 Vt. 71, 93 Atl. 1054. See *Jefferson Bank v. Merchants Refrigerating Co.* (1911) 236 Mo. 407, 139 S. W. 545, *infra*, V.

In *National Bank v. Everett* (1911) 136 Ga. 372, 71 S. E. 660, the court says: "In the instant case the evidence discloses that, at the time of the deposit, the drawer had overdrawn its account, and the deposit was entered as cash to its credit; that the drawer was not only accustomed to draw against deposits of this character, but actually did draw. These circumstances evince the parties' intention to treat the draft as a deposit of money, and therefore the title to the draft with the bill of lading attached is in the bank." In *Higgins v. Hayden* (1897) 53 Neb. 61, 73 N. W. 280, the customer of a bank, whose account was

overdrawn and who had checks outstanding which would still further overdraw his account, went to the bank with a draft and requested credit therefor. The bank officials at first hesitated to allow credit, but, on the depositor's informing them of the outstanding checks, agreed to do so, saying that credit would be given, but that if the draft was not paid the deposit would be overdrawn just the same. In pursuance of this understanding the bank paid outstanding checks, and cashed a small check contemporaneously with the crediting of the draft. Upon this state of facts the court held that title had passed to the bank.

And in some cases the fact that the entire credit has been checked out has been emphasized. *Haas v. Kings County Fruit Co.* (1916) — Mo. App. —, 183 S. W. 676; *Riverside Bank v. Woodhaven Junction Land Co.* (1898) 34 App. Div. 359, 54 N. Y. Supp. 266; *American Trust & Sav. Bank v. Austin* (1898) 25 Misc. 454, 55 N. Y. Supp. 561, affirmed without opinion in (1900) 47 App. Div. 635, 62 N. Y. Supp. 1131. The court in *Scott v. W. H. McIntyre Co.* (1914) 93 Kan. 508, L.R.A.1915D, 139, 144 Pac. 1002, after referring to the conflict of decisions upon the question, and saying that an extended review of the authorities was not thought necessary, continued: "Here we regard the result as controlled by the circumstance that the depositor not only received credit for the amount of the draft, but actually drew upon it and used the full amount. When the item was deposited, the account of the McIntyre Company was overdrawn. The credit operated at once to offset the depositor's debt to the bank. Before the garnishment summons issued, the account was again overdrawn and the credit thereby exhausted. In this situation the McIntyre Company could not successfully have asserted a claim to the draft or its proceeds against the Auburn bank, and the attaching creditor could gain no higher rights than were possessed by the defendant." The depositor in *Security Bank v. Northwestern Fuel Co.* (1894) 58 Minn. 141, 59 N. W. 987, had actually

drawn out all of the credit acquired by the deposit of the check, but while noting this as a fact, the court places no emphasis upon it.

c. Rule in case of paper payable directly to bank.

There can be no doubt that, when the paper is made payable directly to the bank of deposit, the legal title is in the bank upon delivery thereto. In considering the question of title at all, the courts must have reference to the beneficial interest or title. The cases involving paper payable directly to the bank have been treated very much the same as those involving paper payable to the depositor or another, and indorsed to the bank. In some cases the fact that paper is payable directly to the bank is emphasized; where a creditor draws a draft on his customer and makes it payable directly to his bank, and it is then credited to his account with the right to draw thereon, it is held that the title passes. *National Bank v. Everett* (1911) 136 Ga. 373, 71 S. E. 660; *First Nat. Bank v. McMillan Bros.* (1914) 15 Ga. App. 319, 83 S. E. 149; *Auto & Accessories Mfg. Co. v. Merchants' Nat. Bank* (1911) 116 Md. 179, 81 Atl. 294.

This is sometimes said to be *prima facie* or presumptive. *National Bank v. Everett* (Ga.) *supra*; *First Nat. Bank v. McMillan Bros.* (1914) 15 Ga. App. 319, 83 S. E. 149. It is said in *Gettysburg Nat. Bank v. Kuhns* (1869) 62 Pa. 88, that drafts or checks held by banks, drawn in their own favor, are *prima facie* presumed to have been received by them on deposit as cash from their customers, and not to have been deposited for collection merely, unless some evidence be adduced to show that fact.

The general rule that where a check is deposited by a customer in a bank in the ordinary course of business, and is accepted and credited as money, the title passes to the bank in the absence of any agreement as to title, was applied in *Lyons v. Union Exch. Nat. Bank* (1912) 150 App. Div. 493, 135 N. Y. Supp. 121, in case of a check drawn by one in opening an account with the bank, to the order of the

bank, the court holding that if the bank accepted the check and gave an unqualified credit therefor, it became the holder thereof.

The drafts in the following cases, in which the title was held to have passed, were payable to the bank, but no point is made of this fact: *Howe Grain & Mercantile Co. v. A. B. Crouch Grain Co.* (1919) — Tex. Civ. App. —, 211 S. W. 946; *Walker v. D. W. Ranlett Co.* (1915) 89 Vt. 71, 93 Atl. 1054.

See *Guggenheimer v. Queen Bee Flour Mills Co.* (1916) 136 Tenn. 488, 190 S. W. 455.

The fact that the amount of credit would be charged back in case the paper is not collected does not change the rule. *First Nat. Bank v. McMillan Bros.* (Ga.) *supra*.

But it has been held, in case of a draft payable directly to the bank, that title does not pass to the bank if it is deposited for collection. *Southern Bank & T. Co. v. Sellers* (1916) 18 Ga. App. 599, 89 S. E. 1094; *Commercial Nat. Bank v. First Nat. Bank* (1914) 158 Ky. 392, 165 S. W. 398. And see *Murchison Nat. Bank v. Dunn Oil Mills Co.* (1909) 150 N. C. 718, 64 S. E. 885, *supra*, *W. J. Barton Seed, Feed & Implement Co. v. Mercantile Nat. Bank* (1913) 128 Tenn. 320, 160 S. W. 848, and *Washington Brick, Lime & Mfg. Co. v. Traders Nat. Bank* (1907) 46 Wash. 23, 123 Am. St. Rep. 912, 89 Pac. 157, where drafts were payable directly to bank. That title does not pass is the assumption in *Bank of America v. Waydell* (1907) 187 N. Y. 115, 79 N. E. 857, and *Stevenson v. Fidelity Bank* (1893) 113 N. C. 485, 18 S. E. 695. And other cases have made no point of the fact that the paper was payable to the bank, but have applied the general rules discussed in subd. IV. a, b, *supra*.

V. Effect of notice in the depositor's pass book, or on deposit slips.

A notice in the customer's pass book that the bank acts only as agent in receiving checks or drafts has generally been regarded as preventing the passing of title to the bank. *Re State Bank* (1893) 56 Minn. 119, 45 Am. St.

Rep. 454, 57 N. W. 336; *South Park Foundry & Mach. Co. v. Chicago G. W. R. Co.* (1899) 75 Minn. 186, 77 N. W. 796; *Farmers' Guaranty State Bank v. Burrus Mill & Elevator Co.* (1918) — Tex. Civ. App. —, 207 S. W. 400. Compare with *American Trust & Sav. Bank v. Austin* (1898) 25 Misc. 454, 55 N. Y. Supp. 561, affirmed without opinion in (1900) 47 App. Div. 635, 62 N. Y. Supp. 1131, *infra*.

The pass book involved in *Farmers' Guaranty State Bank v. Burrus Mill & Elevator Co.* (Tex.) *supra*, contained not only a provision that the bank was acting as the agent of its depositors, but also an additional provision that all items on outside points were credited on receipt, with the understanding that the depositor would reimburse the bank should payment of any be refused.

In holding that the title to paper did not become vested in the bank, the court in *People's State Bank v. Miller* (1915) 185 Mich. 565, 152 N. W. 257, seems to rely largely upon a notice contained in the pass book of the customer to the effect that checks on other banks would be carried over for presentation to the clearing house on the following day; that the bank, in receiving such a check or draft on deposit or for collection, acted only as the agent of the depositor, and beyond due care in selecting agents to other points, and in forwarding to them, assumed no responsibility; and, further, should returns sent by collecting agents for said item be dishonored, the amount would be charged to the account, and the draft delivered to the customer.

In at least one of the foregoing cases the conclusion that the title did not pass to the bank is supported by other circumstances than the notice in the pass book. The course of dealing between the bank and customer in *Re State Bank* (Minn.) *supra*, confirmed the theory that the bank was acting merely as the agent of the depositor in collecting the check. Whenever any of the drafts or checks came back uncollected, the bank charged them up to the depositor's account, or the depositor gave his check for the amount

and took back the paper. It did not appear that such paper was ever protested for nonpayment, or that the petitioners ever waived protest on it, or that its return to them in the manner indicated had any reference to any liability on their part as indorser; but, on the contrary, it appeared that this was done in accordance with the general understanding between the parties that, whenever any of the paper was not paid, either the bank was to charge it up to the depositor's account, or the depositor would give his check for it and take it up. It did appear that when the depositors were doubtful about paper being paid, they would give it to the bank for collection without taking any credit for it. It also appeared that when credit was given for paper the bank would enter it among their discounts, while if no credit was given the bank would enter it among their collections, but this was a matter of bookkeeping of which the depositors had no knowledge.

The draft involved in *South Park Foundry & Mach. Co. v. Chicago G. W. R. Co.* (1899) 75 Minn. 186, 77 N. W. 796, was a time draft, was indorsed by the holder by an unrestricted indorsement, and delivered to the bank, which credited the depositor with the amount, less interest to maturity, on its pass book. The depositor had the privilege of checking against this credit, but as a matter of fact never exercised the privilege, but at all times subsequent to the deposit, and at the time the bank closed its doors, had a sum to its credit much larger than the amount of the draft. The trial court found that the draft was delivered to the bank by the depositor for collection and credit; that the credit at the time of the deposit was merely provisional therefore, and that the title of the draft never passed from the depositor to the bank. Upon appeal, the question is stated to have been whether the evidence justified the finding. In holding that the findings were justified by the evidence, the appellate court relies upon the notice in the pass book, as above stated.

See *American Sav. Bank & T. Co.*

v. Dennis (1916) 90 Wash. 547, 156 Pac. 559, *supra*, IV. a, 1.

Other provisions affecting the passing of title, contained in pass books and also in deposit slips, have been before the courts. In *Amalgamated Sugar Co. v. United States Nat. Bank* (1911) 109 C. C. A. 494, 187 Fed. 746, where a check was indorsed and deposited with a bank, the credit being entered on a deposit slip which contained the provision that the items listed were taken at the owner's risk until the bank had reduced to its possession the funds received, and that credits or remittances were subject to revocation until actual final payment, it is stated clearly that the bank did not acquire any proprietary rights in the checks, which could be maintained against the depositor, if the rights of third parties were not involved. A provision on a deposit slip that the depositor would not hold the bank liable for paper deposited until the cash for each had been paid to the bank is stated in *Harter v. Bank of Brunson* (1912) 92 S. C. 440, 75 S. E. 696, to "afford evidence of an agreement that the paper so deposited was not absolutely sold to the bank, and that the credit given a customer on the deposit of such an item is not absolute, but contingent upon its collection." But a notice in a pass book that checks, drafts, and other papers received by the bank on deposit, or for collection, were taken at the depositor's risk until actual payment has been received, was held in *Security Nat. Bank v. Old Nat. Bank* (1917) 154 C. C. A. 1, 241 Fed. 1, not to prevent the passing of title to the bank; "it simply gives rise, in connection with general commercial custom and the course of business between the parties, to a contract between them that in case the checks deposited and credited upon the account of [depositor] should not be paid by the drawer, the depositor would repay the bank the amount of said checks."

Compare cases in this paragraph with *King v. Bowling Green Trust Co.* (N. Y.) *infra*; and *Spooner v. Bank of Donalsonville* (1916) 144 Ga. 745, 87 S. E. 1062, *supra*, III.

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Compare *Security Nat. Bank v. Old Nat. Bank* (Fed.) *supra*, with *American Trust & Sav. Bank v. Austin* (N. Y.) *infra*.

A notice in the pass book of a depositor that deposits by checks shall not be drawn against, until collected, prevents the title passing, although the depositor has been permitted in certain instances to draw against uncollected checks, notwithstanding the pass-book notice. *Re Jarmulowsky* (1918) L.R.A.1918E, 634, 161 C. C. A. 327, 249 Fed. 319 (especially where the bank has the right to charge back to the depositor's account any check not collected on presentation).

In *First Nat. Bank v. Stengel* (1918) 169 N. Y. Supp. 217, the deposit slip on which the draft in question was entered contained at the bottom thereof the words, "Checks and drafts on other banks credited subject to payment," and some of the pass books issued by the bank contained the statement that the bank received checks and drafts on other banks for collection only. Whether this statement appeared in the pass book of the depositor is not stated. In holding that the title to the draft did not pass to the bank, the court relies largely upon the theory that the right to charge back the credits thus given is inconsistent with absolute ownership. (See *supra* IV. a, 2; b, 2, for discussion of this question.) The provisions on the deposit slip and in the pass book above mentioned were held to apply, although the draft in question was not drawn upon a bank, but upon a commercial company. This decision was affirmed without opinion in (1918) 185 App. Div. 906, 171 N. Y. Supp. 1085, and the decision of the appellate division was affirmed in (1920) 227 N. Y. 659, 126 N. E. 906.

Compare with *Spooner v. Bank of Donalsonville* (1916) 144 Ga. 745, 87 S. E. 1062, *supra*, III.

See *Givan v. Bank of Alexandria* (1898) — *Tenn.* —, 47 L.R.A. 270, 52 S. W. 923, *supra*, II.

Assuming that a provision in a pass book or deposit slip prevents the passing of title, it has been held that such a provision may be waived by the

bank; *Jefferson Bank v. Merchants Refrigerating Co.* (1911) 236 Mo. 407, 139 S. W. 545. It was held in *American Trust & Sav. Bank v. Austin* (1898) 25 Misc. 454, 55 N. Y. Supp. 561, affirmed without opinion in (1900) 47 App. Div. 635, 62 N. Y. Supp. 1181, that a rule made and adopted by a bank to the effect that in receiving checks or drafts on deposit, or for collection, it acted only as agent for the depositor, and beyond care in selecting agents at other points and in forwarding to them, it assumed no liability, was subject to waiver by the bank. Such a notice on the pass book was held waived in *Jefferson Bank v. Merchants Refrigerating Co.* (Mo.) supra, where the check was deposited by unrestricted indorsement in the bank, and on the same day the depositor drew checks on the bank to an amount exceeding all its deposits, including the check in question, which checks were honored by the bank, and where it appeared also that this had been the custom followed by the bank and the depositor for a considerable period of time. The court states that this course of dealing indicated a waiver of the notice in the pass book by the bank.

And such a notice in the pass book, together with another on the deposit slip that the bank shall be liable only when proceeds in actual funds or solvent credit shall have come into its possession, does not prevent the title passing after the point of time at which the bank receives a solvent credit; when the check or draft has been collected and credited to the bank in a solvent correspondent, the depositor can no longer claim title to the funds. *King v. Bowling Green Trust Co.* (1911) 145 App. Div. 398, 129 N. Y. Supp. 977.

But as to another check which had been received "for collection" and forwarded in the same way, it was held that title to it never passed out of the depositor, where it was not collected until the forwarding bank had closed, and the depositor could recover the amount from the collecting bank. *Ibid.* And it has been held that a pro-

vision that the bank shall only be liable when proceeds in actual funds or solvent credit shall have come into its possession is not complied with, where the bank receives a draft from a correspondent bank, payment of which has been stopped. *Security Sav. & T. Co. v. King* (1914) 69 Or. 228, 138 Pac. 465.

Some cases have taken a different view of such a rule. The court in *American Trust & Sav. Bank v. Austin* (N. Y.) supra, while recognizing, as above stated, that such a rule may be waived by the bank, even on the assumption that ordinarily it does prevent the title from passing to the bank, states that it does not seem that the rule was intended to have such effect; that if the bank "discounted and thereby became the absolute owner of a draft for a customer, and the draft for any reason was not paid, it would naturally expect to charge it back to the customer's account, or compel him in some way to make it good. In the case of a draft so discounted and payable in a distant city, it would be necessary for the plaintiff to utilize a line of collecting agents, and any one of them, through failure or insolvency, might defeat the collection of the draft and place plaintiff where it might desire to charge the same back against its customer. And as I look at it, this rule was intended to cover that part of its transactions with its customers and, as to those acts, to make the customer responsible and relieve the bank from liability, except within the limits named by the rule."

The court in *Plumas County Bank v. Bank of Rideout, S. & Co.* (1913) 165 Cal. 126, 47 L.R.A. (N.S.) 552, 131 Pac. 360, says, with reference to a provision on a deposit slip, that items previously credited might be charged back to the depositor's account upon the failure of any of its direct or indirect collecting agents, and that it would only be liable when proceeds in actual funds or solvent credit should have come into its possession, that the right to charge off bad checks does not affect the bank's title.

Compare with *Security Nat. Bank v. Old Nat. Bank* (1917) 154 C. C. A. 1, 241 Fed. 1, *supra*.

And if the depositor indorses generally, and the paper is passed to a bona fide holder, the depositor's rights may be lost. See *National Bank v.*

Bossemeyer (1917) 101 Neb. 96, L.R.A. 1917E, 374, 162 N. W. 508.

The general question of a printed statement of rules in pass books as affecting rights of bank and depositor is discussed in the note in 5 A.L.R., at page 1203. W. A. E.

SOLOMON SHINE

v.

NEW YORK, NEW HAVEN, & HARTFORD RAILROAD.

Massachusetts Supreme Judicial Court — November 11, 1920.

(236 Mass. 419, 128 N. E. 713.)

Carrier — liability for injury to passenger by cinder.

The mere fact that a passenger on a railroad train is struck in the eye by a cinder on a warm day when the windows and doors of the car are open does not establish liability on the part of the railroad company.

[See note on this question beginning on page 1076.]

REPORT by the Superior Court for Norfolk County (Raymond, J.) for determination by the Supreme Judicial Court of an action brought to recover compensation for injuries received by plaintiff while a passenger on one of defendant's trains through its alleged negligence, which resulted in a judgment in its favor. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Harvey H. Pratt and John S. Richardson for plaintiff.

Mr. Joseph Wentworth for defendant.

Per Curiam:

This is an action of tort to recover compensation for injuries received by the plaintiff through the alleged negligence of the defendant while he was a passenger upon one of its trains. The evidence in its aspect most favorable to the plaintiff tended to show that a little after 4 o'clock on a warm, pleasant September afternoon he boarded a train at Taunton for Boston, and took a seat next to an open window in the smoking car, the doors and windows of which were open. He testified: "I received an injury to my eye. I felt something hit my eye. After the train began to move there was a lot of smoke and cinders and fire blow-

ing in. I had a stinging, burning sensation in my eye."

This occurred five or ten minutes after the train started. Another witness testified that smoke and quite a few cinders from the locomotive were coming in at the front door of the car, and that "cinders were blowing around in the air." Later "a speck—some foreign substance"—was removed from the plaintiff's eye, and he suffered serious injury.

This evidence discloses no negligence on the part of the defendant. It is common knowledge that under present conditions coal-burning locomotives cannot draw a train without emitting cinders and smoke. There is nothing to show by whom the windows and doors of the car were opened. *Faulkner v. Boston & M. R. Co.* 187 Mass. 254, 72 N. E.

976, 17 Am. Neg. Rep. 553; Hunt v. Boston Elev. R. Co. 201 Mass. 182, 87 N. E. 489. It is not negligence on the part of the defendant not to keep windows and doors of passenger cars closed in warm weather, in order to exclude cinders. The doctrine of *res ipsa loquitur* has no application to the facts here disclosed. Wadsworth v. Boston Elev.

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cinder.**

R. Co. 182 Mass. 572, 66 N. E. 421, 13 Am. Neg. Rep. 529; Kelsey v. New York, N. H. & H. R. Co. 181 Mass. 64, 63 N. E. 8, 11 Am. Neg. Rep. 593; Searles v. Manhattan R. Co. 101 N. Y. 661, 5 N. E. 66; Wiedmer v. New York Elev. R. Co. 114 N. Y. 462, 21 N. E. 1041; Carney v. Boston Elev. R. Co. 212 Mass. 179, 42 L.R.A. (N.S.) 90, 98 N. E. 605, Ann. Cas. 1913C, 302.

Judgment for the defendant.

ANNOTATION.

Liability of carrier for injury to passenger by sparks or cinders.

The comparatively few cases on this subject are not entirely in harmony, and vary as to the circumstances.

Spark from locomotive of passenger train.

It has been held in Texas that a case is raised for the jury by evidence that a spark or cinder from the engine of a passenger train entered the car and injured a passenger. Texas Midland R. Co. v. Jumper (1901) 24 Tex. Civ. App. 671, 60 S. W. 797; St. Louis S. W. R. Co. v. Parks (1903) 97 Tex. 131, 76 S. W. 740, second appeal in (1905) 40 Tex. Civ. App. 480, 90 S. W. 343; Missouri, K. & T. R. Co. v. Flood (1904) 35 Tex. Civ. App. 197, 79 S. W. 1106. The same was held under the Arkansas statute in Batte v. St. Louis S. W. R. Co. (1917) 131 Ark. 568, 199 S. W. 907.

Thus, in Texas Midland R. Co. v. Jumper (Tex.) supra, it was held, in effect, that the fact that a passenger was struck in the eye by a spark or cinder escaping from the engine made a *prima facie* case of negligence and liability on the part of the company, but the case was reversed for error in the charge.

So, in St. Louis S. W. R. Co. v. Parks (1903) 97 Tex. 131, 76 S. W. 740, supra, it was assumed that the doctrine of *res ipsa loquitur* applied; in other words, that a *prima facie* case of negligence was made by evidence that a passenger, while standing in the front of the car where he had gone to get a drink of water, was struck in the

eye by a shower of sparks and cinders, varying in size from a pea to bird-shot, which rushed in at the door as it was suddenly opened; but the judgment in favor of the plaintiff was reversed because of the failure of the court to observe the technical distinction between the effect of such evidence to create a *prima facie* case of negligence, or a presumption of negligence, and its effect to cast upon the defendant the burden of negating negligence on its part; the Texas courts not being allowed to charge upon the weight of the evidence. Upon a second appeal (1905) 40 Tex. Civ. App. 480, 90 S. W. 343, it was held that evidence that sparks and cinders, from the size of a pin-head to that of a pea, escaped from the engine and injured the eyes of a passenger who had gone to the front of the car to get a drink of water, when the door was opened and the sparks and cinders entered, makes a *prima facie* case of negligence on the part of the carrier, either in an insufficient spark arrester or in its handling.

It will be seen, on the other hand, that it is held in the reported case (SHINE v. NEW YORK, N. H. & H. R. Co. ante, 1075) that the doctrine of *res ipsa loquitur* has no application to the case of a passenger who takes his seat on a warm day by an open window in the smoking car, and is injured by a foreign substance entering his eye, and that such a case discloses

no negligence on the part of the company.

—**spark arresters and window screens.**

It is proper to refuse to charge, in regard to a passenger injured by a spark, that the company is only required to use ordinary care in providing a safe spark arrester, instead of the highest care compatible with the reasonable prosecution of its business. *St. Louis S. W. R. Co. v. Parks* (1903) 97 Tex. 131, 76 S. W. 740.

An instruction was held correct in *St. Louis S. W. R. Co. v. Parks* (1905) 40 Tex. Civ. App. 480, 90 S. W. 343, *supra*, which informed the jury that they should find for the passenger if they believed from the evidence that his injuries were proximately caused by the failure of the defendant to equip the engine with proper and suitable appliances for the prevention of the escape of cinders or sparks, or by its negligent failure to have such appliances in reasonably good repair and condition, or by the negligent operation of the engine at the place where the passenger was injured.

In *Batte v. St. Louis S. W. R. Co.* (1917) 131 Ark. 568, 199 S. W. 907, *supra*, where the plaintiff, in September, took his seat next to a closed window of the smoking car, the window in front being open and unscreened, and received an injury to his eye apparently from a cinder, there was a statute providing that all railroads operating in Arkansas shall be responsible for all damages caused by the running of trains, and it was held that, while the railroad company was not required to keep its windows screened, the undisputed evidence made a prima facie case against the defendant, to overcome which it was necessary to show not only that the engine of the train was supplied with the best-known appliances to prevent the escape of cinders, but also that the appliances had been duly inspected and were in good repair at the time the plaintiff received his injuries, and that the engine was being properly and skilfully managed and operated at the time. The court said: "It is true the evidence shows that cinders

of the size of the one in question could come through screens of the most approved pattern in use; but it is equally true that many more such cinders would escape if the net or screen was torn, or if the engine was not operated in a skilful manner."

In *Missouri, K. & T. R. Co. v. Flood* (1904) 35 Tex. Civ. App. 197, 79 S. W. 1106, *supra*, a judgment in favor of a passenger who was struck in the eye and injured by a cinder escaping from the locomotive while he was sitting at an open smoking-car window was affirmed, the court specifically holding that an instruction exonerating the defendant if its engine was equipped with the best-approved apparatus and appliances then in use for the prevention of the escape of sparks or cinders, and "proper care" was exercised to keep them in reasonably good repair and condition, was not subject to criticism because of the use of the phrase "proper care," or its failure to define that phrase; and, further, that, if it could be said in any case that a passenger could be guilty of contributory negligence in riding in a coach provided by the carrier for the carriage of passengers, the issue was fully submitted by the charge that the jury should find for the defendant "if [they believed that the plaintiff], in riding in the position and under the circumstances which you find and believe from the evidence he was riding, . . . was guilty of negligence, and such negligence, if any, proximately contributed to cause plaintiff's injury."

But it is error to charge that the defendant, to rebut the prima facie case, must show that its engine was equipped with the best appliances obtainable, without any qualification as to whether such appliances were in use, or had been approved by railroads generally. *Texas Midland R. Co. v. Jumper* (1901) 24 Tex. Civ. App. 671, 60 S. W. 797.

In *Missouri, K. & T. R. Co. v. Orton* (1903) 67 Kan. 848, 73 Pac. 63, 14 Am. Neg. Rep. 548, a verdict in favor of a passenger who was struck in the eye and severely injured by a cinder while standing in the door of a car

was reversed because negligence on the part of the defendant was negatived by the special verdict, which found that the engine was in good repair and was supplied with the best-known appliances to prevent the escape of cinders, that the engineer in charge and the fireman were both competent and skilful, and that the engine was being properly and skilfully operated and managed at the time of the injury; there being no such proof as warranted a finding of culpable negligence with respect to the open door.

It is not negligence on the part of the carrier to omit to supply screens to passengers' windows. *Batte v. St. Louis S. W. R. Co.* (1917) 131 Ark. 568, 199 S. W. 907; *SHINE v. NEW YORK, N. H. & H. R. Co.* (reported herewith) ante, 1075. See also *Malone v. St. Louis-San Francisco R. Co.* (1919) 202 Mo. App. 489, 213 S. W. 864 (infra, "Sparks at stations").

(Reference may here be made to *O'Donnell v. Louisville & N. R. Co.* (1897) 19 Ky. L. Rep. 1005, 42 S. W. 846, where a passenger sitting in a smoking car by the open window suffered an injury to his eye from a cinder, and the only negligence alleged was that the window could not be pulled down because of a defect in the catches thereto, and there were in the car other vacant seats, by windows which were or might have been closed, and it was held that the plaintiff could not recover.)

— brakeman disobeying rules.

In *Ladshaw v. Southern R. Co.* (1912) 90 S. C. 462, 73 S. E. 879, the plaintiff recovered for injuries suffered while a passenger, sitting about three seats from the front vestibule door of the car, when a cinder came through the open door and struck her right eye, the door having been opened by a brakeman before stopping, against a rule of the company.

— in tunnel.

A carrier is liable for injury to the eye of a passenger due to a cinder entering the car, where a brakeman, contrary to rules, left the door of the car open when the train was passing through a tunnel. *Louisville & N. R.*

Co. v. Roberts (1920) 187 Ky. 192, 9 A.L.R. 94, 218 S. W. 713.

In an action for injury to an infant passenger by being struck in the eye by a cinder which entered through an open window when the train was passing through a tunnel, there being evidence that the passenger had requested the conductor, before reaching the tunnel, to close the window, which she was unable to do, and that he had failed to do so, the court, in *Lexington & E. R. Co. v. Robinson* (1919) 186 Ky. 739, 216 S. W. 86, stated that the plaintiff's evidence, while unsatisfactory, was sufficient to take the case to the jury; yet that the verdict, which was for the plaintiff, was not only against the weight of the evidence, but the amount awarded as damages was so excessive that for both reasons a reversal must be ordered.

For the general duty of a carrier to passengers while train is going through a tunnel, see the annotation to *Louisville & N. R. Co. v. Roberts*, 9 A.L.R. 96.

Sparks at stations.

Passengers at stations have recovered damages for injuries to the eyes from sparks or cinders while waiting in a car, while on a platform, and while leaving the premises.

In *Malone v. St. Louis-San Francisco R. Co.* (1919) 202 Mo. App. 489, 213 S. W. 864, the plaintiff recovered for injuries received while a passenger on one of defendant's trains, by being struck in the eye by a piece of coal or cinder more than an inch in length and breadth. He was sitting by an open window in a train on a sidetrack, when another train or engine passed suddenly, and he turned to look out of the window, and was struck by the coal or cinder coming through the window. The court, after holding that it was not negligence to fail to screen windows, said: "We must hold that there was sufficient evidence in this case to warrant a finding that plaintiff, a passenger, was injured by a coal cinder coming from the defendant's engine; that this cast on the defendant the burden of disproving negligence, both as to the equipment and

appliances, and in the management and operation of such engine by its agents and servants. . . . The mere fact that a passenger is injured does not raise the presumption of negligence; but . . . when a passenger is injured, and the injury is shown to be connected with the appliances of transportation, then the proof is sufficient to raise the presumption of negligence, and this must be rebutted by the carrier in order to escape liability."

In *Philadelphia & R. R. Co. v. Young* (1898) 33 C. C. A. 251, 62 U. S. App. 429, 90 Fed. 709, 5 Am. Neg. Rep. 541, it was held that a question for the jury as to a railroad company's negligence was made by evidence that the plaintiff, even if not constructively in the defendant's care as a passenger, was lawfully on its platform awaiting a train, when he was struck in the eye by a cinder from the locomotive of a passing train, which, he testified, "must have been a pretty good-sized one," because, when he "wiped the eye, the handkerchief was full of pieces of cinders," and there were "small pieces of coal and blood on it;" it further appearing that, though the accident occurred in the daytime, the sparks were plainly visible and fell in great numbers from underneath the locomotive, which was being fired at the time, the evidence also warranting the belief that a properly constructed and carefully managed ash pan would have prevented such an emission of sparks, and indeed, any considerable fall of sparks, and that it was not customary to fire engines when passing stations.

In *Missouri, K. & T. R. Co. v. Mitchell* (1904) 34 Tex. Civ. App. 394, 79 S. W. 94, it was apparently assumed that the fact that a passenger waiting on the platform was struck in the eye by a spark or cinder from a passing locomotive made a *prima facie* case of negligence and liability, though the judgment in favor of the plaintiff was reversed because the charge imposed an absolute duty upon the part of the company to equip its locomotives with spark arresters which are considered among the best

by railroad men, and keep the same in good order, instead of requiring it to exercise a very high degree of care in that respect. Upon a subsequent appeal of this case (1905) — Tex. Civ. App. —, 87 S. W. 841, a judgment for plaintiff was upheld on the ground that, though the evidence may have been insufficient to show negligence on the part of defendant in the equipment of the engine from which the spark was emitted, it was reasonably sufficient to show that the engine was negligently handled, and that such negligence was the proximate cause of the escape of the cinder which was thrown into and put out the plaintiff's eye. This, in view of the high degree of care due by a carrier to a passenger, there being testimony by one of defendant's witnesses that "when a light engine is operated properly and carefully in front of a passenger depot, no cinders at all will escape."

In *Atherton v. London & N. W. R. Co.* (1905) 21 Times L. R. (Eng.) 671, 93 L. T. N. S. 464, the plaintiff recovered for injuries from a spark which entered his eye from the locomotive of the train from which he had alighted and while he was on a path leading from the platform, which path ran along the rails about 150 feet on the company's premises till it reached the public road, and was one of two regular exits from the platform. The path was not screened from the line, and a petition had previously been presented to the company, pointing out the danger from sparks, and asking that it should be protected by a covering, but the company refused. There was evidence that engines in starting from the station were liable to emit sparks, but there was no evidence of negligence on the part of the company in the construction or working of the engine. The appellate court in affirming the judgment said: "It must be a question for the court to say whether, in the particular circumstances, the suggested precaution might have been a reasonable one to adopt. If it might, then it was for the jury to say whether the railway company ought to have adopted it."

B. B. B.

JACOB L. GORDER, Respt.,

v.

LINCOLN NATIONAL LIFE INSURANCE COMPANY, Appt.

North Dakota Supreme Court — December 6, 1920.

(— N. D. —, 180 N. W. 514.)

Insurance — war clause — operation.

1. Under the war clause in an insurance policy, the insured was required to obtain permission from the company to engage in military or naval service in time of war and to pay an extra premium. In the event of his failure to do so, it was stipulated that in case of the death of the insured in consequence of such service, the liability of the company should not be greater than the legal reserve on the policy. Without obtaining the permit, the insured entered the military service, and died of pneumonia about seven days after debarkation at Liverpool, England. It is held, the clause above referred to does not limit the liability of the company except where death occurs in consequence of military or naval service.

[See note on this question beginning on page 1103.]

Evidence — burden of proof — limitation of insurance.

2. Where an insurance company relies upon a provision in the policy limiting its liability to less than the amount of the insurance, it has the burden of establishing the facts upon which the limited liability depends.

Trial — fact — death in consequence of military service.

3. Whether or not the death of the insured in a particular case was in consequence of the military service within the above war clause is a question of fact to be determined upon all of the evidence of the circumstances surrounding the insured at the time of his death.

Evidence — statistics — cause of death.

4. Where a death is occasioned by a

disease which was epidemic at the time among both the civilian and the military population, the court cannot find from statistics alone, which apparently show greater mortality in the Army as a whole than among the civil population, that the insured died in consequence of military service.

— sufficiency — failure to prove conditions.

5. The burden resting upon the defendant to establish that death resulted from military service is not sustained, where no evidence is introduced showing sanitary conditions in the various camps in which the insured was stationed, and upon the Army transport upon which he sailed, nor in the military unit to which he was attached.

APPEAL by defendant from a judgment of the District Court for Bottineau County (Burr, J.) in favor of plaintiff in an action brought to recover the amount alleged to be due on a life insurance policy. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Pierce, Tenneson, & Cupler, for appellant:

The death of Arthur Norman Gorder was in consequence of military service, and therefore the legal reserve on the policy is the full measure of defendant's liability.

Myli v. American L. Ins. Co. — N. D. —, post, 1097, 175 N. W. 631; *Kelly v. Fidelity Mut. L. Ins. Co.* 169 Wis.

274, 4 A.L.R. 845, 172 N. W. 152; *Coxe v. Employers' Liability Assur. Corp.* [1916] 2 K. B. 629, 85 L. J. K. B. N. S. 1557, 114 L. T. N. S. 1180, 33 Times L. R. 664; *Mattox v. New England Mut. L. Ins. Co.* — Ga. App. —, 103 S. E. 180; *Ruddock v. Detroit L. Ins. Co.* — Mich. —, 177 N. W. 242.

Mr. W. H. Adams, for respondent:
In construing a policy of insurance

it is the general rule that, since the contract is drawn by the insurer, its provisions, if any doubt arises as to their meaning, will be construed strongly against the insurer and in favor of the insured.

Welts v. Connecticut Mut. L. Ins. Co. 48 N. Y. 34, 8 Am. Rep. 518; *Kelly v. Fidelity Mut. L. Ins. Co.* 169 Wis. 274, 4 A.L.R. 845, 172 N. W. 152; *Myli v. American L. Ins. Co.* — N. D. —, post, 1097, 175 N. W. 631.

Birdzell, J., delivered the opinion of the court:

This is an action to recover the face amount of a life insurance policy. By the stipulation it was tried before the district court of Bottineau county without a jury, and a judgment was rendered for the full amount of the policy, interest, and costs, amounting in all to \$2,179.67. The policy was issued on March 31, 1917, to Arthur Norman Gorder, age twenty-two years. The beneficiary was Jacob L. Gorder, his father, the plaintiff in this action. On June 14, 1918, the insured entered the military service of the United States under the Selective Service Law. He was stationed in various training camps and cantonments prior to his embarkation for overseas duty. At the time of embarkation he was a member of Battery F, 125th Field Artillery, and sailed with this unit on September 24, 1918, on the Army transport *Saxon*. He is reported to have been transferred on October 7, 1918, to the base hospital at the port of debarkation, Liverpool, England, where he died on October 14, 1918, of pneumonia.

The defense relied upon by the appellant arises under the provision of the policy which was stated under the heading "Conditions as to Residence, Travel and Occupation." The provision reads as follows: "This policy is free from restrictions as to residence, travel, and occupation after one year from date of issue, except military or naval service in time of war, for which permission must be obtained from the company and an extra premium, at the established rate, shall be paid. In case

of death of the insured in consequence of such service and without the company's permit, the liability of the company hereunder shall be for an amount not greater than the legal reserve on this policy."

The insured had paid the annual premium stipulated in the policy, of \$48.76, but he had not paid the extra premium which would cover the risk of military service fixed by the actuaries at \$100 per thousand, or \$200 per annum on this policy. Nor had he obtained permission from the company, as required by the clause above quoted. The trial court found that the death of the insured was not in consequence of his military service.

It is contended that the insured had subjected himself to greater hazard by becoming a member of the military forces and by submitting to conditions of life prevailing in military camps and upon transports, thereby being subjected to contagious diseases prevalent in armies. It is stated that such diseases as typhoid, measles, and influenza are more prevalent in the Army than in civil life, and that even during times of warfare a greater number of soldiers have died from contagious diseases than were killed in actual combat. The appellant argues from this that a death from one of these diseases while in military service is necessarily a death resulting from the service just as much as though it had resulted from a wound from an enemy bullet. Reading the clause in question in the light of such facts, it is contended that it is not ambiguous, and that its purpose is to stipulate against all increase of risk due to military service.

We cannot adopt this construction of the provision for the reason that it is expressly stated therein what the effect of the failure to obtain the permit and pay the extra premium shall be. The provision is in two parts: one part provides for the payment of an added premium to cover all risk incident to military service, and the other stipulates for a limited

liability where the insured, without contracting for the added risk, dies "in consequence of such service." The limitation is not to be construed liberally to reduce liability. There is a vast difference between a death in the active military service (*Miller v. Illinois Bankers' Life Asso.* 138 Ark. 442, 7 A.L.R. 378, 212 S. W. 310; *Reid v. American Nat. Assur. Co.* — Mo. App. —, 218 S. W. 957; *Rud-dock v. Detroit L. Ins. Co.* 209 Mich. 638, 177 N. W. 242), and a death in consequence of such service (*Malone v. State L. Ins. Co.* 202 Mo. App. 499, 213 S. W. 877; *Kelly v. Fidelity Mut. L. Ins. Co.* 169 Wis. 274, 4 A.L.R. 845, 172 N. W. 152; *Benham v. American Cent. L. Ins. Co.* 140 Ark. 612, 217 S. W. 462; *Nutt v. Security L. Ins. Co.* — Ark. —, 218 S. W. 675). A further reason why the limitation should only operate to reduce liability in the instances where the death occurred in consequence of military service is that the normal premiums continue to be payable. These premiums are presumably calculated on the basis of average mortality in civil life. To give to this war clause the construction for which the appellant contends would be to discriminate in this respect against all who entered the military service. It is well known that the ravages of influenza-pneumonia resulted in many thousands of deaths among those in civil life, and to hold that the insurance is not applicable where a soldier dies from the same cause would be to exempt for a hazard that would have been insured against had the soldier remained in civil life. With respect to soldiers, therefore, it would place the insurance company upon a better footing than it occupied with respect to civilians generally.

The provision differs materially from the one before this court in the case of *Myli v. American L. Ins. Co.* — N. D. — post, 1097, 175 N. W. 631. In the policy there considered it was stipulated: "If, within five years from date hereof, the death of

the insured shall occur while engaged in military or naval service in time of war without previously having obtained from the company a permit therefor, the company's liability shall be limited to the cash premiums paid hereon for the three years from date of issuance, and thereafter to the legal reserve on this policy," etc.

Had that provision stood alone, it would have been extremely doubtful whether the beneficiary could have recovered insurance where the insured had been inducted into the active military or naval service. *Malone v. State L. Ins. Co.*; *Miller v. Illinois Bankers' Life Asso.*; *Reid v. American Nat. Assur. Co.*; *Rud-dock v. Detroit L. Ins. Co.* and *Nutt v. Security L. Ins. Co.*—*supra*. Language could have been employed which would have rendered more clear the intention to make the status of the insured alone the condition upon which the limited liability would attach. But the other provisions of the policy so clearly provided for double indemnity and disability insurance, except for death or injuries resulting from military or naval service, that it was plain status alone was not the condition of the limited liability. Under the facts in that case it was evident that death did not result from the service; also that the insured did not die surrounded by any hazards not common to civilians in equal degree. So, adopting the most favorable construction contended for by the beneficiary (making the character of the service the test), the beneficiary was clearly entitled to recover. He, of course, would have been equally entitled to recover had he contended that it was not shown that death in fact resulted from the service.

In the instant case, death occurred while the insured was in the active military service, and is attributable to a cause which resulted in many deaths both in civilian and army life. It has been held that a death from such cause cannot be said to have been a death resulting

from military service. The supreme court of Arkansas, in the case of *Benham v. American Cent. L. Ins. Co.* 140 Ark. 612, at page 463 of 217 S. W., said: "In the case at bar the insured died from influenza, and the record shows that this disease was prevalent throughout the United States, and that soldiers and civilians alike contracted it and died from it. The death of the insured, then, was in no sense caused by performing any military service, or in consequence of being engaged in military service."

We do not hold that a death from influenza may not, under certain circumstances, be shown to have been in consequence of military service within a war clause such as the one in question. See 18 Mich. L. Rev. 686. We are satisfied, however, that the company has not shown the death in the instant case to have been in consequence of such service.

It is elementary, that the burden of establishing the facts which relieve an insurance

**Evidence—
burden of proof
—limitation of
insurance.**

company from liability for the face of the policy rests upon the defendant. 25 Cyc. pp. 925-930; *Malone v. State L. Ins. Co.* supra. It is frequently held under clauses somewhat analogous, such as those limiting liability where the death of the insured is caused by the use of intoxicating drink, or occurs in consequence of the violation of the criminal law, that the burden is upon the company to establish the fact that the death was the proximate result of the cause, and thus to bring the case within the limitation. *Cluff v. Mutual Ben. L. Ins. Co.* 13 Allen, 308, and a case arising out of the same facts; *Bradley v. Mutual Ben. L. Ins. Co.* 45 N. Y. 422, 6 Am. Rep. 115; *Mutual L. Ins. Co. v. Stibbe*, 46 Md. 302; *Kerr v. Minnesota Mut. Ben. Asso.* 39 Minn. 174, 12 Am. St. Rep. 631, 39 N. W. 312. See also *Fellers v. Modern Woodmen*, 182 Iowa, 99, 165 N. W. 584.

We have no evidence bearing upon the sanitary condition of the camps in which the insured had been sta-

tioned prior to his death, nor with respect to the Army transport *Saxon*, upon which he sailed. Sanitary conditions varied greatly upon different transports. See *The Military Surgeon*, October, 1919, p. 399. If any presumption would arise regarding the sanitary conditions surrounding him prior to embarkation, it would be that they were good; for it is not to be presumed that the War Department would designate for overseas duty units that were in poor physical condition, or that were likely to become incapacitated prior to participation at the front. Neither is there any evidence of the extent of the prevalence of influenza or pneumonia in the unit to which the insured was attached. Dr. *Al-yen*, of Fargo, who was in the Medical Corps of the United States Army practically throughout the war, and who had considerable experience in 1918 at ports of embarkation, debarkation, and upon transports, having made four trips upon three different transports,—none, however, upon the transport *Saxon*,—testified by deposition. He testified that the ships were crowded; that the men were obliged to sleep in quarters with little or no ventilation; that conditions were such as to increase the risks of transmission of communicable diseases to highest point. In stating his opinion as to the cause of the spread of the epidemic of influenza-pneumonia among the troops, he ascribed it to close contact, constant movement of the troops, age of the individual, rapid movement of the troops, climatic conditions, and the short period of organization after reaching debarkation camps. In addition to this testimony the appellant relies upon statistics showing a much higher mortality rate for influenza-pneumonia in the Army than is shown by statistics covering those in civil life. Some statistics offered would seem to show that there were about six deaths in the Army from this cause to one in civil life among a similar number of people, and that the disease was much more preva-

lent in the Army than in civil life. These statistics are admitted to be very unreliable; for, as is remarked in the report of the state board of health for the biennial period ending June 30, 1920, "case reports were most inaccurate and thousands never saw a physician," whereas, in the Army, every man was under constant observation for pathological symptoms, and no case of disease would be likely to be overlooked. Furthermore, the age of susceptibility to the particular disease in question is greatest and the mortality highest among those of military age, and of these it has been observed that it bore heaviest upon the most vigorous. Therapeutics, Preventive Medicine, Fantus and Evans, vol. VI. 1919, 323; Annual Report of Public Health Service (United States Treasury) for 1919, p. 179. The removal of so large a number of vigorous persons of this age from civil life would naturally have a tendency both to lessen the mortality rate for civil life and to accelerate it for military life. There is a woeful lack of accurate information concerning the ravages among the civil population of the pandemic of influenza-pneumonia. The United States Public Health Service has estimated the number of deaths at 350,000; the New York Life Insurance Company has placed the number at 460,000, or about 30 per cent greater; and Major Soper of the Sanitary Corps of the United States Army, who has given special consideration to the subject, says it is doubtful if this larger estimate is great enough. The Annual Report of the Public Health Service (United States Treasury) for 1919 puts the number at over 500,000 (page 178).

The outstanding fact in this case is that the hazard to the lives of both the military and civil population was increased several fold by the prevalence of the pandemic of influenza-pneumonia. Statistical data thus far compiled show wide variation of mortality in different sections of the country

—statistics—
cause of death.

and in different Army camps. Both soldiers and civilians suffered from a common disease, whereas the high death rates due to diseases in the armies assembled in former wars were occasioned by diseases more peculiar to military life. Diseases such as typhoid, before the employment of modern preventive methods, would rage in the Army because of the peculiar facilities for acquiring it, whereas it would continue to affect only the average number in civil life. Now it is more rare in the Army than in civil life, due to efficient preventive measures.

However the policy in question might be construed in reference to diseases that are more peculiarly prevalent in Army camps than in civil life, so that a death from such a disease might be regarded as a death in consequence of such service, we are of the opinion that on the record in this case we cannot say that the death of the insured was in consequence of such service. It is our opinion, further, that under the language of the provision in question, each individual case is to be determined upon its own facts. For the foregoing reasons, the judgment appealed from is affirmed.

—sufficiency—
failure to prove
conditions.

Trial—fact—
death in conse-
quence of
military service.

Nuessel, Dist. J., and Bronson and Robinson, JJ., concur.

Grace, J., concurs in the result.

Christianson, Ch. J., being disqualified, did not participate, Honorable W. L. Nuessel, Judge of the Fourth Judicial District, sitting in his stead.

NOTE.

The subject of the validity, construction, and effect of provisions in life or accident policies, in relation to military service, is considered in the annotation following *MYLI v. AMERICAN L. INS. Co.* post, 1103.

BOATWRIGHT
v.
AMERICAN LIFE INSURANCE COMPANY, Appt.

Iowa Supreme Court — December 16, 1920.

(— Iowa, —, 180 N. W. 321.)

Insurance — exception of naval service — period at training camp.

1. One duly enlisted in the United States Navy is not, while at a naval training camp in this country, within the operation of an exception in a life insurance policy of deaths occurring while engaged in the military or naval service in time of war, and therefore the insurer is liable upon the policy in case he dies of influenza while at such camp.

[See note on this question beginning on page 1103.]

Appeal — question open — judgment favorable to appellant.

2. Appeal by defendant, in a suit to reform an insurance policy and recover the amount due thereon, from a judgment denying reformation but requiring payment of the face of the policy, does not bring the question of reformation before the appellate court.

Pleading — sufficiency of prayer for relief.

3. Judgment may be entered against an insurer without reformation of the policy, in a suit to reform the policy and for judgment thereon when reformed, if the petition also prays such further and complete relief as to the court may seem just and equitable in the premises.

[See 10 R. C. L. 422, 423.]

APPEAL by defendant from a judgment of the District Court for Polk County (Wilson, J.) in favor of plaintiff in an action brought to reform an insurance policy and recover the amount due thereon. *Affirmed.*

Statement by Stevens, J.:

Action in equity to reform a policy of life insurance and for judgment thereon. The court denied reformation, but entered judgment against the defendant for the face of the policy. Defendant appeals.

Messrs. E. B. Evans and Opal Boling for appellant.

Mr. F. T. Van Liew for appellee.

Stevens, J., delivered the opinion of the court:

The policy in suit was issued in April, 1918, upon the life of Ernest E. Boatwright, who shortly thereafter enlisted in the Navy, and in September, 1918, died of influenza, while at the naval training station at Great Lakes, Illinois. The policy contained the following provision: "If within five years from date hereof the death of the insured shall occur while engaged in the military or naval service in time of war,

without previously having obtained from the company a permit therefor, the company's liability shall be limited to the cash premiums paid thereon for three years from date of issuance, and thereafter to the legal reserve of the policy."

The plaintiff, who is the grandmother of the insured and the beneficiary named in the policy, after the necessary formal allegations, alleged in her petition that the application for the policy in suit was prepared and delivered to the company by George A. Young, one of its agents; that at the time of signing same insured contemplated enlisting in the Navy, and that he informed defendant's agent that he did not desire a policy at all, unless it would be effective in the event of his death while in naval training in the United States, and that he was informed by said agent that the policy applied for would be valid and enforceable

so long as he remained in the United States and until he boarded a ship for the seat of war. She further alleged that the insured would not have accepted the policy and paid the premium but for the fact, as plaintiff alleges, that he understood it would continue in force so long as he remained in the United States, and that the face of the policy would, in case of his death before boarding a ship for the seat of war, be paid to the beneficiary named. Plaintiff therefore prayed that the policy be so reformed as to be valid during the time he was at the naval training station, and for judgment thereon as reformed, and for all just and proper equitable relief. The defendant demurred to this petition upon the grounds that it appeared upon the face thereof that the insured came to his death while engaged in the naval service of the United States in time of war, and that, under and by virtue of the terms and provisions of the policy quoted above, the company assumed no risk while the insured was engaged in the naval service in time of war, except its obligation to return the premium paid, which defendant later tendered. The demurrer was overruled, and the cause tried upon the issues thereafter joined. The court below denied reformation of the policy, but entered judgment in favor of the plaintiff

Appeal—
question open—
judgment
favorable to
appellant.

for the full amount thereof. The defendant alone appeals, so that this issue is not before

us. We cannot presume that defendant appealed from that part of the decree which was favorable to it. *Hintrager v. Hennessy*, 46 Iowa, 600; *Devoe v. Hall*, 60 Iowa, 749, 14 N. W. 124; *Frost v. Parker*, 65 Iowa, 178, 21 N. W. 507; *Huff v. Olmstead*, 67 Iowa, 598, 25 N. W. 784; *Smith v. Knight*, 88 Iowa, 257, 55 N. W. 189.

The principal propositions are urged by appellant as follows: (a) That, as plaintiff in her petition asked judgment against the defend-

ant only upon the policy when reformed, the court was without jurisdiction to enter judgment thereon without reformation; and (b) that the death of the insured occurred while he was engaged in the naval service of the United States in time of war, and that, as he entered such service without previously obtaining a permit from the defendant company to do so, the company was, by the terms of the policy, exempted from liability. It is true that the prayer of plaintiff's petition is for judgment for the amount of the policy when reformed; but there is also a prayer for such "further and complete relief as to the court may seem just and equitable in the premises." No motion was made to transfer the cause to the law side of the docket for trial. There was some discussion between the court and counsel just before the cause was submitted, from which the inference may be drawn that counsel for appellant understood that, if the court refused to reform the policy as prayed, plaintiff's petition would be dismissed, but evidently, upon more thorough consideration of the questions before it, the court reached the conclusion that plaintiff was entitled to judgment upon the policy for the face thereof without reformation thereof, and acted accordingly. The court, under a prayer

for general equitable relief, was authorized to cause judgment to be entered in accordance with the law and evidence. *Reiger v. Turley*, 151 Iowa, 491, 131 N. W. 866; *Laverty v. Sexton*, 41 Iowa, 435; *Hoskins v. Rowe*, 61 Iowa, 180, 16 N. W. 78; *Pond v. Waterloo Agri. Works*, 50 Iowa, 596; *Thomas v. Farley Mfg. Co.* 76 Iowa, 735, 39 N. W. 874.

If plaintiff was entitled to recover upon the policy unreformed, then, so far as the defenses pleaded in the answer are concerned, the court would, if the cause had been tried to a jury, have been compelled to direct a verdict in plaintiff's favor, and de-

Pleading—
sufficiency of
prayer for
relief.

fendant was not, therefore, prejudiced by the entry of judgment.

II. By stipulation of the parties, it was agreed upon the trial that the insured died on or about September 23, 1918, at the Great Lakes Naval Training Station, Great Lakes, Illinois, of influenza; that this disease was prevalent throughout the United States, and that soldiers, sailors, and civilians were attacked thereby and died therefrom, and that said disease was not confined to any particular locality or class of people; that at the time of his death the premiums due had been paid; that shortly after the policy was delivered, without first obtaining permission from them to do so, he enlisted in the Navy, and that at the time the United States was at war with certain foreign countries; that while at the naval training camp the insured was subject to the same military discipline, and occupied barracks and tents the same as other enlisted or drafted men in training for the naval service at said station.

There is no question but that, when the insured voluntarily enlisted and took the prescribed oath, he entered the naval service of the United States government, and thereafter became subject to the orders and discipline provided for that branch of the government service. *Ruddock v. Detroit L. Ins. Co.* 209 Mich. 638, 177 N. W. 242; *Malone v. State L. Ins. Co.* 202 Mo. App. 499, 213 S. W. 877; *Reid v. American Nat. Assur. Co.* — Mo. App. —, 218 S. W. 957.

The only question is: Was he, at the time of his death, within the meaning of the provisions of the policy quoted above, "engaged in military or naval service in time of war?" If so, then manifestly the judgment entered in the court below cannot be sustained. An examination of the adjudicated cases reveals some lack of harmony in the conclusions reached. However, it will be observed that the language of each contract was in some respects unlike that of the others.

The supreme court of Wisconsin, in *Kelly v. Fidelity Mut. L. Ins. Co.* 169 Wis. 274, 4 A.L.R. 845, 172 N. W. 152, sustained a judgment in favor of the plaintiff for the amount thereof upon a policy containing the following provision: "Military or Naval Service or Work in Connection with Warfare.—If the insured shall, within two years from date of this policy, engage in any military or naval service, or in any work as a civilian in any capacity whatsoever in connection with actual warfare, and shall die within two years of the date of this policy as a result, directly or indirectly, of engaging in such service or work, the liability of the company under this policy shall be limited to the return of the premiums paid, without interest."

In that case it appeared that the insured entered the military service in 1917, was transferred to France, and while in the discharge of his duties in the Army, which was the supervision of the construction and operation of sawmills, he was accidentally killed by being thrown from a motorcycle he was riding against a tree. At the time his death occurred he was more than 100 miles from the zone of actual warfare, or from the territory occupied or invaded by the enemy. The court held that the death of the insured occurred while he was engaged in the military service, but not "as a result directly or indirectly of engaging" therein, and therefore the provision of the policy was not broken.

In *Myli v. American L. Ins. Co.* — N. D. —, post, 1097, 175 N. W. 631, the supreme court of North Dakota, construing the provisions of a policy identical with the provisions of the policy in suit, sustained a recovery by the beneficiary. The insured died of influenza while in a naval training station at Minneapolis. The court held that, as the insured was not subject to any of the hazards of war, had not been assigned to special service, but was only in training therefor, he was not, within the meaning of the policy, "en-

gaged in the military or naval service" of the United States.

The language of the policy considered by the supreme court of Michigan in *Ruddock v. Detroit L. Ins. Co.* supra, was as follows: "This policy and the application therefor, a full and true copy of which is hereto attached, shall constitute the entire contract between the parties hereto. It is unrestricted as to travel, residence, or occupation, and shall be incontestable after one year from date, except for nonpayment of premium and except for naval or military service in time of war, without a permit, which are risks not assumed by the company, provided that, in case of the death of the insured while engaged in such service, without a permit, the amount payable hereunder shall be the reserve on the policy at date of death. Military and naval service in time of war shall be construed to include work as a civilian, in any capacity whatever, in connection with actual warfare."

The insured, after entering the military service, died at Camp Custer of pneumonia. The court held that, as the insured had entered the military service, no recovery could be had. The specific language construed by the court in this case was, "If I shall enter or be engaged in such service, . . . " recovery would be limited to the net reserve held against the policy.

In *Miller v. Illinois Bankers' L. Asso.* 138 Ark. 442, 7 A.L.R. 378, 212 S. W. 310, the supreme court of Arkansas held that the defendant was not liable upon a policy containing the following clause: "It is expressly provided that death while in the service in the Army or Navy of the government in time of war is not a risk covered at any time during the continuance or reinstatement of this policy for any greater sum than the amounts actually paid to the company thereon," where the death of the insured resulted from pneumonia while stationed at Camp Beauregard, Louisiana; but in *Benham v. American Cent. L. Ins. Co.*

140 Ark. 612, 217 S. W. 462, which was a suit upon a policy providing: "Death while engaged in military or naval service in time of war, or in consequence of such service, shall render the company liable for only the reserve under this policy, unless the company's permission to engage in such service shall have been obtained and such extra premium or premiums as the company may require shall have been paid,"—the same court held that plaintiff was entitled to recover, although the death of the insured occurred while in the military service in time of war from influenza at Camp Dick, Texas. The court, in the course of its opinion, said: "The words in the restricted clause now under consideration mean something more than death to the insured during the period of time he was in military service of the United States. The word 'engaged' denotes action. It means to take part in. To illustrate: a servant injured while in the operation of a train means that he must be injured while assisting or taking part in the operation of the train. An officer engaged in the discharge of the duties of his office is one performing the duties of his office. So, here, the words 'death while engaged in military service in time of war' mean death while doing, performing, or taking part in some military service in time of war; in other words, it must be death caused by performing some duty in the military service. That is to say, in order to exempt the company from liability, the death must have been caused while the insured was doing something connected with the military service, in contradistinction to death while in the service due to causes entirely or wholly unconnected with such service. This construction, we think, would be according to the natural and ordinary meaning of the words. By the use of the word 'engaged' it must have been intended that some activity in the service should have caused the death, in contradistinction to merely a period of time while the

(— Iowa, —, 180 N. W. 321.)

insured was in the service. This view is strengthened when we consider the words following. The words 'or in consequence of such service' relate to the word 'death.' So that death in 'consequence of such service' means death resulting from some act of the insured connected with the service, whether such death occurred during the period of his service or afterwards."

In *Malone v. State L. Ins. Co.* 202 Mo. App. 499, 213 S. W. 877, the Springfield, Missouri, court of appeals affirmed a judgment against the defendant for the amount of a policy which provided: "If within five years from the date of this policy the insured shall engage in any military or naval service in time of war (death from submarine or aviation service, connected with actual warfare, as a part thereof, is a risk not covered by this policy), the liability of the company in event of the death of the insured while so engaged, or within six months thereafter, as a result of such service, will be limited to the return of the premiums paid hereon, exclusive of any extra premium paid for military or naval service, less any indebtedness to the company hereon."

The death of insured occurred while he was in the military service at Jefferson Barracks, Missouri, from the accidental discharge of a gun in the hands of a fellow soldier. The court held that, as his death was not the result of his services in the Army, the provision quoted did not relieve the company from liability. The same court, in *Reid v. American Nat. Assur. Co.* — Mo. App. —, 218 S. W. 957, reversed a judgment in favor of the plaintiff in a suit upon a policy containing the following provision: "Notwithstanding anything herein to the contrary, if the insured shall die or become disabled while engaged in naval or military service in time of war, or in consequence of such service, the amount payable and the liability of the company hereunder shall be limited to an amount equal to the net reserve hereon, calculated

according to the American Experience Table of Mortality, with interest at the rate of three and one-half (3½) per cent per annum. After one year from the date of this policy this condition will be waived, if the insured, immediately before engaging in such naval or military service, shall pay to the company at its home office an extra cash premium; such extra premium shall be payable annually in advance during the term of such service, and shall be seven and one-half (7½) per cent of the face of this policy."

The insured died at a hospital in Raleigh, North Carolina, from pneumonia, after he had been assigned to Company 13, 163d Depot Brigade, at Camp Polk, North Carolina. The court held that at the time of his death he was engaged in the military service, and gave no special significance to the words "or in consequence of such service," found in the clause quoted.

The provision of the policy construed by the Missouri court of appeals in *Slaughter v. Protective League L. Ins. Co.* — Mo. App. —, 223 S. W. 819, was as follows: "The death of the insured while engaged in military or naval service in time of war is a risk not assumed under this policy, and in such event the company will return all the premiums actually paid to the company hereunder."

The insured died in France, after the armistice was signed. The court followed its holding in *Reid v. American Nat. Assur. Co.* supra, and declined to accept the effect given to the word "engaged" by the Arkansas court in *Benham v. American Cent. L. Ins. Co.* supra.

As appeared from the extract from the policy in suit in each of the cases cited, there is considerable diversity in the language thereof, and the conclusion of the court in several cases is based upon language materially different from that of the policy in controversy. The rule is universal that the provisions of an insurance contract are to be construed most strongly against the in-

suror. Words must not, however, be given a strained or unusual meaning in order to effect liability. The provision of the policy exempts the defendant from liability if the death of the insured occurred while he was engaged in the military or naval service in time of war. It is conceded that the defendant enlisted in the Navy shortly after the policy was applied for, and that he died of influenza while in the service at the government naval training station at Great Lakes, Illinois. He had not at the time been assigned to duty in the Navy, and his occupation was not necessarily more hazardous than it was at the time the application for the policy was signed, which was that of a farmer and driver of a dairy wagon. At the time of his death an epidemic of influenza extended over a large part of the United States, and was nearly, if not quite, as common among civilians as among those in training at the naval station referred to, or the various camps throughout the country. That the provision of the policy in question was inserted therein as a protection to the insurer against the extraordinary hazards of war is, of course, obvious. The insured at the time of his death, and at all times after he enlisted in the Navy, was thousands of miles from this zone of actual warfare and many hundred miles from the high seas. He had assumed none of the hazards of naval warfare. In the sense that he had pledged or obligated himself to perform whatever service he might be called upon to perform, and that he was bound to observe the rules and discipline of the Navy, he was engaged in the naval service. He had entered the naval service of the United States in time of war. He had not, however, taken part in any of the movements of the Navy, had

not been present when it was engaged in a conflict with the enemy or other action, but was pursuing a course of instruction preparatory to being assigned to some active duty in the Navy.

Except *Myli v. American L. Ins. Co.* — N. D. —, post, 1097, 175 N. W. 631, and *Benham v. American Cent. L. Ins. Co.* 140 Ark. 612, 217 S. W. 462, none of the cited cases are squarely in point on the proposition before us, and in the latter case, in which the liability of the company was sustained, the court gave considerable significance to the words "in consequence of such service" found in the exemption clause. We are of the opinion that the insured was not, at the time of his death at the Great Lakes Naval Training Station, which occurred at a point remote from the war zone or the high seas, and at a time when his occupation was not more hazardous than at the time the policy was issued, within the meaning of the clause in question, engaged in the naval service of the United States, although this country was at the time at war with the Central European powers, and that the exemption does not apply.

Insurance—
exception of
naval service—
period at train-
ing camp.

It follows that the judgment of the court below must be, and is, affirmed.

Weaver, Ch. J., and Ladd, Preston, and Salinger, JJ., concur.

Arthur, J., dissents.

NOTE.

The subject of the validity, construction, and effect of provisions in life or accident policies, in relation to military service, is considered in the annotation following *MYLI v. AMERICAN L. INS. CO.* post, 1103.

O. C. BRADSHAW, Admr., etc., of Emmett Elton Bradshaw, Deceased,
v.

FARMERS' & BANKERS' LIFE INSURANCE COMPANY, Appt.

Kansas Supreme Court — November 6, 1920.

(107 Kan. 681, 193 Pac. 332.)

Insurance — exception of military service — construction.

A provision in a life insurance policy was to the effect that, if the insured engaged in military or naval service and died while in such service, the extent of the liability of the insurer should be the return of the premiums paid on the policy. It was also provided that the limitation would not apply if an insured engaging in the service should obtain a permit from the insurer and pay the extra premiums required. The insured, who had been inducted into military service under the Selective Service Act and was acting as chief blacksmith of his company in a training camp, died of pneumonia. Held, that the agreement limiting the liability of the insurer where the insured engaged in military service was one the parties had a right to make, and is binding upon both of them, and that the extent of the liability of the insurer on a policy was the amount of the premiums paid thereon; and held, further, that the limitation of liability applies equally to persons inducted into the military service under the Selective Service Act, as to those who voluntarily enlist in that service.

[See note on this question beginning on page 1103.]

Headnote by JOHNSTON, Ch. J.

APPEAL by defendant from a judgment of the District Court for Harper County (Hay, J.) in favor of plaintiff in an action brought to recover the amount alleged to be due on a life insurance policy. *Reversed.*

The facts are stated in the opinion of the court.

Mr. J. A. Brubacher, for appellant:

Insured not having taken out a permit from the company to engage in military service, and not having paid the extra war premium as required by the naval and military war clause of his policy, defendant's liability was limited to a return of the annual premium paid, to wit, eighty-six dollars and ninety cents (\$86.90), the insured having died while engaged in the military service in time of war.

Malone v. State L. Ins. Co. 202 Mo. App. 499, 213 S. W. 877; Bastian v. British American Assur. Co. 143 Cal. 287, 66 L.R.A. 255, 77 Pac. 63; Redd v. American Cent. L. Ins. Co. 200 Mo. App. 383, 207 S. W. 74; Miller v. Illinois Bankers' Life Asso. 138 Ark. 442, 7 L.R.A. 378, 212 S. W. 310; Kelly v. Fidelity Mut. L. Ins. Co. 169 Wis. 274, 4 A.L.R. 845, 172 N. W. 152; Malone v. State L. Ins. Co. 202 Mo. App. 499, 213 S. W. 877; Myli v. American L. Ins. Co.

— N. D. —, post, 1097, 175 N. W. 631; Benham v. American Cent. L. Ins. Co. 140 Ark. 612, 217 S. W. 462; Sandstedt v. American Cent. L. Ins. Co. 109 Wash. 338, 86 Pac. 1069; Nutt v. Security L. Ins. Co. — Ark. —, 218 S. W. 675; Reid v. American Nat. Assur. Co. — Mo. App. —, 218 S. W. 957; Ruddock v. Detroit L. Ins. Co. 209 Mich. 638, 177 N. W. 242; Mattox v. New England Mut. L. Ins. Co. — Ga. App. —, 103 S. E. 180; Edwards v. Masonic Mut. L. Asso. — W. Va. —, 103 S. E. 454; Interstate Business Men's Acci. Asso. v. Lester, 168 C. C. A. 309, 257 Fed. 225; Graves v. Knights of Macca-bees, 199 N. Y. 397, 139 Am. St. Rep. 912, 92 N. E. 792; Sovereign Camp, W. W. v. Akins, — Tex. Civ. App. —, 219 S. W. 492.

Messrs. Donald Muir and Henry J. Brady, for appellee:

Defendant was liable for the full face value of the policy.

Queen Ins. Co. v. Excelsior Mill. Co. 69 Kan. 114, 76 Pac. 423; Elliott v. Grand Lodge, A. O. U. W. 2 Kan. App. 430, 42 Pac. 1009; Kelly v. Fidelity Mut. L. Ins. Co. 169 Wis. 274, 4 A.L.R. 845, 172 N. W. 152; Myli v. American L. Ins. Co. — N. D. —, post, 1097, 175 N. W. 631; Benham v. American Cent. L. Ins. Co. 140 Ark. 612, 217 S. W. 462; Edwards v. Masonic Mut. L. Asso. — W. Va. —, 103 S. E. 454; Redd v. American Cent. L. Ins. Co. 200 Mo. App. 383, 207 S. W. 74; Nutt v. Security L. Ins. Co. — Ark. —, 218 S. W. 675.

Johnston, Ch. J., delivered the opinion of the court:

This action was brought by O. C. Bradshaw, as administrator, against the Farmers' & Bankers' Life Insurance Company, upon a life insurance policy. The plaintiff recovered judgment, and defendant appeals.

The policy was issued on the life of Emmett Elton Bradshaw on November 27, 1917, and the premium for the first year, \$86.90, was paid. Included in the policy was a military and naval service clause, which reads as follows:

"If, within five years from the date of this policy, the insured shall engage in military or naval service in time of war, the liability of the company, in event of the death of the insured while so engaged, or within six months thereafter, will be limited to the return of the regular premium paid hereon, exclusive of any extra premium, less any indebtedness to the company hereon;

"Unless, before or within one month after engaging in such service, or at the time of issuance hereof if the insured be already so engaged, the insured shall secure permit for such service and pay to the company, at its home office in Wichita, Kansas, such extra premium as may be required by the company, and, in like manner, shall pay, annually thereafter, on each anniversary of this policy or within one month thereafter, while the insured shall continue to be so engaged, such extra premium as may be required by the company.

"Within one year after the termi-

nation of the war the company will return such portion of the extra premium as in its judgment will not be required to cover the extra hazard. In event that the insured enters such service, any total and permanent disability benefit or double indemnity for accidental death benefit shall be canceled automatically upon such entry and any premium paid for such benefit or benefits shall no longer be collected.

"Service in the Aviation Corps or on submarines within five years from date of this policy is a risk not assumed under this contract, and in event of death while engaged in such service the amount payable shall be limited to the return of the regular premium paid hereon, exclusive of any extra premium paid for military or naval service, less any indebtedness to the company hereon."

Under a rule of the insurance company, permits for military and naval service were granted upon payment of an added premium of \$37.50 per year on each \$1,000 of insurance. After the issuance of the policy and about June 1, 1918, Emmett Elton Bradshaw was inducted into the military service under the provisions of the Selective Service Law (U. S. Comp. Stat. §§ 2044a-2044k) and sent to Camp Ft. Logan, in Colorado, where he was assigned to duty as a member of a cavalry troop which was shortly afterwards transferred to Ft. D. A. Russell, in Wyoming. There he was assigned to duty as a blacksmith and horse-shoer, but was drilled in the cavalry service and trained as a marksman. The troop to which he had been assigned was transferred into a battery of field artillery on September 8, 1918, and that battery was sent to a camp near West Point, Kentucky. After arriving at the camp in Kentucky, he served as chief blacksmith for his company, drawing the pay of a top sergeant, but was not required to drill. About three weeks after arriving at that camp he had an attack of influenza, and died as the result of lobar pneumonia on October 13, 1918, in a hospital at

Camp Taylor. From the time he entered the military service until his illness, he wore the uniform of a soldier and was under military supervision. While being transferred from the fort in Wyoming to the camp in Kentucky he traveled on a pass given by a superior officer which read: "Pass Sergeant — and Horseshoer Bradshaw."

When the claim for insurance was presented, the defendant acknowledged liability for and offered to pay the amount of the premiums which had been paid by the insured for the policy, but refused to pay the face value of the policy because of the fact that the insured had entered and was in the military service when he died, and had not obtained a permit nor paid the added premium for the extra hazard arising from such service. There is no dispute as to the facts in the case, no question as to the validity of the contract of insurance; but there is a controversy as to the meaning and effect of the terms of the policy.

The provisions of the war clause, giving them their natural and ordinary meaning, fairly imply that, to secure the full indemnity of \$2,500 in case the insured engages in military service, he must have paid the extra premiums, and if these are not paid only the limited liability attaches. They recite that, if the insured shall engage in military service and he dies while so engaged, the limit of liability will be the regular premiums that have been paid. They further stipulate that if he engages in such service he shall obtain a permit from the company, and also pay the extra premiums required by the company, and continue such payments at each anniversary of the policy while he is so engaged, and the company in turn agreed that when the war ended it would return any part of the extra premiums not required to cover the extra hazard. It is conceded that, about six months after the policy was issued, the insured entered the military service and continued in that service until his death, and it is further conceded

that no permit was asked and no extra premiums were paid. However, the plaintiff contends that the provision for limited liability does not apply, because Bradshaw was not in fact engaged in the military service, and his death from pneumonia was not the result of military service. It is urged that the word "engage," as used in the policy, implies more than that he is in the military service, but carries the idea that the extra premium is based upon the hazards attendant upon active service, and that the policy, when liberally interpreted, only exempts the company from liability for the face of the policy when the insured is actually and actively performing functions in or near the firing line or is otherwise exposed to war activities. The insured, it is contended, was a company blacksmith while he was at the camp, and the hazards were no greater than if he had been employed at the same work as a civilian outside of military service, and, besides, his death did not result from war activities. The cases cited by counsel relating to war clauses of insurance policies are not in harmony, but the differing views of the courts rest to quite an extent on the differing terms of these provisions. A somewhat similar provision was before this court in *La Rue v. Kansas Mut. L. Ins. Co.* 68 Kan. 539, 75 Pac. 494. There the policy provided that the insured might serve in the militia or the military or naval service of the United States in times of peace without prejudice to the insurance policy, and he might so serve in time of war by giving the insurer notice and paying an extra premium for the war hazards, but in case of death the company should be liable for the reserve on the policy only. He enlisted in the United States service and aided in putting down the insurrection against the United States government in the Philippine Islands. No premium was paid, and it was held that the company was not liable for more than the reserve on the policy.

Among the cases growing out of

the late war is *Mattox v. New England Mut. L. Ins. Co.* — Ga. App. —, 103 S. E. 180. The policy provided that the insured should not engage in military or naval service without the consent of the insurer, and in case he did engage in such service in time of war, and his death occurred while so engaged, the liability of the insurer would be limited to the return of the premiums paid on the policy. The insured enlisted in the Dental Corps of the Army, and while aboard a transport bound for France he became ill with pneumonia and died while at sea. At the time of his death he was performing dental service, and under the military regulations no combatant service was or could be required of him. The plaintiffs sought a recovery of the face value of the policy, but the court gave effect to the terms of the war clause and rendered judgment for the insurer.

In *Ruddock v. Detroit L. Ins. Co.* 209 Mich. 638, 177 N. W. 242, the insured was inducted into the military service after he had obtained a policy which provided that it "shall be incontestable after one year from date, except for nonpayment of premium and except for naval or military service in time of war, without a permit, which are risks not assumed by the company, provided that, in case of the death of the insured while engaged in such service, without a permit, the amount payable hereunder shall be the reserve on the policy at date of death. Military and naval service in time of war shall be construed to include work as a civilian in any capacity whatever in connection with actual warfare."

Within three months after entering the service the insured died from disease in a training camp. It was contended in the action that, as he entered the Army by conscription and not voluntarily, and as he was not engaged in active military service at the time of his death, the provisions of the military clause were not effective. The court held that such clauses are not contrary to pub-

lic policy, that the insured was in the military service when he passed the examination, took the oath, and was enrolled as a soldier, and that one so inducted into the Army is as clearly engaged in the military service when in training as when before the enemy. It was further held that it was competent for the parties to draw the line when liability should cease in time of war, and that the court could not, without changing the contract, ignore the war clause and hold the defendant liable for the amount named in the policy.

In a case from Missouri the policy provided that, if the insured died while engaged in naval or military service or in consequence of such service, the liability of the insurance company would be limited to an amount equal to the net reserve, and, further, that this condition would be waived if extra premiums were paid by one engaged in such service. The insured entered the Army under the Selective Service Act, and he died of pneumonia while in training. The court held that the insured was engaged in the military service when he died, that the exemption in the military clause was one which the parties had a right to make, and that the insurance company was not liable beyond the net reserve of the policy. *Reid v. American Nat. Assur. Co.* — Mo. App. —, 218 S. W. 957.

In another case a court of appeals of Missouri held, under a stipulation in a war clause, that if insured shall engage in military or naval service in time of war, the liability of the company, in the event of death while so engaged, or within six months thereafter as a result of such service, shall be limited to a return of the premiums. The court held that it was not enough for the insurance company to prove that the insured was engaged in military service and died while so engaged, but that under the conditions of the clause it must further prove that he died as the result of such service. It was held that one who had been inducted into the Army was engaged in mili-

tary service, but that the exemption from liability for death rested not alone upon the insured being engaged in that service, but also upon the cause of death; that is, death "as the result of such service." It was remarked that proof of the first by no means proved the second. *Mallone v. State L. Ins. Co.* 202 Mo. App. 499, 213 S. W. 877.

In *Redd v. American Cent. L. Ins. Co.* 200 Mo. App. 383, 207 S. W. 74, the policy involved contained a provision that "in case of death from service in war without permission from the company, the full reserve for this policy at the time of such death only will be paid."

In the application for the policy it was stated that active service in the Army in time of war would invalidate the insurance unless a permit was given. The court in a divided opinion held that the term "active service," in a military sense, meant the performance of duty against an enemy or operations carried on in his presence in time of war, and that one in a training camp thousands of miles from the scene of hostilities was not engaged in active service. The case turned upon the use of the term "active service," and it was interpreted to mean the service one renders when engaged or enlisted in actual hostilities, and, the insured not being in such service at the time of his death, judgment was awarded the plaintiff for the face value of the policy.

In the late case of *Miller v. Illinois Bankers' Life Asso.* 138 Ark. 442, 7 A.L.R. 378, 212 S. W. 310, the supreme court of Arkansas passed on a policy containing a clause to the effect that the death of the insured while in military service is not a risk covered by the policy for any greater sum than the amounts actually paid as premiums. The insured died while in a camp in this country, and it was ruled that he was in the military service within the meaning of the provision exempting the insurer from liability.

In a later case, *Benham v. American Cent. L. Ins. Co.* 140 Ark. 612,

217 S. W. 462, a condition of the policy was that "death while engaged in military or naval service in time of war, or in consequence of such service, shall render the company liable for only the reserve under this policy, unless the company's permission to engage in such service shall have been obtained and such extra premium or premiums as the company may require shall have been paid."

The insured died of influenza while undergoing training in this country, and it was held by a bare majority of the court that the term "engaged" denotes action and meant death while doing or taking part in some military service, and that, taking this term in connection with the phrase, "in consequence of such service," the parties meant that the liability related to a death resulting from some act connected with the service, in contradistinction to a period of time when he was in such service. A like interpretation was placed upon a similar clause in *Nutt v. Security L. Ins. Co.* — Ark. —, 218 S. W. 675. The justices dissenting in the last two cases insisted that the cases were controlled by the rule of *Miller v. Illinois Bankers' Life Asso.* supra, and made the forcible contention that the terms of the policy related to the status of the insured, and not to the cause of death.

In a case decided a few days ago, the Missouri court of appeals declined to adopt or follow the interpretation placed by the Arkansas supreme court upon the word "engaged," and held that the exemption clause was enforceable where death resulted from pneumonia. *Slaughter v. Protective League L. Ins. Co.* — Mo. App. —, 223 S. W. 819.

The supreme court of Wisconsin had before it a policy containing a military clause to the effect that, if the insured engaged in any military or naval service or work as a civilian in connection with active warfare, and died as a result of engaging in such service or work, only a limited liability would attach. Applying the rule that such exemption should be

construed most strongly against the insurance company, it was ruled that the clause did not limit liability for all deaths in military service, but only for such as are due to some cause peculiar to military service. In this case the insured met his death while riding a motorcycle under circumstances, it is said, which were not peculiar to military service, and it was therefore held that the insured could recover all of the insurance. The court evidently gave force to the provision limiting liability where the service or work was performed in connection with actual warfare. It stated that "the hazards attendant upon riding a motorcycle under the facts set out in this case were no greater because the insured was engaged in the military service of the United States than if he were performing a like act as a civilian and apart from the military service. In other words, his death resulted from circumstances which are common to military and civil life." *Kelly v. Fidelity Mut. L. Ins. Co.* 169 Wis. 274, 4 A.L.R. 845, 172 N. W. 152.

One of the cited cases is *Myli v. American L. Ins. Co.* — N. D. —, post, 1097, 175 N. W. 631, where the insured died of influenza while in the naval service. An insurance policy on his life provided that if his death occurred while engaged in military or naval service where no permit for such service had been granted, only a limited liability would attach. The court ruled that because of other provisions in the policy relating to the payment of double indemnity, which were united with the exemption for the extra hazards of military and naval service, the limitation did not apply unless the death resulted from such extra hazards.

Another case cited is *Sandstedt v. American Cent. L. Ins. Co.* 109 Wash. 338, 186 Pac. 1069, which involved a policy containing a military clause limiting liability where the insured dies while engaged in military service, and it was determined that the

exemption was controlling and judgment was given for the defendant. The principal controversy in that case was as to the effect of statements made by a local agent of the insurance company to the mother of the insured, and it was held that these did not constitute a modification or waiver of the conditions of the policy, and that under its terms no recovery could be had.

A case from West Virginia is cited, but the determination there was placed on a rule of estoppel arising on the representations made and interpretations placed on the policy by the agent of the insurance company, when the insurance was taken, on which the insured relied and had a right to rely, and therefore his failure to pay the extra premiums did not defeat a recovery of the insurance. *Edwards v. Masonic Mut. Life Asso.* — W. Va. —, 103 S. E. 454.

Although there is some conflict in the authorities, the better reason is with those which hold that such limitations do not conflict with any public policy, and that, when they are plainly expressed in insurance contracts, parties are bound by them. The extra hazards of military and naval service furnish a good ground for requiring the consent of the insurer and the payment of extra premiums. The decisions denying the enforcement of such provisions are mostly placed on exceptional conditions interpreted to mean that the limitation applies when death results in consequence of war activities or in connection with actual warfare, provisions not found in the policy in question.

We are unable to agree with those decisions holding that the expression "engaged in military service" means the performance of functions in actual war or in resisting the hostile action of the enemy. As used in the policy in question, the term means no more than the insured was in the military service. Status and not causation is the ground for the limi-

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military service
—construction.

tation, and it is plainly provided that anyone engaged in military service may, by obtaining consent of the insurer and paying added premiums, keep alive the whole insurance provided by the policy. Nor do we find anything in the conditions of the policy that gives ground for a distinction between those who volunteer and enter the service by enlistment, and those who are taken in under the Selective Service Act. In either case there is freedom of contract to fix the extent of liability. As was said in *Ruddock v. Detroit L. Ins. Co.* 209 Mich. 638, 177 N. W. 242: "The government to which both owed allegiance had the right to call the deceased to the service. We are unable to perceive that public policy prevented them from contracting that if that event took place defendant should not be bound if death occurred while in such service

unless a permit was given and an additional fee or premium paid. The parties did not differentiate between voluntary and involuntary service, between service performed under enlistment and service performed under the Draft Law, and we cannot, without making a contract for them, read such differentiation into the policy."

The judgment is reversed, and the cause remanded, with directions to enter judgment against the defendant for the amount of the premium paid on the policy by the insured.

Petition for rehearing denied.

NOTE.

Provisions in life or accident policy in relation to military service are considered, both with reference to their validity and their construction and effect, in the annotation following *MYLI v. AMERICAN L. INS. Co.* post, 1103.

LENA MYLI, Respt.,

v.

AMERICAN LIFE INSURANCE COMPANY of Des Moines, Iowa, Appt.

North Dakota Supreme Court — November 17, 1910.

(— N. D. —, 175 N. W. 631.)

Insurance — death in military service — absence of permit.

1. In an action upon an insurance policy, where it appeared that the insured had enlisted in the Navy Department during the recent war, and had been assigned to Dunwoody Institute in Minneapolis for instruction and training, and while so assigned had contracted influenza, from which he died, after a brief illness, in the city hospital at Minneapolis, the insurance company defended on the ground that the insured had not obtained a permit under the following clause of the policy: "If, within five years from date hereof, the death of the insured shall occur while engaged in military or naval service in time of war without previously having obtained from the company a permit therefor, the company's liability shall be limited to the cash premiums paid hereon for the three years from the date of issuance and thereafter to the legal reserve on this policy." It is held, in view of the other provisions of the policy with respect to double indemnity for accidental death and disability benefits, the above-quoted provision does not exempt from liability for the face of the policy, where the death of the insured was not occasioned by extra hazard incident to military or naval service.

[See note on this question beginning on page 1103.]

Headnotes 1-3 by BIRDZELL, J.

— repugnancy in clauses — construction.

2. Where a repugnancy exists between different clauses of an insurance policy, the whole should, if possible, be construed so as to conform to an evident, consistent purpose.

[See 6 R. C. L. 847; 14 R. C. L. 926.]

— provision against extra hazard.

3. Where status or occupation is not clearly made the basis for exemption from liability under an insurance policy, and where the language employed indicates a desire to provide

only against extra hazard, to avoid forfeiture of the insurance, the policy will be construed to the latter effect.

— death from influenza — hazard of naval service.

4. One who dies from influenza in an inland training school after having enlisted in the United States Navy does not come to his death while subject to the hazard of naval service, within the meaning of an exception in a life insurance policy.

[See annotations in 4 A.L.R. 848; 7 A.L.R. 382.]

APPEAL by defendant from a judgment of the District Court for Cass County (Cole, J.) in favor of plaintiff, and from an order denying a motion to vacate and order judgment in her favor for a lesser amount, in an action brought to recover the amount alleged to be due on a life insurance policy. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. E. B. Evans and Carmody, Loudon, & Mulready, for appellant:

A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as it is ascertainable and lawful.

Young v. Metcalf Land Co. 18 N. D. 441, 122 N. W. 1101; Miller v. St. Paul F. & M. Ins. Co. 26 S. D. 454, 128 N. W. 609; Fletcher v. Arnett, 4 S. D. 615, 57 N. W. 915; Frost v. Williams, 2 S. D. 457, 50 N. W. 964.

Evidence of the witnesses Stark and Mennie was admissible.

9 Cyc. 588; Janssen v. Muller, 38 S. D. 611, 162 N. W. 393; Moore v. Beiseker, 77 C. C. A. 545, 147 Fed. 367.

The insured, Hiram I. O. Myli, while at the Dunwoody Institute, was in the naval service of the United States.

Miller v. Illinois Bankers' Life Asso. 138 Ark. 442, 7 A.L.R. 378, 212 S. W. 310; Re Grimley, 137 U. S. 147, 34 L. ed. 636, 11 Sup. Ct. Rep. 54; Ex parte Reed, 100 U. S. 13, 25 L. ed. 538; United States v. Nagler, 252 Fed. 217; Redd v. American Cent. L. Ins. Co. 200 Mo. App. 383, 207 S. W. 74; Graves v. Knights of Maccabees, 99 N. Y. 397, 139 Am. St. Rep. 912, 92 N. E. 792.

Messrs. Harry Lashkowitz and Barnett & Richardson, for respondent:

The clause, Death occurring while engaged in naval service in time of war, being restrictive, therefore the construction of the clause must be strict, and an interpretation placed upon it in favor of the insured, if possible.

Welts v. Connecticut Mut. L. Ins. Co. 48 N. Y. 34, 8 Am. Rep. 518; Union Cent. L. Ins. Co. v. Hughes, 110 Ky. 26, 60 S. W. 850; Bolte v. Equitable F. Asso. 23 S. D. 240, 121 N. W. 773; Beauchamp v. Retail Merchants Asso. 38 N. D. 483, 165 N. W. 545; Schwindermann v. Great Eastern Casualty Co. 38 N. D. 584, 165 N. W. 982; Pulaski v. Sovereign Camp, W. W. 105 Misc. 740, 174 N. Y. Supp. 298; Donahue v. Mutual L. Ins. Co. 37 N. D. 203, L.R.A. 1918A, 300, 164 N. W. 50.

Deceased was not engaged in performing an act of naval service at the time of his death.

Beauchamp v. Retail Merchants Asso. 38 N. D. 483, 165 N. W. 545; Union Cent. L. Ins. Co. v. Hughes, 110 Ky. 26, 60 S. W. 850; Wilkinson v. Travelers' Ins. Co. — Tex. Civ. App. —, 72 S. W. 1016.

Defendant was liable on the policy.

Welts v. Connecticut Mut. L. Ins. Co. 48 N. Y. 34, 8 Am. Rep. 518; New York L. Ins. Co. v. Hendren, 24 Gratt. 536; LaRue v. Kansas Mut. L. Ins. Co. 68 Kan. 539, 75 Pac. 494; Cox v. Employers' Liability Assur. Corp. [1916] 2 K. B. 629, 85 L. J. K. B. N. S. 1557, 114 L. T. N. S. 1180, 33 Times L. R. 664; Ex parte Mikell, 253 Fed. 817; Woods v. Standard Acci. Ins. Co. L.R.A.1918C, 130, note; Redd v. American Cent. L. Ins. Co. 200 Mo. App. 383, 207 S. W. 74; Interstate Business Men's Acci. Asso. v. Lester, 168 C. C. A. 309, 257 Fed. 225; Kelly v. Fidelity Mut. L. Ins. Co. 169 Wis. 274, 4 A.L.R. 845, 172 N. W. 152.

At the time of the payment of the premium due in September, the insurance company, through its agent, Stark, had full knowledge of the fact that the deceased was at Dunwoody Institute. This fact being known to Stark, his knowledge would be held to be the knowledge of the company.

Teutonia Ins. Co. v. Howell, 21 Ky. L. Rep. 1245, 54 S. W. 852; *Germania L. Ins. Co. v. Koehler*, 168 Ill. 293, 61 Am. St. Rep. 108, 48 N. E. 297; *Harding v. Norwich Union F. Ins. Soc.* 10 S. D. 64, 71 N. W. 755; *Fosmark v. Equitable Fire Asso.* 23 S. D. 102, 120 N. W. 777; *Thomas v. Modern Brotherhood*, 25 S. D. 632, 127 N. W. 572.

Birdzell, J., delivered the opinion of the court:

This is an appeal from a judgment in favor of the plaintiff and from an order denying a motion to vacate and to order judgment in favor of the plaintiff for a lesser amount. The action is one to recover the face of a life insurance policy. The defense is that, by reason of a provision in the policy, the liability of the defendant was limited to \$68.30, the amount of premiums previously paid by the insured.

On October 30, 1917, a policy of insurance in the sum of \$2,000 was issued by the defendant company to Hiram I. O. Myli, in which Lena Myli, his mother, the plaintiff in this action, was sole beneficiary. On or about June 19, 1918, the insured enlisted in the United States Navy, and was required to attend Dunwoody Institute in Minneapolis for training. The Institute was at the time under the control of the United States Naval Department, and it furnished technical and other instruction to enlisted men after the fashion of ordinary colleges. There were also some requirements as to drill and physical culture. After a brief illness of influenza, the insured died on October 7, 1918, in the city hospital at Minneapolis. At the trial of the action the court directed a verdict for the plaintiff, and the defendant appeals.

Upon this appeal the principal contention of the defendant and ap-

pellant concerns its liability under the policy. It contests liability for the face of the policy on the ground that by express provision it was stipulated that its liability should not exceed the cash premium paid, if the death of the insured should occur while he was engaged in naval service. The language of the policy upon which this contention is based is as follows: "If, within five years from date hereof, the death of the insured shall occur while engaged in military or naval service in time of war without previously having obtained from the company a permit therefor, the company's liability shall be limited to the cash premiums paid hereon for the three years from date of issuance and thereafter to the legal reserve on this policy."

The argument is that the above provision reduces liability to a return of the premium in this case, by reason of the fact that the insured was at the time of his death an enlisted man in the naval service. It is contended that the effect of the provision is to automatically cancel the life insurance stipulated in the policy, the moment the policyholder becomes enlisted or inducted into the military or naval service without having previously obtained a permit therefor, and without complying with whatever provisions (not named in the policy) the company might wish to require concerning additional premiums. As against this contention, the respondent asserts that it is the evident purpose of the stipulation to provide only against the consequences of extra hazard incident to actual service in connection with hostilities.

Before the harsh construction in the direction of forfeiture can be supported, it must be found to result necessarily from the provisions of the policy. The policy must be read in the light of the obvious purpose of the particular provision, and it must be found that the exemption falls clearly and directly within its terms. It seems clear to us, upon a

view of the whole policy and the evident purpose underlying the particular stipulation, that the circumstances of this case do not bring the defendant within the exemption contracted for.

This policy is more than the usual life insurance policy. It provides for the payment of \$2,000 upon the death of the insured, "or \$4,000 in the event of the death of the insured . . . while this policy is in full force, by bodily injury effected exclusively by external, violent, and accidental means, not including death by self-destruction, sane or insane, nor resulting from military or naval service in time of war, and occurring within ninety days after such bodily injury."

The policy also provides, under the head of "Risks Not Assumed," that it is issued without restrictions as to residence, travel, or occupation, "except military or naval service in time of war as provided herein," and that, subject to the restriction for military or naval service in time of war, the face value shall be incontestable after two years; also that "the double indemnity benefit contained in this policy shall be contestable, after two years from the date of issuance, only for military or naval service in time of war," etc.

Besides the double indemnity feature, the policy also contains a disability feature, and in the paragraph defining the disability protection it is stated that after the payment of one annual premium, and while the policy is in full force, the company, upon receipt of proofs of disability, will pay certain stipulated benefits. The injuries excepted, for which benefits will not be paid, are stated as follows: "Excluding intentional, self-inflicted injuries, or injuries resulting from military or naval service in time of war."

There are further stipulations for a reduction of the annual premiums to the extent of \$1.40 per thousand dollars if the insured shall elect to cancel the disability protection, and

\$2 on each thousand if the insured shall elect to cancel the double indemnity protection.

From the foregoing provisions it is apparent that the insurance company did not stipulate for nonliability under either the double indemnity or disability clauses of the policy, for injuries to the insured or for accidental death, while his status was that of an enlisted man. For these clauses specifically provide for nonliability for the double indemnity and the disability benefit only in case the injury or death results from military or naval service in time of war. If the appellant's contentions are correct with respect to the meaning of the clause particularly relied upon, the situation would be this: If an enlisted man should die from some cause not attributable to war, the insurance would not be collectable. But if, while walking down the street he should meet with an accident not attributable to the extra hazard of war, he would be entitled to his disability benefits, or, if he should meet accidental death, the beneficiary would be entitled to double indemnity.

It will be seen that if the construction of the appellant be followed there is a repugnancy on the face of the policy between the provision relied upon and the provision concerning double indemnity in case death results from accidental means not "resulting from" military or naval service. The repugnancy is this: A double indemnity is provided for in case of accidental death, provided that such death does not result from military or naval service in time of war, and in the clause relied upon by appellant, as construed by it, no insurance is provided in case death shall occur while the insured is "engaged in military or naval service in time of war." If an enlisted man should meet death by accidental means not attributable to military or naval service, the double indemnity would be payable under the double indemnity clause, but under the clause relied upon it would also

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be true that his death occurred while his status was that of an enlisted man in time of war, and the death loss would not be payable.

The other provisions of the policy respecting the extra hazard of war service appear to be based upon the same foundation as the double indemnity provision. They except from liability for injury or accident only where occasioned by the extra hazard. The whole policy should be

—repugnancy
in clauses—
construction. read together, so that its provisions may be reconciled to a consistent purpose. Especially should this be done where the main purpose is evident, and is one which accords with reason. It would indeed be a peculiar situation under which a person who has life insurance has double indemnity in case of death by accident and no indemnity in case of death from natural causes. This situation is rendered none the less peculiar by reason of the fact that upon obtaining the permit the exception provided in the double indemnity and disability clauses would still obtain, because a repugnancy arises and does exist as explained above upon the failure to obtain a permit.

Reading the whole policy, we deem the intention of its various provisions with regard to the restrictions concerning military or naval service to be clear. The express intention does, in reality, conform to the purpose of the provision as stated in the deposition of an officer of the company, namely, to except the policy from applying where the insured has come to his death from a hazard connected with military or naval service. In short, the status of the insured is not made the test, but the character of the service. The important words in the clause relied upon, and those which signify its correlation with the other provisions hereinbefore referred to, are "while engaged in military or naval service." These words are descriptive of two forms

of hazardous service that are not intended to be covered, and it is only while the insured is engaged in such service that the exemption is applicable. It is idle to say that because one's status is such that he must respond to orders from military or naval authority, he is in military or naval service within such a provision, when in fact there is nothing about his daily activities that suggests the least physical danger that would enhance an insurance risk.

It would be highly unreasonable to assume that it was intended to exempt from liability on the mere ground of status.

—provision
against extra
hazard. In the first place, if status were to be made the test, language should have been employed to make it apparent that it was to be the test. For instance, it might well have been stated, "If within five years from date the insured shall enlist or become inducted into the military or naval service without having obtained a permit therefor," etc., then status would clearly have been the test. In the late war we know that many men were inducted into the service and assigned to special duties for which they were fitted by training, and which involved no hazard peculiar to military or naval service; also that many who were capable of receiving special technical training were assigned to institutions capable of giving that training, so that they might later on be better equipped for more highly specialized service in conducting actual hostile operations, and that, while receiving that training, they were not subjected to the hazards of war. There would be no reason for such persons to assume that by so enlisting they rendered themselves liable to pay extra premiums on life insurance policies of this sort, or, failing to do so, to lose the benefit of their insurance.

On the question of the proof that the insured came to his death while

subjected to the hazard of naval service, it is clear that such is not the case. He was in an inland city, and not subject to any risks not common to civilians with whom he was constantly associated. Neither do we deem the exclusion of the testimony of defendant's agents, with reference to the construction of the contract at the time the application was made, to be erroneous. By express stipulation the company refused to be bound by any construction placed upon the policy by its agent, or agents, and from this it results that the conversations taking place between the insured and the agents of the defendants could not, as a matter of law, amount to a mutual construction of the contract by the parties; and the provisions are not so doubtful that a court would be justified in following any construction the insured alone might have placed upon it.

—death from
influenza—
hazard of naval
service.

For the foregoing reasons, the judgment and order appealed from are affirmed.

Christianson, Ch. J., and Bronson, Grace, and Robinson, JJ., concur.

A petition for rehearing having been filed, Birdzell, J., on December 8, 1919, handed down the following additional opinion:

Appellant has filed a petition for rehearing, in which emphasis is laid upon a portion of those provisions of the policy relating to double indemnity and disability. It is stated that these provisions are expressly made applicable only "while the policy is in full force and effect," and that, in the instant case, if appellant's contention as to the meaning of the principal clause in controversy is correct, the policy would not be in full force and effect while a man was in military or naval service without a permit. Ergo, says the petitioner, the discussion in which the repugnancy is pointed out begs the question, for it first assumes that the policy "is in full force and effect." The learned counsel

for the petitioner are apparently unmindful of the argument advanced by them in the brief in answer to the respondent's contention that the company had waived the benefit of the clause in question. The respondent argued that, by the acceptance of the premium from the insured after his enlistment in the naval service, the company had waived the provision respecting limited liability during such service. Appellant's counsel asserted in the brief, and strenuously argued (and we think correctly), that this did not constitute a waiver, for the insured had the right to pay the premiums "and continue the policy in force while he was in the naval service of the United States, notwithstanding the exemption of the company from liability," etc. It is our view that the policy was in force, as the counsel for appellant originally argued, and that the repugnancy does exist as pointed out in the original opinion. It may be added that the petitioner's argument is clearly founded upon a misconception of the stipulation relied upon. The stipulation does not cancel the policy. It only provides what the liability shall be in case of the death of the insured while engaged in military or naval service without a permit. It does not purport to limit or create any exemption from liability for disability following accidents sustained by one in the military or naval service, not resulting from such service. Then, to accentuate the repugnancy previously pointed out, the policy says: "If the death of the insured shall occur during the period of total and permanent disability, then the full amount of this policy, less the value of any indebtedness, shall be paid to the beneficiary."

It is clear that the disability benefit attaches before the exemption from liability for a death loss becomes operative.

If the disability and double indemnity provisions were not intended to be operative while the insured was in the military or naval

service without a permit, it would seem that the policy, which expressly stipulates for stated reductions in the premium where the insured elects to cancel these benefits, would also be extended to cancelations automatically effected through entry into the military or naval service without a permit. The insurance company itself has apportioned the premiums to these risks, and why would it collect those portions of

the premiums applicable to such risks from a man in military or naval service without a permit, if it was not assuming the risks exactly as stated in the policy? And, as stated, the exemptions under these clauses are based upon death or injuries resulting from military or naval service in time of war.

The petition is denied.

Christianson, Ch. J., and Robinson, Bronson, and Grace, JJ., concur.

ANNOTATION.

Validity, construction, and effect of provisions in life or accident policy in relation to military service.

I. Validity, 1103.

II. Construction and effect:

- a. Commencement and termination of period, 1104.
- b. Character and nature of risks contemplated, 1105.

The above question is covered in the annotations to *Kelly v. Fidelity Mut. L. Ins. Co.* 4 A.L.R. 848, and *Miller v. Illinois Bankers' Life Asso.* 7 A.L.R. 382. And the present annotation includes the later decisions on the point, which, it will be observed, are rapidly accumulating.

I. Validity.

(Supplementing annotation in 4 A.L.R. 848.)

In accord with the earlier view, it has been held that a provision exempting an insurer from liability in case the insured dies while engaged in naval or military service is valid, and not against public policy. *BRADSHAW v. FARMERS' & BANKERS' L. INS. CO.* (reported herewith) ante, 1091; *Reid v. American Nat. Assur. Co.* (1920) — Mo. App. —, 218 S. W. 957. With respect to this question the court, in *Reid v. American Nat. Assur. Co.* (Mo.) supra, said: "The suggestion that an exemption clause of this character should be held void as against public policy, in that it deters enlistment in the Army or Navy and hampers the government in its war activities, has not been considered directly except in *Miller v. Illinois Bankers'*

II.—continued.

- c. Persons contemplated; manner of induction, 1109.
- d. Payment of extra premiums, 1110.

III. Waiver or estoppel, 1110.

Life Asso. (1919) 138 Ark. 442, 7 A.L.R. 378, 212 S. W. 310, and there the court ruled against the contention. It has doubtless been more or less considered in other cases, as it was by us in *Malone v. State L. Ins. Co.* (1919) 202 Mo. App. 499, 213 S. W. 877, though not discussed. We find no suggestion by court or textbook writer that such clause is void as against public policy. That service in the military forces in time of war is a somewhat hazardous occupation must be admitted. That the government could, under its war powers, compel insurance companies to carry insurance on soldiers at regular rates, need not here be questioned. It is sufficient to say that it has not done so. That is only one of the numerous financial losses incident to military service. The fact that the government entered largely into war risk insurance, doubtless at large expense and loss, was due in part, at least, to the fact that insurance companies were not willing to, and doubtless could not except at great loss, carry insurance on soldiers and sailors, except at a considerable increase of rates. We find no sufficient reason for declaring void as against public

policy provisions in contracts of insurance excluding therefrom the hazards incident to military service in time of war, or, what is the same thing, exacting a higher rate of premium for such risks."

And in *Ruddock v. Detroit L. Ins. Co.* (1920) — Mich. —, 177 N. W. 242, a provision of a life insurance policy entered into with one of military age when a state of war existed, that military or naval service in time of war was not a risk assumed under the policy, was held not invalid on the ground that it was against public policy. The court said: "It must be borne in mind that the solvency of insurance companies is maintained by the collection of their premiums; that risks differ, and that a rate adequate for one condition may not be adequate for another; and, eliminating the question of the power of the state to prescribe a standard form of contracts of insurance and otherwise regulate such corporations (questions not here involved), a company may contract with the insured upon the terms under which it shall be bound. Both the parties to this contract knew when it was entered into that a state of war existed; both knew that deceased was of draft age, that he was a single man in good health, as his medical examination showed; and both knew he was subject to be called by our government to do military service. With this knowledge, possessed by both, this contract of insurance was entered into. The government to which both owed allegiance had the right to call the deceased to the service. We are unable to perceive that public policy prevented them from contracting that, if that event took place, defendant should not be bound if death occurred while in such service, unless a permit was given and an additional fee or premium paid. The parties did not differentiate between voluntary and involuntary service, between service performed under enlistment and service performed under the Draft Law, and we cannot, without making a contract for them, read such differentiation into the policy."

It will be observed that the con-

clusion in this case is in harmony with the decisions in *Duckworth v. Scottish Widows' Fund Life Assur. Soc.* (1917) 33 Times L. R. (Eng.) 430, and *Miller v. Illinois Bankers' Life Asso.* (Ark.) *supra*, which are set out in the prior annotation.

And it was conceded in *Long v. St. Joseph L. Ins. Co.* (1920) — Mo. App. —, 225 S. W. 106, that provisions in life insurance policies, reducing liability or exempting the insurer altogether in case of insured's death while engaged in military or naval service, are valid.

II. Construction and effect.

(Supplementing annotations in 4 A.L.R. 848, and 7 A.L.R. 382.)

a. Commencement and termination of period.

After a review of the authorities set out in the prior annotation, the court in *Ruddock v. Detroit L. Ins. Co.* (1920) — Mich. —, 177 N. W. 242, under a policy providing that military or naval service in time of war was not a risk assumed by the policy, held that one had entered the military service when he had passed the examination, taken the oath, been enrolled, and become subject to the orders of the military authorities, and accordingly decided that an insured had entered such service where he had been duly inducted into the military service of the United States and had died of pneumonia at a military camp. The court said: "An examination of the authorities is convincing that one has entered 'military service' when he has passed the examination, taken the oath, been enrolled as a soldier, and become subject to the orders of the military branch of the government. This, we think, is clearly the common understanding of that term. He then gives up for the time being the occupation of a civilian, and takes up the tasks of a soldier. He may no longer come and go as he pleases. He is constantly subject to the orders of his superiors. If he violates the Articles of War he is tried by court-martial, a military court. His status is then fixed. He is as clearly in the military service when in training as when be-

fore the enemy. We think the parties to this contract so understood the term, as 'military service' in times of peace did not suspend the contract or relieve defendant of liability. The parties had the right to draw the line where liability would cease in time of war. They drew it at the point where the insured entered 'military service,' when he was inducted into that service. Unless we interpolate the word 'active,' or otherwise change the language of the contract, we must hold that the defendant was not liable under the terms of the contract. We recognize the rule that if two reasonable interpretations of the contract are permissible, we should adopt the one most favorable to the insured, the contract having been prepared by the insurer. This rule is a salutary one, and we have no disposition to weaken its force. We should, however, be careful to guard against its misapplication. It is not applicable where it is necessary to read something into the contract that the parties have not put there, in order to make it susceptible of a double construction. We are constrained to hold that defendant was not, under the policy, required to pay upon the death of deceased, which occurred after he was inducted into the military service of his country during a time of war, and while he was still in such service. The language found in the policy, 'Military and naval service in time of war shall be construed to include work as a civilian in any capacity whatever in connection with actual warfare,' cannot aid the plaintiff; on the contrary, it indicates that 'military service,' as applied to a soldier, does include service not connected with actual warfare before the enemy. This language tends to strengthen rather than weaken the defendant's contention, and does not impress us as in any way sustaining the plaintiff's contention, or as militating against the conclusion we have reached."

And in *Reid v. American Nat. Assur. Co.* (1920) — Mo. App. —, 218 S. W. 957, the court said that an insured, who enlisted in the Army in consequence of the draft while the United

States was at war with Germany, and died of pneumonia in a hospital, was beyond question in military service.

And citing the *Ruddock Case* (Mich.) and the *Reid Case* (Mo.) supra, and the *Malone Case* (1919) 202 Mo. App. 499, 213 S. W. 877, set out in the prior annotation, the court in *BOATWRIGHT v. AMERICAN L. INS. CO.* (reported herewith) ante, 1085, stated that there was no question but that, when the insured enlisted and took the prescribed oath, he entered the military service of the government, and became subject to the orders and discipline of the military branch thereof.

The insured's death in *Slaughter v. Protective League L. Ins. Co.* (1920) — Mo. App. —, 223 S. W. 819, occurred after the signing of the Armistice on November 11, 1918, and the court stated that even if they were willing to hold that, on the death of a soldier who was in France, from pneumonia, after the Armistice was signed, he was not engaged in military service, they would be precluded from so holding under the stipulated agreement of facts.

b. Character and nature of risks contemplated.

The decisions construing provisions excluding full liability in case an insured engages in military or naval service are not in entire harmony, where an insured has died from disease at a military camp before seeing any active service abroad. The word "engaged," as used in those provisions in connection with military service, has been given rather a forced construction in some cases, where the view has been taken that the word denotes action, and means death while doing or taking part in some military service, and that the parties intended that the liability should relate to a death resulting from some act connected with the service, in contradistinction to a period of time when the insured was in such service.

It will be observed, however, that some of the apparent conflict among the cases may be explained by noting

the difference in the phraseology of the policies.

In one of the cases (*Benham v. American Cent. L. Ins. Co.* (1920) 140 Ark. 612, 217 S. W. 462), which adopted the rather strained construction above indicated, the policy provided that it should be incontestable except for violation of its provisions as to military or naval service in time of war, and that "death while engaged in military or naval service in time of war, or in consequence of such service," should render the company liable only for the reserve, unless the company's permission was obtained and such extra premium paid as the company required. It was contended that the case of *Miller v. Illinois Bankers' Life Asso.*, set out in the prior annotation in 7 A.L.R. 382, controlled, but the court refused to concede the point, and held that the words "death while engaged in military service in time of war" meant death while doing, performing, or taking part in some military service in time of war, and did not include a case of death from influenza of an enlisted man, who died in a hospital in Dallas. The court said: "The words in the restricted clause now under consideration mean something more than death to the insured during the period of time he was in the military service of the United States. The word 'engaged' denotes action. It means to take part in. To illustrate, a servant injured while in the operation of a train means that he must be injured while assisting or taking part in the operation of the train. An officer engaged in the discharge of the duties of his office is one performing the duties of his office. So here, the words 'death while engaged in military service in time of war' mean death while doing, performing, or taking part in some military service in time of war; in other words, it must be death caused by performing some duty in the military service. That is to say, in order to exempt the company from liability, the death must have been caused while the insured was doing something connected with the military service, in contradistinction to death while in the service due

to causes entirely or wholly unconnected with such service. This construction, we think, would be according to the natural and ordinary meaning of the words. By the use of the word 'engaged,' it must have been intended that some activity in the service should have caused the death, in contradistinction to merely a period of time while the insured was in the service. This view is strengthened when we consider the words following. The words, 'or in consequence of such service,' relate to the word death. So that death 'in consequence of such service' means death resulting from some act of the insured connected with the service, whether such death occurred during the period of his service or afterwards. It is well known that there is more danger in performing the duties incident to naval or military service than other occupations. Hence, after the World War commenced, presumably this restrictive clause was added, in anticipation that the insured might join the Army or Navy, and, recognizing that the duties of such a service imposed additional danger to the insured, it was provided that if death ensued while he was engaged in the performance of a military or naval service, the company would be exempt from liability. The word 'engaged,' as used in the policy, means an active or physical performance of some act or duty in connection with military service. As above stated, the rule applies that the clause should receive the interpretation most favorable to the plaintiff, because the defendant is responsible for the language used. In the case at bar the insured died from influenza, and the record shows that this disease was prevalent throughout the United States, and that soldiers and civilians alike contracted it and died from it. The death of the insured, then, was in no sense caused by performing any military service, or in consequence of being engaged in military service."

And in *Nutt v. Security L. Ins. Co.* (1920) — Ark. —, 218 S. W. 675, a provision of a life policy that after one year it should be incontestable, "except for naval or military service

in time of war without a permit," and that, "in case of death while engaged in such service without a permit," the amount payable should be only the reserve value, was construed not to mean the death of the insured during the time he was in the Army, but to mean death resulting from war activities. And following the Benham Case (Ark.) supra, it was held that recovery for the full amount of the policy could be had where the insured, who was an enlisted private in the Army, died from influenza in a base hospital at a military camp, where the disease was common alike to soldiers and civilians. The court said: "The war exemption provision, when read in entirety, relates to death proximately caused by war. In order to give the proviso contained in the provision a reasonable meaning, it is necessary to restrict the risks not assumed by appellee insurance company while the insured was in military service without a permit, to death incidental to military duty. The word 'engaged' in the proviso furnishes the key to a proper construction of the provision. It was so held by this court in the interpretation of a provision in an insurance policy quite similar to the provision now before us for construction, in the recent case of Benham v. American Cent. L. Ins. Co. (1920) 140 Ark. 612, 217 S. W. 462, handed down on November 24, 1919. In that case the court said: 'The word "engaged" denotes action. It means to take part in'—and in the same case also said: "'Death while engaged in military service in time of war" means death while doing, performing, or taking part in some military service in time of war. That is to say, in order to exempt the company from liability, the death must have been caused while the insured was doing something connected with the military service, in contradistinction to death while in the service due to causes entirely or wholly unconnected with such service.' While we do not regard the clause now before us for construction as containing any ambiguity, yet an additional reason in support of the conclusion reached upon the interpretation of the clause may be found in the fact that

no reduction was provided in the policy of the premium during the period of enlistment. Had it been the intention of appellee insurance company to relieve itself from death resulting from natural or ordinary causes during the period of enlistment, it would certainly have provided for a corresponding reduction in the premium. It is hardly supposable that the same premium of \$68.26 per annum would have been exacted to give the insured protection to the extent of the reserve value of the policy, when the reserve value was less than the annual premium. The fact that no reduction was made in the premium is indicative of the intent on the part of the company to exempt itself from the payment of the face of the policy under the war exemption provision from death caused by enhanced danger or hazard to life incident to war, and not from death incident to causes for which it imposed and exacted a fixed annual premium."

And in Long v. St. Joseph L. Ins. Co. (1920) — Mo. App. —, 225 S. W. 106, where the policy provided that in case of death of the insured "while engaged in any military or naval service in time of war," the beneficiary should accept in full settlement a sum equal to the premiums paid, it was held that the insurer was liable for the face of the policy, upon its appearing that the insured, although he enlisted in the Navy prior to the signing of the Armistice, died after such signing, from influenza, while he was at home on a furlough. The court here relied on the Benham and NUTT Cases, supra.

And the court in Rex Health & Acci. Ins. Co. v. Pettiford (1920) — Ind. App. —, 129 N. E. 248, also relied upon the Benham and Nutt Cases in reaching its conclusion that death did not result "while engaged in active military service," where the insured, shortly after having entered training camp, died at the Base Hospital of influenza.

And after reviewing the cases on the point, and calling attention to some lack of harmony and also to the fact that the language of the policies

varied somewhat, the court in *BOATWRIGHT v. AMERICAN L. INS. CO.* (reported herewith) ante, 1085, held that the insured at the time of his death was not "engaged in military or naval service in time of war," within the meaning of an exemption provision of the policy sued on, where he enlisted in the Navy and died of influenza at a naval training station on the Great Lakes, at a time when that disease was prevalent throughout the United States, and was common to civilians as well as enlisted men.

And it will be noted that in *MYLI v. AMERICAN L. INS. CO.* (reported herewith) ante, 1097, the insurer was held liable for the face of the policy, where the insured, during the war, enlisted and was assigned to an instruction camp in Minneapolis, and died in the city hospital, the court holding that a provision that "if within five years from date hereof the death of the insured shall occur while engaged in military or naval service in time of war, without previously having obtained from the company a permit therefor, the company's liability shall be limited," should be construed in connection with a clause providing for double indemnity in the event of accidental death not "resulting from military or naval service in time of war," and another provision for double indemnity, "excluding . . . injuries resulting from military or naval service in time of war," the view being taken that the provisions for limitation exempted the insurer from full liability only where death was occasioned by an extra hazard, incident to military or naval service, and that under the facts of the case the provision for exemption was without force.

And in *GORDER v. LINCOLN NAT. L. INS. CO.* (reported herewith) ante, 1080, a provision requiring the insured to obtain permission to enter military service, and pay an extra premium, and, in case of death in "consequence of such service and without the company's permit," limiting the insurer's liability, was held not to excuse payment of the face of the policy, except where death occurred in consequence

of military service, and, the insured having entered the military service without the company's consent, and dying at a base hospital of pneumonia, which was epidemic among both the civilian and military population, the view was taken that it could not be said from the evidence in the case that his death was in consequence of military service.

The court distinguished the provision from that in the *MYLI CASE* reading, "while engaged in military or naval service in time of war," observing that had that provision stood alone it would have been extremely doubtful whether the beneficiary could have recovered, where the insured had been inducted into the active military or naval service, and in this connection referred to the other provisions of the policy in the *MYLI CASE*, making it plain that status alone was not the condition of the limited liability.

It will be observed that the *MYLI CASE*, by reason of the additional provisions, may be more easily distinguished from some of the following cases than can *Benham v. American Cent. L. Ins. Co.* (1920) 140 Ark. 612, 217 S. W. 462, and *Nutt v. Security L. Ins. Co.* (1920) — Ark. —, 218 S. W. 675, *supra*.

The court in *BRADSHAW v. FARMERS' & BANKERS' L. INS. CO.* (reported herewith) ante, 1091, said that they were unable to agree with those decisions holding that the expression "engaged in military service" meant the performance of functions in actual war or in resisting the hostile action of the enemy, and held that the provision of the policy in that case that if the insured should "engage in military or naval service in time of war, in event of his death while so engaged," the recovery should be limited to a return of premiums paid, unless a permit was obtained and an extra premium paid, meant no more than that the insured was engaged in the military service, that status and not causation was the ground for the limitation, and that the insurer was liable only for the amount of the premiums paid, where the insured died of influenza at a military

hospital while he was an enlisted soldier.

And in *Slaughter v. Protective League L. Ins. Co.* (1920) — Mo. App. —, 223 S. W. 819, where the policy provides that death "while engaged in military or naval service in time of war" was a risk not assumed, and that in such case the company should be liable only for a return of premiums paid, it was held that the exemption applied upon its appearing that the insured, who was a private, died from pneumonia somewhere in France, while with the American Expeditionary Forces, the court stating that the only condition required to create the exemption was that the insured be engaged in naval or military service in time of war. The court said that they were unwilling to make the close distinction in regard to the word "engaged" that was adopted in *Benham v. American Cent. L. Ins. Co.* and *Nutt v. Security L. Ins. Co.* (Ark.) supra.

And in *Sandstedt v. American Cent. L. Ins. Co.* (1920) 109 Wash. 338, 186 Pac. 1069, it was held that the insurer was liable only for the reserve value, where the insured enlisted in the military service, and died in France of pneumonia, and the policy provided that "death while engaged in military or naval service in time of war, or in consequence of such service," should render the company liable for only the reserve under the policy, unless the company's permission to engage in such service should have been obtained and such extra premium as the company might require have been paid.

And in *Reid v. American Nat. Assur. Co.* (1920) — Mo. App. —, 218 S. W. 957, a provision of a life policy that if the insured should die "while engaged in military service in time of war," the amount of liability should be limited to the reserve of the policy, was held to limit the right of recovery to the reserve of the policy, where the insured died of pneumonia at a hospital while he was an enlisted man in the United States Army during the war. The court distinguished *Redd v. American Cent. L. Ins. Co.* (1918) 200 Mo. App. 383, 207 S. W. 74; and *Malone v. State L. Ins. Co.* (1919) 202 Mo.

App. 499, 213 S. W. 877, set out in the earlier annotation, and said: "In each of the two cases just mentioned the exemption clause was so worded as to require more than mere proof that the insured died while in military service. In the *Redd Case*, the insurer was not liable, according to the terms of the policy, unless the deceased was in the active military service, as distinguished from service in a training camp; and in the *Malone Case*, the exemption only applied when the deceased was engaged in the military service and his death was the result of such service. In the present case we find no such restrictive clause, but the exemption from liability applies to every death occurring while the insured is engaged in the military service in time of war. The policy states in unequivocal terms that the insurer shall be liable only for the net reserve value of the policy in case the insured dies 'while engaged in naval or military service in time of war.' If this is a valid policy provision, the defendant cannot be held liable except for the small reserve value of this policy, which it offered to pay. There is nothing in this policy contract warranting the instruction that, in order to escape military liability, there must be a finding not only that the deceased was engaged in military service at the time of his death, but that such death was in consequence of such service."

c. Persons contemplated; manner of induction.

In *Sovereign Camp, W. W. v. Compton* (1919) 140 Ark. 313, 215 S. W. 672, an amendment to the constitution of the mutual benefit association that enlisted men in the Army and Navy during the war might be admitted to membership, upon payment of a certain addition to the regular rate, was held to have no reference to members in good standing at the time of the amendment, but to apply only to new members.

In *Sovereign Camp, W. W. v. Compton* (Ark.) supra, a provision of the constitution of a mutual benefit association that persons employed as aviators should not be admitted to

membership was held not to relate to one in the aviation service in the Army and Navy of the United States, but to refer to persons engaged in aviation as a private business.

The court in *BRADSHAW v. FARMERS' & BANKERS' L. INS. CO.* (reported herewith) ante, 1091, held that the provision of the policy limiting liability if the insured should engage in military service in time of war applied equally to persons taken into the military service under the Selective Service Act, and to those who volunteered and entered the service by enlistment. And to the same effect, see *Ruddock v. Detroit L. Ins. Co.* (1920) — Mich. —, 177 N. W. 242, *supra*.

d. Payment of extra premiums.

In *Carlson v. Scandia L. Ins. Co.* (1919) 170 Wis. 342, 174 N. W. 896, a provision that after the payment of the first premium a grace of thirty-one days would be allowed for the payment of any subsequent premium, the policy meanwhile continuing in force, was construed as applying to a provision that military and naval service was a risk not assumed unless a written permit was obtained therefor at a rate of extra premium, and providing for a limited benefit in case of death while in such service without such permit and payment of extra premium, the court stating that the two provisions were not entirely clear, and that the company, having so construed the provisions, could not complain, and accordingly a recovery was allowed for the death of an insured which occurred within thirty-one days after he had entered the service.

In *Mattox v. New England Mut. L. Ins. Co.* (1920) — Ga. App. —, 103 S. E. 180, where a war clause in a policy provided that if the insured within five years from the date of the policy should engage in any military or naval service in time of war, the insurer's liability, in event of the insured's death while so engaged, should be limited to a return of premiums paid, unless before engaging in such service, or within thirty-one days thereafter, the insured should pay such extra premium as might be required by the com-

pany, the court refused to adopt the plaintiff's contention that the beneficiary was entitled to recover the face of the policy upon the insurer's death in military service without the payment of an extra premium, unless the company had actually demanded it, but, on the contrary, sustained the view asserted by the insurer that under the war clause, considered with other provisions of the policy, it was not obligatory on the company to ascertain that the insured was intending to enlist in military service and notify him that the company required an extra premium for such service, but that it was clearly incumbent upon the insured, if he desired to keep the policy in force for the full value, to notify the insurer of his intention to enter military service so that the company might have an opportunity to demand the extra premium of him. The court recognized the rule that any ambiguity in an insurance contract should be construed most strongly against the insurer, but stated that the construction must be a reasonable and not a strained one, and that it would be an unreasonable construction to adopt the theory advanced by the plaintiff.

III. Waiver or estoppel.

The question of waiver or estoppel not being distinctive or peculiar to the subject under annotation, the cases cited are, of course, not exhaustive on the point.

In *Ruddock v. Detroit L. Ins. Co.* (1920) — Mich. —, 177 N. W. 242, it was held that the doctrine of waiver or estoppel by causing the beneficiary to proceed to make proofs could not be invoked against the defense that the policy excluded liability in case of death while engaged in military service. With respect to this the court said: "The cases where the doctrine of waiver, or estoppel, has been applied, have largely been cases where the insurance companies have relied on a forfeiture of the contract, upon breaches of the warranties and conditions to work such forfeitures; and in many such cases this court and other courts of last resort have held that if the companies have led the other

party, to his prejudice,—to his expense,—to understand that such forfeitures, such breaches of warranties and conditions, would not be insisted upon, then the companies would be estopped from asserting such defenses. But here the defendant makes no claim of forfeiture of the contract; on the contrary, it is insisting upon the contract itself, and insisting that by its terms it did not insure the deceased when engaged in military service in time of war. To apply the doctrine of estoppel and waiver here would make this contract of insurance cover a loss it never covered by its terms; to create a liability not created by the contract, and never assumed by the defendant under the terms of the policy. In other words, by invoking the doctrine of estoppel and waiver, it is sought to bring into existence a contract not made by the parties, to create a liability contrary to the express provisions of the contract the parties did make."

In *Caldwell v. Illinois Bankers' Life Asso.* (1921) — Tex. Civ. App. —, 226 S. W. 747, where it was provided by statute that every policy of life insurance should contain the entire contract, that no policy should be issued unless it contained a provision that the policy should constitute the entire contract, and that no life insurance company or its agent should make any

agreement as to the insurance except as expressed in the policy, it was held, there being no waiver in the policy of a provision that death while in service in the army or navy of any government was not a risk covered by the policy, that in view of these statutory regulations, the provision in question could not be orally waived, however clearly the oral agreement might be established.

There was held to be no waiver of the military nonliability clause in *Reid v. American Nat. Assur. Co.* (1920) — Mo. App. —, 218 S. W. 957, by reason of the acceptance from the insured's brother of one quarterly instalment of the premium after the insurer's enlistment in the Army, it appearing that the insurer had no knowledge at the time of payment, or before the insured's death, that he had entered the military service, and that he had failed to notify the insurer of such fact as required by the policy.

And it has been held that the mere acceptance by an insurer, of premiums, with knowledge that the insured was in the military service, did not waive a provision of the policy exempting it from liability in case of death while in the military service. *Miller v. Illinois Bankers' Life Asso.* (1919) 138 Ark. 442, 7 A.L.R. 378, 212 S. W. 310. J. T. W.

OSCAR L. MARTIN, Appt.,

v.

PEOPLE'S MUTUAL LIFE INSURANCE COMPANY of Jonesboro.

Arkansas Supreme Court — July 5, 1920.

(— Ark. —, 223 S. W. 389.)

Insurance — accident — wound in battle as accident.

A wound received by a soldier in battle by the explosion of an enemy shell is not the result of an accident within the meaning of an accident insurance policy.

[See note on this question beginning on page 1113.]

APPEAL by plaintiff from a judgment of the Circuit Court for Conway County (Priddy, J.) in favor of defendant in an action brought to recover the amount alleged to be due on an accident insurance policy. *Affirmed.*

Statement by Hart, J.:

Oscar L. Martin brought this suit against the People's Mutual Life Insurance Company of Jonesboro, Arkansas, to recover \$1,000 on an accident insurance policy.

The material facts are as follows: On March 16, 1917, the Arkansas Mutual Life Insurance Company issued to Oscar L. Martin an accident insurance policy in the sum of \$1,000. Article No. 4 of the policy provides that, should the insured sustain bodily injuries resulting directly, independently, and exclusively of any and all other causes, effected solely through external, violent, and purely accidental means, which shall wholly and continuously from the date of such injury disable and prevent insured from performing each and every duty pertaining to any and every kind of business, labor, or occupation, and which injury shall require the continuous service of a registered surgeon for one full week or more, the company will pay to the insured the sum of \$10 per week for each week of such disability, not exceeding twenty consecutive weeks.

Subsequently Oscar L. Martin was drafted in the United States Army and was sent with the Army to France to fight against the German Army. On July 22, 1918, while the United States and German Armies were engaged in battle, the Germans fired a shell which fell near where Martin was engaged in fighting, and exploded, wounding him so severely that he was permanently disabled for more than two months. Subsequently to the issuance of the policy, the defendant company assumed all liabilities of the Arkansas Mutual Life Insurance Company under the terms of the policies issued by it.

The court directed a verdict for the defendant, and the plaintiff has appealed.

Messrs. Sellers, Gordon, & Sellers, for appellant:

Defendant having entered the battle not voluntarily, the injury he received was an accident.

14 R. C. L. 1255; 1 C. J. p. 459, note 89; Gresham v. Equitable Acci. Ins. Co. 87 Ga. 497, 13 L.R.A. 838, 27 Am. St. Rep. 263, 13 S. E. 752.

Mr. Basil Baker, for appellee:

The injury received was not an accident.

Standard Life & Acci. Ins. Co. v. Langston, 60 Ark. 381, 30 S. W. 427; United States Mut. Acci. Asso. v. Barry, 131 U. S. 100, 33 L. ed. 60, 9 Sup. Ct. Rep. 755; Atlanta Acci. Asso. v. Alexander, 104 Ga. 709, 42 L.R.A. 188, 30 S. E. 939, 4 Am. Neg. Rep. 616; Lickleider v. Iowa State Traveling Men's Asso. 184 Iowa, 423, 3 A.L.R. 1295, 166 N. W. 363, 168 N. W. 884.

Hart, J., delivered the opinion of the court:

It is insisted by counsel for the plaintiff that the injury received by him was the result of an accident within the meaning of the terms of the policy.

We do not agree with counsel in this contention. The policy insured Martin against bodily injuries resulting directly, independently, and exclusively of any and all other causes, effected solely through external, violent, and purely accidental means. In construing a similar clause in Standard Life & Acci. Ins. Co. v. Langston, 60 Ark. 381, 30 S. W. 427, the court said that the means which produced the injury must be something unforeseen, unexpected, and unusual at the time it occurred.

In Maloney v. Maryland Casualty Co. 113 Ark. 174, 167 S. W. 845, the court had under consideration a similar clause, where the insured was injured by the nurse striking the coccyx bone of the insured while attempting to place a bedpan under him, thereby causing an infection which produced blood poison. The court said that if an injury occurs without the agency of the insured, it may be logically termed accidental, even though it may be brought about designedly by another person.

Tested by this rule we do not think that the injury sustained by the insured in the case at bar was an accidental one. He was drafted

Insurance—
accident—
wound in battle
as accident.

in the United States Army, and was injured in battle by an explosion of a shell fired from the gun of the enemy. The injury was the direct and immediate result of the explosion of the shell. If the words as used in the policy are to be understood in their plain and ordinary meaning, they include injury from any unexpected event which happens as by chance, or which occurs without the agency of the insured. In the case at bar the injury took place according to the usual course of things. It is true the insured became a soldier in the United States

Army by reason of the Draft Law after the United States had engaged in the war with Germany; but the two armies voluntarily engaged in battle, and there was a mutual design to kill and injure as many of the enemy as possible.

Under these circumstances, it could not be said that a soldier injured by a bullet or piece of shrapnel from the enemy's gun sustained an accidental injury.

It follows that the court was right in directing a verdict for the defendant, and the judgment must be affirmed.

ANNOTATION.

Accident insurance: death or injury in battle as due to accident or accidental means.

As to validity, construction, and effect of specific provision in life or accident policy, in relation to military service, see annotations in 4 A.L.R. 848; 7 A.L.R. 382; and the supplemental note accompanying *Myli v. American L. Ins. Co.* ante, 1103.

It will be observed that in the reported case (*MARTIN v. PEOPLE'S MUT. L. INS. CO.* ante, 1111), it is decided that a wound received by a soldier in battle by the explosion of an enemy shell is not the result of an accident within the meaning of an accident policy, the court stating that the injury took place according to the usual course of things, the two armies being voluntarily engaged in battle, and each having a common design to kill and injure as many as possible. The somewhat analogous question whether an injury received by one who assaults another may be considered an accident is treated in the annotation accompanying *Meister v. General Acci. Corp.* (1919) 92 Or. 96, 4 A.L.R. 723, 179 Pac. 913. It is there stated that injuries sustained by an insured in an encounter brought about by an assault committed by him upon another with a deadly weapon, or upon one who he knew had such a weapon, are not sustained by accident, or accidental means, within the meaning of an acci-

dent policy, since, under such circumstances, the injury is the natural and probable consequence of his act. The situation in the reported case differs somewhat, inasmuch as the insured was inducted into service under the draft, and was also bound to obey commands of his officers; but these facts were apparently considered of little importance in the reported case.

But two other cases have been disclosed involving the question whether an injury sustained in battle is accidental, or results from accidental means. The fact that so little authority exists on this question may possibly be due in part to specific provisions contained in the policies excluding risks of this character.

In another case, decided since the reported decision (*MARTIN v. PEOPLE'S MUT. L. INS. CO.* ante, 1111), the court has come to a different conclusion than was there reached.

In the case referred to, *State L. Ins. Co. v. Allison* (1920) — A.L.R. —, — C. C. A. —, 269 Fed. 93, where the insured, an American soldier, was killed by a piece of shrapnel from an exploded shell during the Argonne-Meuse battle, it was held that his death was effected directly through external, violent, and accidental means. The court here stated that if it was by

chance, without his design, consent, or co-operation, that he was the victim of the external and violent means which caused his death, such means should be regarded as accidental so far as he was concerned, and that they were none the less accidental as to him because they were put in operation by the voluntary act of another. It also called attention to the fact that the hazards incident to many lawful employments, other than war, are such that it is expected that some of those engaged therein will be injured or killed, and stated that while it was to be expected that some of the soldiers engaged in the military operation, in which the insured was taking part when he was killed, would be injured or killed, it was not to be denied that it was by chance that the insured's person was in the path of the piece of shrapnel which caused his death, and that it was chance which determined that he was the soldier who was the victim of the stray missile. In this case a doubt existed as to whether the shrapnel which killed the insured came from a German shell or from an Allied shell, as it appeared that shells fired by the latter were falling short of their intended mark, and exploding. Little, if any, importance, appears to have been attached to this fact by the court in reaching its conclusion. It may be observed, however, that the insured's death would clearly have been caused by accidental means, had it resulted from a part of a shell fired by the Allied forces, which was unintentionally exploded short of its mark.

In *Interstate Business Men's Acci. Asso. v. Lester* (1919) 168 C. C. A. 309, 257 Fed. 225, writ of certiorari denied in (1919) 250 U. S. 662, 63 L. ed. 1195, 40 Sup. Ct. Rep. 11, where a doctor who was a member of the Medical Corps, and was with a detachment of the National Guard which had been sent out to reconnoiter and resist strikers in a mining locality, was shot when he was observing some men with his field glasses, it was held that his death was accidental within the meaning of an accident policy. The court said: "Was Dr. Lester's death 'acci-

dental'? Whether it was intended by the person who fired the fatal shot is matter of conjecture. That, however, is not material. The word, as used in the policy, is a term of art. To answer the question we must consider the event from the point of view of Dr. Lester. Was it accidental as to him? Defendant says it was not, because he knowingly and consciously exposed himself to the very hazard which caused his death, and must have contemplated such a result as a natural and probable consequence of the service in which he engaged. It is insisted that, to be accidental within the meaning of the policy, the result must have been 'unforeseen and unexpected.' We do not regard this view as sound, either in law or upon principle. Persons protected by accident insurance may incur consciously hazards which may result in their injury or death without forfeiting the insurance, unless the policy expressly excepts the hazard. In the course of life men are constantly required to pass into environments of greatly increased hazard. They may do that knowingly, and, if injury or death results, it does not forfeit their insurance, unless they do something which directly and immediately contributes to produce the act from which their death or injury results. For example, for several years past there have been districts in most of our large cities at certain seasons of the year in which there have been habitual assaults upon peaceful citizens by highwaymen. Men have been well aware of the risks of going upon the streets in such districts alone. They may have been so far conscious of the risks as to arm themselves for protection. And yet any peaceful citizen who has, in the pursuit of business or pleasure, incurred these hazards, is entitled to claim, if he is injured or killed by highwaymen, that as to himself the result is accidental. So it is not true that simply going into an environment of greatly increased hazard, with conscious knowledge of such hazard, will cause injury or death which results therefrom not to be accidental, within the meaning of such policies as we

have before us here. Even in case of personal encounter, if the party wounded or killed is wholly free from fault, his injury or death is accidental within the meaning of the term as used in accident insurance. This has been the uniform holding of the courts. The line of distinction is this: If the party does something which culpably provokes or induces the act causing his injury or death, then the result is not accidental; but if he is wholly free from culpability himself, the result is accidental as to him, though it may have been within the deliberate intent of the aggressor. Within this rule the death of Dr. Lester was clearly accidental. He did nothing to provoke or induce the act which resulted in his death. In the pursuit of duty, he simply exposed himself to the haz-

ard of the service. He may have contemplated death or injury as possible, or even probable; but, if he did, this would not take him out of the protection of his accident insurance. So far as we are able to discover from the authorities and text-writers, this is elementary law at the present time. It is possible to build up an argument to the contrary only by catching at phrases and single sentences, and separating them from the real scope of judicial decision."

The fact that the insured in the Lester Case was merely a member of the Medical Corps, whose duty required him to take no active part in the actual hostilities, partially, at least, distinguishes it from the reported case (*MARTIN v. PEOPLE'S MUT. L. INS. Co.* ante, 1111). J. T. W.

U. S. ROGERS et al., Appts.,

v.

C. S. WILLYARD.

Arkansas Supreme Court—June 28, 1920.

(*Rogers v. Williard*, — Ark. —, 223 S. W. 15.)

Fright — miscarriage — liability.

1. A trespasser who causes miscarriage through fright of a woman whom he knows to be pregnant, by challenging one whom he finds on her premises to fight, flourishing a pistol, and threatening to shoot, is liable for the suffering which he thereby causes her, although there is no actual physical violence towards her.

[See note on this question beginning on page 1119.]

Tort — liability of wilful wrongdoer.

2. A wilful tort-feasor is responsible for the direct and proximate consequences of his acts, without regard to his intention to produce the particular injury.

[See 26 R. C. L. 762.]

Fright — liability for suffering caused by.

3. Recovery may be had for bodily pain and suffering resulting from fright caused by a wilful wrong.

[See 8 R. C. L. 525 et seq.]

APPEAL by plaintiffs from a judgment of the Circuit Court for Sebastian County (Brizzolara, J.), sustaining a demurrer to and dismissing the complaint in a suit brought to recover damages for bodily pain and suffering resulting from fright alleged to have been caused by defendant's wilful and malicious conduct. *Reversed.*

Statement by Hart, J.:

U. S. Rogers and Edna Rogers brought suit against C. S. Willyard

to recover damages because of the miscarriage of Edna Rogers as the result of the alleged negligence and

wrongful acts of the defendant. Their complaint alleges a state of facts substantially as follows:

During the year 1919, U. S. Rogers and Edna Rogers lived on the farm of Edwin McDole, and cultivated a part of it as his tenants. C. S. Willyard lived on an adjoining farm. On the 22d day of April, 1919, Edna Rogers was about eight months advanced in pregnancy, and her condition was known to the defendant, Willyard. On that day Willyard unlawfully entered on the premises occupied by U. S. and Edna Rogers, and wilfully and wantonly engaged in a quarrel with Edwin McDole. While in the presence of Edna Rogers, and while knowing her condition, Williard wilfully and wantonly and maliciously challenged Edwin McDole to fight, and drew and flourished a pistol, threatening to shoot McDole. On account of the fright produced by his actions Edna Rogers received such a shock as to cause her to faint and to bring on a threatened miscarriage. She was attended by her physician for a week, and suffered mental and physical pain constantly. At the end of the week she gave premature birth to a child, and said child had died in her womb prior to its delivery. Her mental and physical suffering was caused by the wilful, wanton, and malicious conduct of Willyard by drawing and flourishing his pistol and threatening to fight McDole, while a trespasser on the premises, and in the presence of Edna Rogers.

The court sustained a demurrer to the complaint, and the plaintiffs declined to plead further. Their complaint was dismissed, and from the judgment rendered, the plaintiffs have duly prosecuted an appeal to this court.

Mr. A. A. McDonald for appellants.

Mr. James Seaborn Holt, for appellee:

No recovery can be had for bodily pain and suffering resulting from a scare or fright caused by a negligent act where such scare or fright is not accompanied by actual physical injury or bodily impact.

St. Louis, I. M. & S. R. Co. v. Bragg, 69 Ark. 402, 86 Am. St. Rep. 206, 64 S. W. 226; Pullman Co. v. Lutz, 154 Ala. 517, 14 L.R.A.(N.S.) 907, 129 Am. St. Rep. 67, 45 So. 675; Chapman v. Western U. Teleg. Co. 88 Ga. 763, 17 L.R.A. 430, 30 Am. St. Rep. 183, 15 S. E. 901; Braun v. Craven, 175 Ill. 401, 42 L.R.A. 199, 51 N. E. 657, 5 Am. Neg. Rep. 15; Kalen v. Terre Haute & I. R. Co. 18 Ind. App. 202, 63 Am. St. Rep. 343, 47 N. E. 694; Kagy v. Western U. Teleg. Co. 37 Ind. App. 73, 117 Am. St. Rep. 278, 76 N. E. 792; Lee v. Burlington, 113 Iowa, 356, 86 Am. St. Rep. 379, 85 N. W. 618; Reed v. Ford, 129 Ky. 471, 19 L.R.A.(N.S.) 225, 112 S. W. 600; McGee v. Vanover, 148 Ky. 737, 147 S. W. 742, Ann. Cas. 1913E, 500; Spade v. Lynn & B. R. Co. 168 Mass. 285, 38 L.R.A. 512, 60 Am. St. Rep. 393, 47 N. E. 88, 2 Am. Neg. Rep. 566; Nelson v. Crawford, 122 Mich. 466, 80 Am. St. Rep. 577, 81 N. W. 335; Western U. Teleg. Co. v. Rogers, 68 Miss. 748, 13 L.R.A. 859, 24 Am. St. Rep. 300, 9 So. 823; Tuttle v. Atlantic City R. Co. 66 N. J. L. 327, 54 L.R.A. 582, 88 Am. St. Rep. 491, 49 Atl. 450, 10 Am. Neg. Rep. 134; Mitchell v. Rochester R. Co. 151 N. Y. 107, 34 L.R.A. 781, 56 Am. St. Rep. 604, 45 N. E. 354, 1 Am. Neg. Rep. 121; Rock v. Denis, Montreal L. Rep. 4 S. C. 134; Miller v. Baltimore & O. S. W. R. Co. 78 Ohio St. 309, 18 L.R.A.(N.S.) 949, 125 Am. St. Rep. 699, 85 N. E. 499; Ewing v. Pittsburgh, C. C. & St. L. R. Co. 147 Pa. 40, 14 L.R.A. 666, 30 Am. St. Rep. 709, 23 Atl. 340; Chittick v. Philadelphia Rapid Transit Co. 224 Pa. 13, 22 L.R.A.(N.S.) 1073, 73 Atl. 4; Gulf, C. & S. F. R. Co. v. Trott, 86 Tex. 412, 40 Am. St. Rep. 866, 25 S. W. 419; Smith v. Postal Teleg. Cable Co. 174 Mass. 576, 47 L.R.A. 323, 75 Am. St. Rep. 374, 55 N. E. 380, 7 Am. Neg. Rep. 54; Strange v. Missouri P. R. Co. 61 Mo. App. 586; Trigg v. St. Louis, K. C. & N. R. Co. 74 Mo. 147, 41 Am. Rep. 305; Victorian R. Comrs. v. Coultas, L. R. 13 App. Cas. 222, 57 L. J. P. C. N. S. 69, 58 L. T. N. S. 390, 37 Week. Rep. 129, 52 J. P. 500, 8 Eng. Rul. Cas. 405; Ward v. West Jersey & S. R. Co. 65 N. J. L. 383, 47 Atl. 561; Haile v. Texas & P. R. Co. 23 L.R.A. 774, 9 C. C. A. 134, 23 U. S. App. 80, 60 Fed. 557; Hack v. Dady, 134 App. Div. 253, 118 N. Y. Supp. 906; Morse v. Chesapeake & O. R. Co. 117 Ky. 11, 77 S. W. 361; West Chicago Street R. Co. v. Liebig, 79 Ill. App. 567, 12 Ann. Cas. 741, note; 8 R. C. L. § 80, p. 525;

St. Louis, I. M. & S. R. Co. v. Taylor, 84 Ark. 42, 13 L.R.A. (N.S.) 159, 104 S. W. 551; Chicago, R. I. & P. R. Co. v. Mizell, 118 Ark. 153, 175 S. W. 396; Patterson v. Seals, 51 Okla. 347, 151 Pac. 591; St. Louis & S. F. R. Co. v. Darnell, 42 Okla. 394, 141 Pac. 785; St. Louis & S. F. R. Co. v. Keiffer, 48 Okla. 434, 150 Pac. 1026; Muskogee Electric Traction Co. v. Rye, 47 Okla. 142, 148 Pac. 100; Chicago, B. & Q. R. Co. v. Gelvin, L.R.A. 1917C, 983, 151 C. C. A. 90, 238 Fed. 14; Chesapeake & O. R. Co. v. Robinette, 151 Ky. 778, 45 L.R.A. (N.S.) 433, 152 S. W. 976; Huston v. Freemansburg, 212 Pa. 548, 3 L.R.A. (N.S.) 49, 61 Atl. 1022; Cleveland, C. C. & St. L. R. Co. v. Stewart, 24 Ind. App. 374, 56 N. E. 917.

Hart, J., delivered the opinion of the court:

The right to recover damages for bodily pain and suffering resulting from fright without actual physical violence has been the subject of frequent adjudications by the courts of last resort of the various states, and the decisions are conflicting, and to a great extent, confusing.

In the case of *St. Louis, I. M. & S. R. Co. v. Bragg*, 69 Ark. 402, 86 Am. St. Rep. 206, 64 S. W. 226, this court held that damages could not be recovered at law for mental pain and anguish unaccompanied by physical injury, and caused by unintentional negligence. The court said that where the law allows no recovery for the mental anguish or fright it would seem logically to follow that no recovery could be had for the consequences or results of the fright, since such consequences merely show the degree of the fright and the extent of the damages. To sustain the decision, the court cites the cases of *Mitchell v. Rochester R. Co.* 151 N. Y. 107, 34 L.R.A. 781, 56 Am. St. Rep. 604, 45 N. E. 354, 1 Am. Neg. Rep. 121, and *Spade v. Lynn & B. R. Co.* 168 Mass. 285, 38 L.R.A. 512, 60 Am. St. Rep. 393, 47 N. E. 88.

In discussing the first-mentioned case in the subsequent case of *Presier v. Wielandt*, 48 App. Div. 569, 62 N. Y. Supp. 890, 7 Am. Neg. Rep. 558, the court said that the doctrine there stated applies only to actions

based on negligence, and not to cases of wilful tort. The court said that the rule does not include wanton wrong, nor apply to the acts of a trespasser. There the court had under consideration the case of a wilful and violent trespass upon the plaintiff's house. The court said that the defendants knew the condition of the plaintiff's wife, and the risk to her which was involved in their contemplated act. The court further said that if the death of the plaintiff's wife could be clearly and directly traced to the wilful trespass of the defendants, as a natural and necessary consequence which they might or should have reasonably anticipated, the defendants would be liable, even though there was no actual blow struck by them.

The decision in *Mitchell v. Rochester R. Co.* supra, was followed in *Spade v. Lynn & B. R. Co.* supra, and the supreme court of Massachusetts held that there could be no recovery for bodily injury caused by fright and mental disturbance in a case of unintentional negligence on the part of the defendant. The reason for the rule given was that it would be unreasonable to hold persons who are merely negligent bound to anticipate and guard against fright and the consequences of fright, and that this would open a wide door for unjust claims, which could not successfully be met. Continuing, the court said: "It is hardly necessary to add that this decision does not reach those classes of action where an intention to cause mental distress or to hurt the feelings is shown, or is reasonably to be inferred; as, for example, in cases of seduction, slander, malicious prosecution, or arrest, and some others. Nor do we include cases of acts done with gross carelessness or recklessness, showing utter indifference to such consequences, when they must have been in the actor's mind. *Lombard v. Lennox*, 155 Mass. 70, 31 Am. St. Rep. 528, 28 N. E. 1125, and *Fillebrown v. Hoar*, 124 Mass. 580; *Meagher v. Driscoll*, 99 Mass.

281, 96 Am. Dec. 759. In the present case no such considerations entered into the rulings or were presented by the facts."

In *Drum v. Miller*, 135 N. C. 204, 65 L.R.A. 890, 102 Am. St. Rep. 528, 47 S. E. 421, 16 Am. Neg. Rep. 215, the court, distinguishing negligence from wilful torts, said: "In the case of wilful or intentional wrongdoing we have an act intended to do harm, and harm done by it, and the inference of liability from such an act may seem a plain matter under the general rule of liability, and, assuming that no just cause of exception to it is present, 'it is clear law that the wrongdoer is liable to make good the consequences, and it is likewise obvious to common sense that he ought to be. He went about to do harm, and, having begun an act of wrongful mischief, he cannot stop the risk at his pleasure, nor confine it to the precise objects he laid out, but must abide it fully and to the end.' The principle is commonly expressed in the maxim that a man is presumed to intend the natural consequences of his acts."

It will be observed that in the case of a wilful tort the wrongdoer is responsible for the direct and proximate consequences of his act,

**Tort—liability
of wilful
wrongdoer.**

without regard to his intention to produce the particular injury. *May v. Western U. Teleg. Co.* 157 N. C. 416, 37 L.R.A. (N.S.) 912, 72 S. E. 1059, and *Meagher v. Driscoll*, 99 Mass. 281, 96 Am. Dec. 759. Many other cases sustaining the right to recover for bodily pain and suffering resulting from fright which is caused by wilful wrongdoing may be found in 12 Ann. Cas. at page 744. In his introductory to the case note at page 741 of the same volume, the annotator said: "In passing upon the question whether damages may be recovered for physical pain and suffering resulting from fright without actual violence, the decisions distinguish between fright caused by a negligent act and fright caused

by a wilful wrong. Though the decisions practically agree as to the right to recover when the fright is due to a wilful wrong, there is a difference of opinion as to the right to recover when the fright is due to negligence merely."

In the case of *Watson v. Diltz*, 116 Iowa, 249, 57 L.R.A. 559, 93 Am. St. Rep. 239, 89 N. W. 1068, the court had under consideration a case where the defendant, in the nighttime, wilfully invaded the home of the plaintiff and her husband, and held that it was a question for the jury to say, under the circumstances, whether the prostration resulting from the fright so caused was not the proximate or probable result of the defendant's act. The court said: "'Proximate cause is probable cause; and the proximate consequence of a given act or omission, as distinguished from a remote consequence, is one which succeeds naturally in the ordinary course of things, and which, therefore, ought to have been anticipated by the wrongdoer.'" 1 *Thomp. Neg.* 156. It is within the common observation of all that fright may, and usually does, affect the nervous system, which is a distinctive part of the physical system, and controls the health to a very great extent, and that an entirely sound body is never found with a diseased nervous organization; consequently, one who voluntarily causes a diseased condition of the latter must anticipate the consequences which follow it. The nerves being, as a matter of fact, a part of the physical system, if they are affected by fright to such an extent as to cause physical pain, it seems to us that the injury resulting therefrom is the direct result of the act producing the fright."

But it is claimed that this rule is contrary to the principles decided in *St. Louis, I. M. & S. R. Co. v. Taylor*, 84 Ark. 42, 13 L.R.A. (N.S.) 159, 104 S. W. 551. In that case the court held that mental suffering alone, unaccompanied by physical or other evidence of recoverable

damages, cannot be made the subject of an independent action against a carrier for damages, even where the act or violation of the duty complained of was wilfully committed. There the court did not have under consideration a case where the mental disturbance produced bodily injury, and that case has no application to the facts in the present record. This is shown by the subsequent case of *Chicago, R. I. & P. R. Co. v. Moss*, 89 Ark. 187, 116 S. W. 192. In that case the court recognized that where there was a connection between the recoverable element and the mental suffering, the damages might be recovered for the mental suffering and the bodily injury which resulted therefrom.

Again, in the case of *Pierce v. St. Louis, I. M. & S. R. Co.* 94 Ark. 489, 127 S. W. 707, the rule laid down in the *Taylor and Moss Cases* was reaffirmed. In none of these cases was the *Bragg Case* referred to, and

it is evident that the court did not intend to overrule the case of *St. Louis, I. M. & S. R. Co. v. Bragg*, 69 Ark. 402, 86 Am. St. Rep. 206, 64 S. W. 226.

From the views expressed in that case and the cases cited in support of it, while it is held that there can be no recovery for bodily pain resulting from fright caused by an unintentional negligent act where the fright is not accompanied by bodily injury, still it is inferable from that case and the cases cited in the decision that the right to recover for bodily pain and suffering resulting from fright which is caused by a wilful wrong may be regarded as established in this state.

Therefore, under the allegations of the complaint, the court erred in sustaining the demurrer, and for that error the judgment must be reversed, and the cause remanded for a new trial.

Fright—liability for suffering caused by.

—miscarriage—liability.

ANNOTATION.

Recovery for physical consequences of fright resulting in a physical injury.

I. Fright due to negligence:

a. Rule that there can be no recovery:

1. In general, 1119.
2. Application, 1123.
3. Effect of contemporaneous physical injury, 1128.

Civil liability for using threatening or abusive language is discussed in the annotation in 5 A.L.R. 1286.

I. Fright due to negligence.

a. Rule that there can be no recovery.

1. In general.

The question whether there may be a recovery against one guilty of negligence in causing fright resulting in physical injuries where there was no contemporaneous physical injury has brought about a sharp conflict in the authorities. This question presupposes a breach of duty on the part of defendant toward plaintiff, which,

I.—continued.

b. Rule that there may be a recovery:

1. In general, 1134.
2. Application, 1138.

II. Fright due to wilful tort, 1141.

III. Fright at another's peril, 1143.

apart from the view that fright not accompanied by a contemporaneous physical injury may never be regarded in law as a cause of action or an element of damages, would be regarded as the proximate cause of the plaintiff's fright and consequent injuries. For example, assuming that the plaintiff's fright was due to blasting, the question under annotation is not reached if, in the circumstances, the defendant was within his rights, or if, in the circumstances, he was not bound to anticipate the plaintiff's fright, even if it were to be conceded that, in other circumstances, he might.

have been bound to anticipate it. In the cases which deny a recovery for the physical consequences of fright unaccompanied by a contemporaneous injury, on the theory that there is no proximate cause and result, the courts have not, in all instances, indicated clearly whether it was the injury itself which was not regarded as the proximate result of the negligence, or whether the fright was not so regarded.

According to one doctrine, no recovery can be had for physical consequences of fright unaccompanied by a contemporaneous physical injury.

United States.—*Haile v. Texas & P. R. Co.* (1894) 23 L.R.A. 774, 9 C. C. A. 134, 23 U. S. App. 80, 60 Fed. 557.

Arkansas.—*St. Louis, I. M. & S. R. Co. v. Bragg* (1901) 69 Ark. 402, 86 Am. St. Rep. 206, 64 S. W. 226.

Georgia.—*Allen v. Harris & Satterfield* (1916) 146 Ga. 232, 91 S. E. 28; *Hines v. Evans* (1920) — Ga. App. —, 105 S. E. 59.

Illinois.—*Braun v. Craven* (1898) 175 Ill. 401, 42 L.R.A. 199, 51 N. E. 657, 5 Am. Neg. Rep. 15; *West Chicago Street R. Co. v. Liebig* (1899) 79 Ill. App. 567.

Kentucky.—*Reed v. Ford* (1908) 129 Ky. 471, 19 L.R.A. (N.S.) 225, 112 S. W. 600; *McGee v. Vanover* (1912) 148 Ky. 737, 147 S. W. 742, Ann. Cas. 1913E, 500. See *Morse v. Chesapeake & O. R. Co.* (1903) 117 Ky. 11, 77 S. W. 361, *supra*.

Massachusetts.—*Spade v. Lynn & B. R. Co.* (1897) 168 Mass. 285, 38 L.R.A. 512, 60 Am. St. Rep. 393, 47 N. E. 88, 2 Am. Neg. Rep. 566; *s. c.* on subsequent appeal (1899) 172 Mass. 488, 43 L.R.A. 832, 70 Am. St. Rep. 298, 52 N. E. 747, 5 Am. Neg. Rep. 367; *White v. Sander* (1897) 168 Mass. 296, 47 N. E. 90, 2 Am. Neg. Rep. 573; *Smith v. Postal Teleg. Cable Co.* (1899) 174 Mass. 576, 47 L.R.A. 323, 75 Am. St. Rep. 374, 55 N. E. 380, 7 Am. Neg. Rep. 54.

Michigan.—*Nelson v. Crawford* (1899) 122 Mich. 466, 80 Am. St. Rep. 577, 81 N. W. 335.

Missouri.—*Strange v. Missouri P. R. Co.* (1895) 61 Mo. App. 586; *Deming v. Chicago, R. I. & P. R. Co.* (1899) 80

Mo. App. 152; *Crutcher v. Big Four* (1908) 132 Mo. App. 311, 111 S. W. 891.

New Jersey.—*Ward v. West Jersey & S. R. Co.* (1900) 65 N. J. L. 383, 47 Atl. 561; *Fleming v. Lobel* (1904) — N. J. —, 59 Atl. 28, 17 Am. Neg. Rep. 324; *Porter v. Delaware, L. & W. R. Co.* (1906) 73 N. J. L. 405, 63 Atl. 860.

New York.—*Mitchell v. Rochester R. Co.* (1896) 151 N. Y. 107, 34 L.R.A. 781, 56 Am. St. Rep. 604, 45 N. E. 354, 1 Am. Neg. Rep. 121.

Ohio.—*Miller v. Baltimore & O. S. W. R. Co.* (1908) 78 Ohio St. 309, 18 L.R.A. (N.S.) 949, 125 Am. St. Rep. 699, 85 N. E. 499; *Huffman v. Toledo & O. C. R. Co.* (1900) 9 Ohio S. & C. P. Dec. 748. (The opinion favoring the opposite view, expressed obiter in *Ohliger v. Toledo Traction Co.* (1901) 13-23 Ohio C. C. 365, must, of course, yield to the decision of the supreme court in *Miller v. Baltimore & O. S. W. R. Co. supra*.)

Pennsylvania.—*Ewing v. Pittsburgh, C. C. & St. L. R. Co.* (1892) 147 Pa. 40, 14 L.R.A. 666, 30 Am. St. Rep. 709, 23 Atl. 340; *Huston v. Freemansburg* (1905) 212 Pa. 548, 3 L.R.A. (N.S.) 49, 61 Atl. 1022; *Chittick v. Philadelphia Rapid Transit Co.* (1909) 224 Pa. 13, 22 L.R.A. (N.S.) 1073, 73 Atl. 4; *Morris v. Lackawanna & W. Valley R. Co.* (1910) 228 Pa. 198, 77 Atl. 445.

England.—*Victorian R. Comrs. v. Coultas* (1888) L. R. 13 App. Cas. 222, 58 L. T. N. S. 390, 57 L. J. P. C. N. S. 69, 37 Week. Rep. 129, 52 J. P. 500, 8 Eng. Rul. Cas. 405.

Canada.—*Henderson v. Canada Atlantic R. Co.* (1898) 25 Ont. App. Rep. 437; *Geiger v. Grand Trunk R. Co.* (1905) 10 Ont. L. Rep. 511; *Rock v. Denis* (1888) Montreal L. Rep. 4 S. C. 134, affirmed in (1888) 16 Rev. Leg. 569.

See *Cleveland, C. C. & St. L. R. Co. v. Stewart* (1900) 24 Ind. App. 374, 56 N. E. 917, *infra*, III.

The operation of this rule cannot be avoided by calling the negligence gross, and alleging that the defendant ought to have known that the result complained of would follow his act. *Smith v. Postal Teleg. Cable Co.* (1899)

174 Mass. 576, 47 L.R.A. 323, 75 Am. St. Rep. 374, 55 N. E. 380, 7 Am. Neg. Rep. 54.

Some cases have stated a limited rule to the effect that there can be no recovery for injuries resulting from fright occasioned by negligence where there is no immediate personal injury, trespass to real estate, nor any contract relation. *Morse v. Chesapeake & O. R. Co.* (1903) 117 Ky. 11, 77 S. W. 361. An intoxicated person who assaulted and used abusive language toward another in a house where he was not shown to be a trespasser was held not liable to a pregnant woman in the house, not related to the person assaulted, and out of sight, although within hearing of the assault, and whose presence was not known to the assailant, for injuries resulting to her from fright causing mental pain and agony, illness, threatened miscarriage, and possibly permanent impairment of health. *Reed v. Ford* (1908) 129 Ky. 471, 19 L.R.A. (N.S.) 225, 112 S. W. 600. This decision is based upon two grounds: one, that the damages sought to be recovered were too remote and speculative; and the other, that the defendant was not guilty of negligence. As regards the first ground, the arguments advanced by this court are similar to those advanced by the courts which adhere to the theory now under consideration. It is stated that the injury in such a case being easily simulated and hard to disprove, there is no standard by which it can be justly or even approximately compensated. It is further stated that it seems to be well settled that no recovery can be had for injuries resulting from fright. The rule of the cases now under consideration is approved as follows: "It seems to be well settled that no recovery can be had for injuries from mere fright, caused by the negligence of another, when no immediate personal injury is received."

This rule has been applied even where there has been so definite a physical result of the fright as a miscarriage (*Nelson v. Crawford* (1899) 122 Mich. 466, 80 Am. St. Rep. 577, 81 N. W. 335; *Mitchell v. Rochester R. Co.* (1896) 151 N. Y. 107, 84 L.R.A. 781, 11 A.L.R.—71.

56 Am. St. Rep. 604, 45 N. E. 354, 1 Am. Neg. Rep. 121; *Hutchinson v. Stern* (1906) 115 App. Div. 791, 101 N. Y. Supp. 45, appeal dismissed in (1907) 189 N. Y. 577, 82 N. E. 1128; *Morris v. Lackawanna & W. Valley R. Co.* (1910) 228 Pa. 198, 77 Atl. 445), or hysteria (*Haas v. Metz* (1898) 78 Ill. App. 46). See *infra*, I. a, 2, for facts in the various cases applying the rule.

The doctrine now under consideration rests upon three principles: (1) That since there can be no recovery for fright, there can be no recovery for the consequences of fright; (2) that the physical consequences of fright are too remote, or, in other words, are not the proximate result of the defendant's negligence; and (3) that expediency demands that there be no recovery for the physical consequences of fright, in the absence of a contemporaneous physical injury. Not all of the cases which adhere to this doctrine approve of all of the foregoing principles; some courts base the decision upon a single one. Nor do all of the cases expressly declare the principles, but the principles are well settled. Thus it has been said that there can be no recovery for the consequences of fright where there can be no recovery for fright itself. *St. Louis, I. M. & S. R. Co. v. Bragg* (1901) 69 Ark. 402, 86 Am. St. Rep. 206, 64 S. W. 226; *Spade v. Lynn & B. R. Co.* (1897) 168 Mass. 285, 38 L.R.A. 512, 60 Am. St. Rep. 393, 47 N. E. 88, 2 Am. Neg. Rep. 566; *Mitchell v. Rochester R. Co.* (1896) 151 N. Y. 107, 84 L.R.A. 781, 56 Am. St. Rep. 604, 45 N. E. 354, 1 Am. Neg. Rep. 121. The court in *Mitchell v. Rochester R. Co.* (N. Y.) *supra*, says: "Assuming that fright cannot form the basis of an action, it is obvious that no recovery can be had for injuries resulting therefrom; that the result may be nervous diseases, blindness, insanity, or even a miscarriage, in no way changes the principle. These results merely show the degree of fright or the extent of the damages. The right of action must still depend upon the question whether a recovery may be had for fright. If it can, then an action may be maintained, however slight the injury. If not, then there can be no

recovery, no matter how grave or serious the consequences. Therefore the logical result of the respondent's concession would seem to be not only that no recovery can be had for mere fright, but also that none can be had for injuries which are the direct consequences of it."

Again it is said that the bodily pain and suffering in consequence of the fright are not the proximate result of the negligence. *Braun v. Craven* (1898) 175 Ill. 401, 42 L.R.A. 199, 51 N. E. 657, 5 Am. Neg. Rep. 15; *Ward v. West Jersey & S. R. Co.* (1900) 65 N. J. L. 384, 47 Atl. 561; *Mitchell v. Rochester R. Co.* (1896) 151 N. Y. 107, 34 L.R.A. 781, 56 Am. St. Rep. 604, 45 N. E. 354, 1 Am. Neg. Rep. 121; *Miller v. Baltimore & O. S. W. R. Co.* (1908) 78 Ohio St. 309, 18 L.R.A. (N.S.) 949, 125 Am. St. Rep. 699, 85 N. E. 499; *Ewing v. Pittsburgh, C. C. & St. L. R. Co.* (1892) 147 Pa. 40, 14 L.R.A. 666, 30 Am. St. Rep. 709, 23 Atl. 340; *Haile v. Texas & P. R. Co.* (1894) 23 L.R.A. 774, 9 C. C. A. 134, 23 U. S. App. 80, 60 Fed. 557; *Victorian R. Comrs. v. Coultas* (1888) L. R. 13 App. Cas. 222, 58 L. T. N. S. 390, 57 L. J. P. C. N. S. 69, 37 Week. Rep. 129, 52 J. P. 500, 8 Eng. Rul. Cas. 405. The court in *Ward v. West Jersey & S. R. Co.* (1900) 65 N. J. L. 383, 47 Atl. 561, says: "Physical suffering is not the probable or natural consequence of fright in the case of a person of ordinary physical and mental vigor, and in the general conduct of business in the ordinary affairs of life, although we are bound to anticipate and guard against consequences which may be injurious to persons who are liable to be affected thereby. We have a right, in doing so, to assume, in the absence of knowledge to the contrary, that such persons are of average strength, both in body and of mind." In *Ewing v. Pittsburgh, C. C. & St. L. R. Co.* (1892) 147 Pa. 40, 14 L.R.A. 666, 30 Am. St. Rep. 709, 23 Atl. 340, where the owner of premises adjoining a railroad right of way was suing for fright terminating in sickness, resulting from the throwing of cars against the plaintiff's house in a collision upon the railroad right of way, the court states that the railroad

company owed the plaintiff "no duty to protect her from fright, nor had it any reason to anticipate that the result of a collision on its road would so operate on the mind of the person who witnessed it, but who sustained no bodily injury thereby, as to produce such nervous excitement and distress as to result in permanent injury; and, if the injury was one not likely to result from the collision, and one which the company could not have reasonably foreseen, then the accident was not the proximate cause." In *Haile v. Texas & P. R. Co.* (1894) 23 L.R.A. 774, 9 C. C. A. 134, 23 U. S. App. 80, 60 Fed. 557, an action for insanity resulting from the shock and excitement of a railroad accident, the court said: "While the defendant, as a common carrier, had reason to anticipate that an accident would cause physical injury, and would produce fright and excitement, it had no reason to anticipate that the latter would result in permanent injury as a disease of the mind or any other disease that might be caused by excitement, exposure, and hardships sometimes incident to travel. If the disease was not likely to result from the accident, and was not one which the defendant could have reasonably foreseen, in the light of the attending circumstances, then the accident was not the proximate cause. The defendant had no reason to anticipate that the result of an accident on its road would so operate on Haile's mind as to produce disease,—the disease of insanity,—any more than that the exposure and hardships he suffered would produce grippe, pneumonia, or any other disease." In *St. Louis, I. M. & S. R. Co. v. Bragg* (1901) 69 Ark. 402, 86 Am. St. Rep. 206, 64 S. W. 226, where a railway company, by the unintentional carelessness of one of its employees, caused a passenger to alight from one of its trains a few yards from the crossing at which she wished to alight, and at a place separated from the crossing by a fence and cattle guard, thus compelling her to pass over the cattle guard to get to the crossing, the court, holding that physical ills resulting from fright were not the natural or probable con-

sequence of defendant's negligence, says that the passenger was familiar with the place at which she alighted, that there were others at or near the depot when she alighted, and that one of them immediately went to her assistance, and assisted her in passing over the intermediate fence and cattle guard, and concludes that, under these circumstances, there was no reason why the plaintiff should have been so much frightened, and that "if any fright existed, it must certainly have been over in a minute or two when assistance arrived. We therefore feel compelled to hold that the long train of physical ills of which she complains was not the natural or probable consequences of defendant's negligence." In *Chittick v. Philadelphia Rapid Transit Co.* (1909) 224 Pa. 13, 22 L.R.A. (N.S.) 1073, 73 Atl. 4, the negligence of those in charge of a street car, in operating it so as to cause a steel brace which was being raised near the track to come in contact with the trolley wire and cause an electrical explosion, was held not to be the proximate cause of injury to a person in a neighboring window, due to fright and nervous shock, since it could not have been anticipated.

See *Reed v. Ford* (1908) 129 Ky. 471, 19 L.R.A. (N.S.) 225, 112 S. W. 600, *supra*.

Expediency or public policy has been urged against allowing such damages. *Braun v. Craven* (1898) 175 Ill. 401, 42 L.R.A. 199, 51 N. E. 657, 5 Am. Neg. Rep. 15; *Morse v. Chesapeake & O. R. Co.* (1903) 117 Ky. 11, 77 S. W. 361; *Spade v. Lynn & B. R. Co.* (1897) 168 Mass. 285, 38 L.R.A. 512, 60 Am. St. Rep. 393, 47 N. E. 88, 2 Am. Neg. Rep. 566; *Mitchell v. Rochester R. Co.* (1896) 151 N. Y. 107, 34 L.R.A. 781, 56 Am. St. Rep. 604, 45 N. E. 354, 1 Am. Neg. Rep. 121; *Victorian R. Comrs. v. Coultas* (1888) L. R. 13 App. Cas. 222, 58 L. T. N. S. 390, 57 L. J. P. C. N. S. 69, 37 Week. Rep. 129, 52 J. P. 500, 8 Eng. Rul. Cas. 405. See *Reed v. Ford* (Ky.) *supra*. The court in *Spade v. Lynn & B. R. Co.* (1897) 168 Mass. 285, 38 L.R.A. 512, 60 Am. St. Rep. 393, 47 N. E. 88, 2 Am. Neg. Rep. 566, admits that a physical injury may be directly

traceable to fright, and so may be caused by it, and that it cannot therefore be said that such consequences may not flow proximately from the negligence; but bases the refusal of damages in such case upon the doctrine of expediency, and says in this regard: "The law must be administered in the courts according to general rules. Courts will aim to make these rules as just as possible, bearing in mind that they are to be of general application. But, as the law is a practical science, having to do with the affairs of life, any rule is unwise if, in general application, it will not, as a usual result, serve the purposes of justice. A new rule cannot be made for each case, and there must therefore be a certain generality in rules of law, which, in particular cases, may fail to meet what would be desirable if the single case were alone to be considered. . . . The law of negligence in its special application to cases of accident has received great development in recent years. The number of actions brought is very great. This should lead courts well to consider the ground on which claims for compensation properly rest, and the necessary limitations of the right to recover. We remain satisfied with the rule that there can be no recovery for fright, terror, alarm, anxiety, or distress of mind, if these are unaccompanied by some physical injury; and if this rule is to stand, we think it should also be held that there can be no recovery for such physical injuries as may be caused solely by such mental disturbance where there is no injury to the person from without. The logical vindication of this rule is that it is unreasonable to hold persons who are merely negligent bound to anticipate and guard against fright and the consequences of fright, and that this would open a wide door for unjust claims which could not successfully be met."

2. Application.

The facts under which a recovery has been denied by virtue of the above principle have been varied. The question has frequently arisen in cases of

fright of railway passengers at being put off the train at other than regular stations. It has been held that a railway company is not liable for nervous prostration and permanent illness, caused by a fright resulting from the unintentional carelessness of its employees in putting a woman passenger off the train in the dark, not at the crossing where she wished to alight, but a few yards away, at a place separated from the crossing by a fence and cattle guard, which she was compelled to pass over in order to reach the crossing. *St. Louis, I. M. & S. R. Co. v. Bragg* (1901) 69 Ark. 402, 86 Am. St. Rep. 206, 64 S. W. 226. In *Strange v. Missouri P. R. Co.* (1895) 61 Mo. App. 586, although a girl fourteen years of age, who was a passenger on a railway train, was held to have a cause of action against the railway company for inviting her to get off a mile and a half beyond the station at which she intended to alight, but which the train passed because of the carelessness of the railway employees. It was held that the mental distress and fright which she experienced after leaving the train, and whatever effect may be attributable to such fright or mental suffering, should be excluded in estimating the extent of her recovery. It was found to be the fact in this case that, by reason of the fright and violent exercise in reaching the station, the girl was made sick and very nervous, and was so up to the time of trial. A decision similar to that in *Strange v. Missouri P. R. Co.* appears in *Deming v. Chicago, R. I. & P. R. Co.* (1899) 80 Mo. App. 152, upon practically similar facts. In the *Deming Case* the plaintiff alleged that she was greatly frightened and worried and overtaxed, and thereby made sick, and was confined to her bed for a period of two weeks, and was caused great mental and physical suffering because of her walk back to the station from the place where she alighted from the train. It is stated to be true that the evidence tended to prove that the plaintiff's sickness was the result of the fright, worry, and overtaxing of strength, occasioned by the defendant's negligence, but this is stated not to

be a contemporaneous and physical injury within the meaning of the rule allowing damages for fright and mental suffering when connected with a physical injury; that none of the cases to which the plaintiff referred lent support to her contention that sickness so resulting is a physical injury within the meaning of the rule of liability just referred to.

Other causes of fright of railway passengers have been involved. It has been held that a railroad passenger who has suffered fright and terror resulting in physical injury upon the removal of a drunken passenger from the car in which plaintiff was riding cannot recover of the railroad company. *Spade v. Lynn & B. R. Co.* (1897) 168 Mass. 285, 38 L.R.A. 512, 60 Am. St. Rep. 393, 47 N. E. 88, 2 Am. Neg. Rep. 566, s. c. on subsequent appeal (1899) 172 Mass. 488, 43 L.R.A. 832, 70 Am. St. Rep. 298, 52 N. E. 747, 5 Am. Neg. Rep. 367. A woman is not entitled to recover damages of a carrier for a miscarriage resulting from the nervous shock occasioned by a car in which she was riding bumping over the tracks at an open switch. *Morris v. Lackawanna & W. Valley R. Co.* (1910) 228 Pa. 198, 77 Atl. 445. Insanity resulting from the shock and excitement caused by a railroad accident to a passenger who sustained no bodily injury does not make the railroad company liable. *Haile v. Texas & P. R. Co.* (1894) 23 L.R.A. 774, 9 C. C. A. 134, 23 U. S. App. 80, 60 Fed. 557. A street railway company is not liable to a passenger for physical ailments resulting from fright due to the falling of a trolley pole on a car in which the plaintiff was riding, where there was no accompanying physical injury. *West Chicago Street R. Co. v. Liebig* (1899) 79 Ill. App. 567. In one case the plaintiff was not technically a passenger at the time of the acts complained of, but, having a ticket over another road, was negligently permitted to enter a train on the defendant's road. The railroad company was held not liable for the fright and nervousness which resulted to the plaintiff when told by the conductor that she was on the wrong train and would

have to leave or pay her fare, although the nervousness resulted in a menstrual hemorrhage, followed by a train of nervous disorders. *Crutcher v. Big Four* (1908) 132 Mo. App. 311, 111 S. W. 891.

One about to board a street car, who was frightened by the approach of the horses attached to another car so close that, when they were stopped, she stood between the horses' heads, as a result of which fright and excitement she became unconscious and suffered a miscarriage and consequent illness, is not entitled to recover of the railroad company therefor. *Mitchel v. Rochester R. Co.* (1896) 151 N. Y. 107, 34 L.R.A. 781, 56 Am. St. Rep. 604, 45 N. E. 354, 1 Am. Neg. Rep. 121.

Fright at crossings has been the subject of litigation. It has been held generally that one crossing a railroad track is not entitled to recover of the railroad company for physical injuries resulting from fright at nearly being struck by an approaching train. *Victorian R. Comrs. v. Coultas* (1888) L. R. 13 App. Cas. 22, 58 L. T. N. S. 390, 57 L. J. P. C. N. S. 69, 37 Week. Rep. 129, 52 J. P. 500, 8 Eng. Rul. Cas. 405.

This has been held in case of a traveler upon a highway, who was frightened at being nearly struck by a locomotive at a railway crossing, as a result of which her spinal cord and nervous system were affected so that she was not thereafter able to perform either physical or mental work, and was permanently injured by reason of such shock and fright, it being held that she was not entitled to recover damages therefor from the railroad company. *Huffman v. Toledo & O. C. R. Co.* (1900) 9 Ohio S. & C. P. Dec. 748. A person who was permitted without warning to drive upon a railroad crossing in the face of an approaching train, whereupon and while he was still on the crossing, the gates by which the crossing was protected were carelessly and improperly lowered by the railroad gatekeeper, and he was thereby subjected to great danger of being run down and killed by the train, by reason of which danger he was shocked and paralyzed and otherwise injured, is not entitled to

recover of the railroad company. *Ward v. West Jersey & S. R. Co.* (1900) 65 N. J. L. 383, 47 Atl. 561. A woman who became frightened and suffered a severe nervous shock at seeing one of her children run down and mangled by a locomotive operated in a negligent manner is not entitled to recover, where she sustained no personal injury. *Southern R. Co. v. Jackson* (1916) 146 Ga. 243, 91 S. E. 28.

The right to recover of a railroad company owing to whose negligence cars are thrown upon adjoining property, resulting in fright to the occupants thereof, has been denied. The owner of a house in proximity to a railroad, against which house cars belonging to the railroad company fell when a collision took place on the railroad, subjecting the owner to great fright, alarm, fear, and nervous excitement and distress, whereby he became sick and disabled, has no cause of action against the railroad company therefor. *Ewing v. Pittsburgh, C. C. & St. L. R. Co.* (1892) 147 Pa. 40, 14 L.R.A. 666, 30 Am. St. Rep. 709, 23 Atl. 340. A railroad company which negligently shoved some of its cars off the end of a sidetrack, running them against a house, when the owner was standing within a few feet of the point where the cars struck the house, as a result of which the owner suffered a severe nervous shock that shattered her nervous system and caused great bodily pain and mental anguish and permanent injury to her person and health, is not liable to her for the physical illness due to the fright. *Miller v. Baltimore & O. S. W. R. Co.* (1908) 78 Ohio St. 309, 18 L.R.A. (N.S.) 949, 125 Am. St. Rep. 699, 85 N. E. 499. Under the theory adopted in Kentucky, that there can be no recovery for injuries resulting from fright occasioned by negligence where there is no immediate personal injury, trespass to real estate, nor any contract relation, a railroad company which failed to erect and maintain a bumping post at the end of one of its sidetracks, as a consequence of which, several cars were backed over the end of the track, out into the street and within 15 feet of the yard, and toward

the residence of the plaintiff, where she was at the time, was held not liable for the injuries resulting to plaintiff, who was greatly frightened and alarmed, as a consequence of which she suffered such nervous prostration and physical disability as to confine her to her home for more than two months, under medical treatment. *Morse v. Chesapeake & O. R. Co.* (1903) 117 Ky. 11, 77 S. W. 361. But in *Chicago & N. W. R. Co. v. Hunerberg* (1885) 16 Ill. App. 387, a railroad company whose employees, in backing a train over a sidetrack which was in a defective condition, continued to back the train after some of the cars had left the track, until the end car went through a fence in front of plaintiff's house, and, with great force and violence, struck the porch thereof and demolished it, causing shock and fright to the plaintiff, who was at the time upstairs in the house with two young children, and resulted in her miscarriage, was held liable therefor. The subsequent cases in this jurisdiction adhere to the rule denying recovery for the physical consequences of fright, unaccompanied by contemporaneous physical injury.

Recovery has also been denied for the physical consequences of fright resulting from various other causes. A telegraph company which, in locating its line, blasted a ledge near the building occupied by the plaintiff for a dwelling house, is not liable in damages to the plaintiff for sickness due to fright caused by the negligent blasting. *Smith v. Postal Teleg. & Cable Co.* (1899) 174 Mass. 576, 47 L.R.A. 323, 75 Am. St. Rep. 374, 55 N. E. 380, 7 Am. Neg. Rep. 54. No recovery can be had for frightening a man ill in bed, by the negligent explosion of dynamite in front of his house, so that he died within two weeks thereafter from the shock and attending exertion in aiding his wife, who was also ill. *Huston v. Freemansburg* (1905) 212 Pa. 548, 3 L.R.A. (N.S.) 49, 61 Atl. 1022. A pedestrian walking upon a public highway is not entitled to recover for physical injuries due to fright alone, resulting from the falling of an overhead railroad bridge from under

which she had just passed. *Porter v. Delaware, L. & W. R. Co.* (1906) 73 N. J. L. 405, 63 Atl. 860. No damages can be recovered by a bystander for temporary blindness and terrible fright and nervous shock due to negligence in causing an iron brace to come in contact with a trolley wire, so as to cause a powerful electric flash of an explosive nature. *Chittick v. Philadelphia Rapid Transit Co.* (1909) 224 Pa. 13, 22 L.R.A. (N.S.) 1073, 73 Atl. 4. A child cannot recover for "night terrors" which are the result of fright caused by the burning of his sister in his presence. *Fleming v. Lobel* (1904) — N. J. L. —, 59 Atl. 28. A married woman in a state of pregnancy, who sustained a severe shock from fright when standing in the door of her husband's house with a little child, when a horse belonging to a street railway company, which had run away, dashed up the street at a high rate of speed and plunged toward her, but did not reach her, because its progress was arrested by a post against which it fell, cannot recover of the railway company. *Lehman v. Brooklyn City R. Co.* (1888) 47 Hun (N. Y.) 355. The opinion dismissing the complaint in this case was very brief, and the reason is not clearly given. It does not appear that there was any negligence on the part of the railroad company. In *Huxley v. Berg* (1815) 1 Starkie (Eng.) 98, a plaintiff in an action of trespass was allowed to show in evidence the fact that his wife was so terrified by the conduct of the defendant that she was immediately taken ill and soon afterwards died; but this was held to be admissible for the purpose only of showing how outrageous and violent the breaking was, and not on the substantive ground of damage. In some cases the rule has been followed where the defendant was guilty of more than negligence. A woman who went into the room of another woman who was sick in bed, and there began talking in a loud and angry manner to the sick person, whereby she was frightened and attacked with hysteria, to which she was subject, but of which fact the defendant was ignorant, is not liable for such

injury, where there was no injury to the person at the time, since it cannot reasonably have been anticipated that simply talking to the plaintiff in a loud and angry manner would cause a return of a hysterical malady of which the defendant had no notice. *Haas v. Metz* (1898) 78 Ill. App. 46. A landlord who entered the leased premises, and, with loud and angry words and the waving of arms, forbade a woman, a sister of the tenant, who was packing goods, from removing the same, and threatened to call a constable, is not liable to her for an attack of St. Vitus's dance, resulting from excitement and fright caused by his action. *Braun v. Craven* (1898) 175 Ill. 401, 42 L.R.A. 199, 51 N. E. 657, 5 Am. Neg. Rep. 15. Recovery for miscarriage resulting from fright caused by an assault upon the husband of the woman, in her presence, was denied in *Hutchinson v. Stern* (1906) 115 App. Div. 791, 101 N. Y. Supp. 145, appeal dismissed in (1907) 189 N. Y. 511, 82 N. E. 1128, the court stating that the rule is settled in New York that fright alone cannot form the basis for an action. A mentally incompetent man, who, without any malicious motive, but "just to have a little fun," dressed himself in woman's clothes and went at dusk to a neighbor's house, followed the latter's wife into the house, but made no demonstration other than to tap the end of his parasol on the ground or floor, and offered no violence, was held not liable for the fright of the woman, resulting in illness and a miscarriage. *Nelson v. Crawford* (1899) 122 Mich. 466, 80 Am. St. Rep. 577, 81 N. W. 335. Some cases have not clearly adopted the rule now under consideration, or that discussed in subd. I. b. Among those which seem to favor the rule now under consideration are the following: *Kagy v. Western U. Teleg. Co.* (1906) 37 Ind. App. 73, 117 Am. St. Rep. 278, 76 N. E. 792. In this case, an action against a telegraph company for failure to deliver a telegram sent by one who was sick, asking a relative to come to his assistance, and where it was claimed that, because of the failure of the relative to receive the telegram,

and consequently come to his assistance, the sender suffered injuries in his sickness which might have been prevented. It has been held that there is no right to recover damages for a miscarriage caused by fright occasioned by violent and abusive language and conduct of the defendant towards the plaintiff's husband and a boy, within her hearing but out of her sight, where it does not appear that the defendant knew of the plaintiff's condition, nor that she was within hearing. *Phillips v. Dickerson* (1877) 85 Ill. 11, 28 Am. Rep. 607. In *Trigg v. St. Louis, K. C. & N. R. Co.* (1881) 74 Mo. 147, 41 Am. Rep. 305, a passenger who had been carried by her station was held not entitled to recover for the anxiety and suspense of mind suffered by her in consequence thereof, nor for the effect upon her health, because "no personal injury was received by the plaintiff, and no circumstances of aggravation attended the wrongful act complained of." In holding that a married woman who fell into an unguarded opening, thereby permanently impairing her hand to a certain extent, was not entitled to recover, as an element of damage, for the humiliation and regret that she might thereafter feel because of her inability to attend to her household duties, and to perform the services she had before performed for her husband, the court, in *Linn v. Duquesne* (1903) 204 Pa. 551, 93 Am. St. Rep. 800, 54 Atl. 341, approved of the rule now under consideration. There is no discussion of this question in *Bachelor v. Morgan* (1912) 179 Ala. 339, 60 So. 815, Ann. Cas. 1915C, 888, an action in damages by a pedestrian against the owner of an automobile for damages caused, as the pedestrian claimed, by being knocked down by the automobile while crossing the street. In the course of the opinion it is stated by the court that "if, from mere fright or excitement, the plaintiff fell, and was not touched, as the defendant contends, then the defendant was not liable." But see Alabama cases adhering to opposite rule, *infra*. There can be no recovery for a bodily injury caused by a mere fright resulting from

the act of a person in throwing a stone through a closed blind into a room where the plaintiff was, where the defendant had no intention of injuring the plaintiff, and did not know she was in the room. *White v. Sander* (1897) 168 Mass. 296, 47 N. E. 90, 2 Am. Neg. Rep. 573.

In *Cook v. Mohawk* (1913) 207 N. Y. 311, 100 N. E. 815, an action by a landowner for the wrongful obstruction of a natural waterway in such a manner as to discharge the water upon plaintiff's land, causing damage thereto, and affecting the health of his wife, who was one of the occupants of a dwelling situated thereon, the question of fright was not considered, but the wife, who was afflicted with a hemorrhage due primarily to a small fibroid tumor, which made her very nervous, was affected by the flowing of the water into the plaintiff's cellar. In the course of the opinion the case of *Mitchell v. Rochester R. Co.* (1896) 151 N. Y. 107, 34 L.R.A. 781, 56 Am. St. Rep. 604, 45 N. E. 354, 1 Am. Neg. Rep. 121, is cited, and it is stated that mental suffering is not a legal element of damages in such cases, and there can be no recovery except for physical ills which can be ascribed directly and with reasonable certainty to the defendant's wrongful act. It is further stated that the defendant in this case should not be held liable for the mental and nervous disturbance of the plaintiff's wife, due to a cause entirely separate from the flooding of the plaintiff's premises.

Nervousness terminating in sickness of the wife of one who is in the habit of becoming intoxicated, resulting from his abuse of her, was held to be a physical injury under a statute giving the wife a right of action in damages for selling liquor to her husband. *Kear v. Garrison* (1896) 13 Ohio C. C. 447.

3. Effect of contemporaneous physical injury.

Although in the foregoing jurisdictions there may be no recovery for the physical consequences of fright unaccompanied by a contemporaneous physical injury, if there is a contem-

poraneous physical injury there may be a recovery.

United States.—*Denver & R. G. R. Co. v. Roller* (1900) 49 L.R.A. 77, 41 C. C. A. 22, 100 Fed. 738; *Pennsylvania Co. v. White* (1917) 155 C. C. A. 213, 242 Fed. 437. But see *Haile v. Texas & P. R. Co.* (1894) 23 L.R.A. 774, 9 C. C. A. 134, 23 U. S. App. 80, 60 Fed. 557, *infra*.

Georgia.—*Southern R. Co. v. Jackson* (1916) 146 Ga. 243, 91 S. E. 28; *Hines v. Evans* (1920) — Ga. App. —, 105 S. E. 59.

Kentucky.—*Southern R. Co. v. Owen* (1914) 156 Ky. 827, 162 S. W. 110.

Massachusetts.—*Homans v. Boston Elev. R. Co.* (1902) 180 Mass. 456, 57 L.R.A. 291, 91 Am. St. Rep. 324, 62 N. E. 737, 11 Am. Neg. Rep. 248; *Driscoll v. Gaffey* (1910) 207 Mass. 102, 93 N. E. 1010; *Warren v. Boston & M. R. Co.* (1895) 163 Mass. 484, 40 N. E. 895; *Berard v. Boston & A. R. Co.* (1900) 177 Mass. 179, 58 N. E. 586; *Cameron v. New England Teleph. & Teleg. Co.* (1902) 182 Mass. 310, 65 N. E. 385, 13 Am. Neg. Rep. 86; *Conley v. United Drug Co.* (1914) 218 Mass. 238, L.R.A. 1915D, 830, 105 N. E. 975.

Missouri.—*Lowe v. Metropolitan Street R. Co.* (1910) 145 Mo. App. 248, 130 S. W. 119; *McCardle v. George B. Peck Dry Goods Co.* (1915) 191 Mo. App. 263, 177 S. W. 1095.

New Jersey.—*Buchanan v. West Jersey R. Co.* (1890) 52 N. J. L. 265, 19 Atl. 254; *Porter v. Delaware, L. & W. R. Co.* (1906) 73 N. J. L. 405, 63 Atl. 860; *Kennell v. Gershonovitz Bros.* (1913) 84 N. J. L. 577, 87 Atl. 130; *Consolidated Traction Co. v. Lambertson* (1896) 59 N. J. L. 297, 13 Atl. 100, affirmed in (1897) 60 N. J. L. 457, 38 Atl. 684; *Tuttle v. Atlantic City R. Co.* (1901) 66 N. J. L. 327, 54 L.R.A. 582, 88 Am. St. Rep. 491, 49 Atl. 450, 10 Am. Neg. Rep. 134.

Pennsylvania.—*Hess v. American Pipe Mfg. Co.* (1908) 221 Pa. 67, 70 Atl. 294.

Canada.—*Toronto R. Co. v. Toms* (1911) 44 Can. S. C. 268, 20 Ann. Cas. 985, 1 N. C. C. A. 338.

It has been stated that any physical injury, however slight, is sufficient to take a case out of the rule. *Southern*

R. Co. v. Owen (Ky.) and Toronto R. Co. v. Toms (Can.) *supra*. In Driscoll v. Gaffey (1910) 207 Mass. 102, 93 N. E. 1010, it is stated that there can be no recovery for illness due solely to fright; but in this case a recovery was sustained because there was evidence to justify a finding that there was a battery to the person. When there is a physical contact with the person, accompanying the fright, the court will not attempt to determine whether the physical pain and suffering which follow are the result of the physical contact or of the fright. *Homans v. Boston Elev. R. Co. (Mass.) supra*.

The slight contemporaneous injuries which have been held to take a case out of the rule are well illustrated in *Porter v. Delaware, L. & W. R. Co.* (1906) 73 N. J. L. 405, 63 Atl. 860, where the plaintiff, who had been walking upon the public highway, and had been frightened by the falling of an overhead railroad bridge from under which she had just passed, was seeking to recover for her injury. The court states that if her injuries were due to fright alone, there could be no recovery; but if, as she testifies, she was hit on the neck by something and the dust from the crash got into her eyes, the case was taken out of the rule, and there might be a recovery. In this case the chief injuries were alleged to be to her eyes and nervous system. Again, in *Kennell v. Gershonovitz Bros.* (1913) 84 N. J. L. 577, 87 Atl. 130, where the plaintiff, who had been a passenger on a street car, and, according to her testimony, had been struck by something and showered with glass, when some object projecting from a passing wagon struck a glass in the car, and had been treated for a bruise and a sprained arm, the court states that if the glass caused no bodily injury, yet a strain and sustaining the bruises would comply with the rule.

The unqualified doctrine of the foregoing cases, that when there is a contemporaneous physical injury there may be a recovery for the physical consequences of fright, is not followed in all cases. Some cases allow a recovery in the event of a contemporane-

ous physical injury only when that injury is the direct cause of the fright or shock. The court, in the second appeal of *Hack v. Dady* (1911) 142 App. Div. 510, 127 N. Y. Supp. 22, thus states the rule: "I think that a recovery may not be had in an action for negligence for consequences attributable to fright alone or to shock alone, merely upon proof that there was a bodily injury coincident with that fright or that shock, but it must appear that there was some causal relation between the bodily injury and the fright or shock. Otherwise the recovery would rest upon the fright or shock alone, which would be against the rule noted. For example, could it be logically said in the case at bar that if the personal injuries were attributable alone to fright or shock, consequent to the explosion, the plaintiff could not recover for fright or shock or their physical consequences if she had been unscathed in any way, and yet again she could recover therefor because a bit of lead from the explosion lighted upon her hand, to burn it slightly before she brushed it away?" In a strong dissenting opinion in *Tracy v. Hotel Wellington Corp.* (1919) 175 N. Y. Supp. 100, affirmed without opinion in (1919) 188 App. Div. 923, 176 N. Y. Supp. 923, *Lehman, J.*, asserts the correctness of the rule laid down in *Hack v. Dady* (N. Y.) *supra*, that recovery may be had for damages caused by nervous shock when the nervous shock was the direct result of the physical impact. Some such limitation upon this doctrine seems to have been in the mind of the court in *Spade v. Lynn & B. R. Co.* (1899) 172 Mass. 488, 48 L.R.A. 832, 70 Am. St. Rep. 298, 52 N. E. 747, 5 Am. Neg. Rep. 367. In that case a passenger was suing for injuries resulting from fright consequent upon the removal of a drunken passenger from the car in which she was riding. In the removal another drunken passenger, who was standing in front of the plaintiff, was jostled and thrown upon her. The fall seems to have been a trifling matter, but the fright caused by that and the rest of the occurrences in the car resulted in physical injury.

The jury were instructed that if there was a physical injury, and it was accompanied by fright which operated to the injury of the plaintiff in body or mind, she could recover for the damages caused by the fright. This was held to be error. The court, speaking through Holmes, J., says: "By something of an anomaly, consequences of the defendant's conduct which would not of themselves constitute a cause of action may at times enhance the damages if the conduct has some other consequence for which an action lies. But this further liability is not for all consequences of the defendant's conduct, but for consequences of the defendant's wrong to the plaintiff. The wrong to the plaintiff, if any, began with the battery, and it is for the consequences of the battery only that the defendant is liable, and not for all the consequence of the drunken man's presence in the car, or of the defendant's attempt to remove him. We are perfectly aware of the difficulty of discriminating. But it seems quite possible in this case that the plaintiff's trouble was due in substance to the disturbance as a whole, although it may be that the jury would be warranted in finding that the impact upon her person gave the detonating spark, without which she would not have collapsed." This case is distinguished in the subsequent case of *Homans v. Boston Elev. R. Co.* (1902) 180 Mass. 456, 57 L.R.A. 291, 91 Am. St. Rep. 324, 62 N. E. 737, 11 Am. Neg. Rep. 248, by saying that in the *Spade Case* "the defendant's wrong, if any, began with the battery, and it was not responsible for the previous sources of fear; whereas here [in the *Homans Case*] the defendant was responsible for the trouble throughout." The distinction made in these cases is an exceedingly elusive one, and the courts of these jurisdictions have not consistently followed it. See Massachusetts cases, *supra*. A recovery was allowed in *Tracy v. Hotel Wellington Corp.* (1919) 175 N. Y. Supp. 100, affirmed without opinion in (1919) 188 App. Div. 923, 176 N. Y. Supp. 923, to a passenger in defendant's elevator, who, at the suggestion of the operator,

who preceded her, was about to leave the elevator when it started to ascend without control, and when about 4 feet above the landing, the operator seized the plaintiff by the arm and dragged her to the landing, plaintiff falling on the marble floor, striking on her knees, which afterward became discolored, and where plaintiff's shoulder and the back of her neck were injured by the ascending elevator, and buttons were ripped off the sleeve of her dress. The majority of the court announced the rule of law that while there may be no recovery for mere fright or for injuries that are the direct consequence of it, there may be a recovery where bodily injury and fright concur in producing shock giving rise to damages. The jury in the *Tracy Case* found that the plaintiff's neurotic condition and impaired physical health, of which she was complaining, were due to the physical injury she sustained. In view of this finding, the discussion as to the right to recover for physical injuries due to fright or shock seems inapplicable. In the first appeal of *Hack v. Dady* (1909) 134 App. Div. 253, 118 N. Y. Supp. 906, an action by one who was passing on a city street where the defendant, in laying a main, had a pot of melting lead standing, when an explosion occurred, resulting in some of the drops of molten lead being dashed upon her clothes and upon her hand, seeking to recover damages therefor, the court states that the physical injuries were so slight as not to call for treatment, that they were of no importance compared with her nervousness and her shock, and says if all the injuries to the plaintiff were "consequent to the accident, I would rather ascribe them to the fright therefrom. The explosion, her proximity to it with two small children, may well account for her consequent fright, shock, and nervousness. But as she cannot recover damages for her fright, she cannot recover for any physical consequence of her fright." Upon a second appeal (1911) 142 App. Div. 510, 127 N. Y. Supp. 22, a recovery was sustained under the theory above set out. The mother of children, who saw them ascending in an eleva-

tor in which there was no operator, in an apartment house in which she was living, and who was so overcome by fright at the sight that she fainted and fell into the elevator shaft, may recover for her injury on the theory, as expressed by the court, that "when the fright results in an actual physical injury," there may be a recovery. *Cohn v. Ansonia Realty Co.* (1914) 162 App. Div. 791, 148 N. Y. Supp. 39. A similar decision appears in *Mundy v. Levy Bros. Realty Co.* (1918) 184 App. Div. 467, 170 N. Y. Supp. 994, where an occupant of an apartment house, who was waiting for an elevator, was so frightened by the fall of an elevator door down the shaft, and the resulting noise, vibration, and jar, that she lost her balance and fell, receiving the injuries for which suit had been brought, was held entitled to recover. The court states that there was an immediate personal injury which was obviously caused by the fall of the elevator door; that this chain of cause and effect is not broken because one link in the chain was the present effect upon the mind and nerves of the plaintiff, without trespass upon her person. In the last two cases the fear resulted in action by the plaintiff which terminated in the physical injuries complained of. Such cases have not, in general, been included in the note.

The New York courts have also drawn a distinction between shock and fright, and hold that where there is a contemporaneous physical injury sufficient to produce shock, there may be a recovery. A passenger upon a railway, who had a miscarriage as a result of shock when a light globe fell, striking her upon the temple, and exploding with a loud report, the metal part then falling and striking her upon the abdomen, is entitled to recover for her injuries. *Jones v. Brooklyn Heights R. Co.* (1897) 23 App. Div. 141, 48 N. Y. Supp. 914. The court in this case distinguishes between shock and fright, saying that the fright may be the producing cause of the shock, and where it is the sole producing cause, there can be no recovery; but when it is associated with actual injury, it may be considered, and where the in-

jury and the fright concur, and result in producing the shock out of which arises the damage, it is sufficient upon which to base a recovery. This distinction between shock and fright is approved in *Wood v. New York C. & H. R. R. Co.* (1903) 83 App. Div. 604, 82 N. Y. Supp. 160, affirmed without opinion in (1904) 179 N. Y. 557, 71 N. E. 1142, where the plaintiff was suing for injuries which resulted when a horse which he was driving became frightened at an approaching engine at a railroad crossing, bolted and jerked the buggy so that the plaintiff immediately thereafter spit blood freely, and continued to do so until after he reached home, and his condition continued to grow worse until, at the time of the trial, he was suffering from tuberculosis.

In some early cases in Canada the damages resulting from fright were separated from those resulting from the contemporaneous physical injuries, and only the latter held recoverable. Thus, in *Henderson v. Canada Atlantic R. Co.* (1898) 25 Ont. App. Rep. 437, affirmed in (1899) 29 Can. S. C. 632, an action against a railway company by one whose horses, attached to a carriage in which the plaintiff was riding, were frightened at a train of the defendant company, and ran away, upsetting and breaking the carriage and injuring the plaintiff, the plaintiff was allowed to recover "in respect of shock caused by a blow or blows," but not entitled to recover "in respect of personal injury resulting exclusively from mental shock." And in *Geiger v. Grand Trunk R. Co.* (1905) 10 Ont. L. Rep. 511, where the plaintiffs, who were husband and wife, were riding in an omnibus which was caught between the parts of freight trains and considerably damaged, but neither of them suffered physical injury beyond a few slight bruises, but both complained of serious injury to their nervous systems as a result of fright, recovery was denied in respect to personal injury resulting exclusively from mental shock. The court in the *Geiger Case* says that it may be that the decision of the court of appeal in the *Henderson Case* (Ont.) *supra*,

goes further than *Victorian R. Comrs. v. Coultas* (1888) L. R. 13 App. Cas. (Eng.) 222, 58 L. T. N. S. 390, 57 L. J. P. C. N. S. 69, 52 J. P. 500, 37 Week. Rep. 129, and that inasmuch as the terror of the plaintiff in the *Henderson Case* was accompanied by physical injury, damages for injury occasioned by the accompanying mental or nervous shock might have been allowed without departing from the principle of the decision in the *Coultas Case*. However that may be, the court in the *Geiger Case* was bound to follow the *Henderson Case*, and following it, to hold that the plaintiffs were not entitled to judgment. The theory of these cases was repudiated by the court in *Toronto R. Co. v. Toms* (1911) 44 Can. S. C. 268, 20 Ann. Cas. 985, 1 N. C. C. A. 238.

The cases in which a recovery has been permitted where there was a contemporaneous physical injury have involved fright from causes similar to those in which recovery was denied where there was no contemporaneous injury. Thus a recovery has been permitted for the physical consequences of the fright of a railway passenger at a wreck, where there was some contemporaneous physical injury. In *Denver & R. G. R. Co. v. Roller* (1900) 49 L.R.A. 77, 41 C. C. A. 22, 100 Fed. 738, it was held that injuries caused by fright or shock resulting from a bodily injury in connection with a railroad collision, the accompanying explosion, fire, and wreck of cars, and the surrounding circumstances directly connected therewith and solely attributable thereto, might be included in a recovery for the injuries sustained in the accident. But in *Haile v. Texas & P. R. Co.* (1894) 23 L.R.A. 774, 9 C. C. A. 134, 23 U. S. App. 80, 60 Fed. 557, an action for insanity resulting from the shock and excitement caused by a railroad accident, it was alleged that the injured person was hurled from his seat to the floor of the car, where he lay prostrated by the shock. The court, however, does not expressly consider whether the physical injury thus received is sufficient to take the case out of the rule, but says that there was no bodily injury, so far as the petition showed.

Recovery has been allowed for the physical consequences of fright at crossings where there was a contemporaneous physical injury. A woman who, in the exercise of ordinary care in walking across a railroad track at a street crossing in a city, attended by her two small children, discovers that she is about to be run down by an engine approaching the crossing in a negligent manner, and who leaps from the track and falls to the ground, and one of her children is run down and mangled by the engine in her presence, and, on account of the fall, she sustains a shock and endures pain and suffering therefrom, has a right of action for the wrong to herself. *Southern R. Co. v. Jackson* (1916) 146 Ga. 243, 91 S. E. 28. A boy driving a delivery wagon, who, when crossing the tracks of defendant's railway company, was shut in by the closing of the gates on each side of the track, and who was either thrown by the impact of an approaching engine upon the wagon, or jumped immediately before the impact, alighting on his hands and knees upon the brick pavement, 14 or 15 feet beyond the gate, may recover of the railroad company for physical injuries resulting from fright. *Pennsylvania Co. v. White* (1917) 155 C. C. A. 213, 242 Fed. 437. In *Warren v. Boston & M. R. Co.* (1895) 163 Mass. 484, 40 N. E. 895, where one who had been shut upon a railroad track at a crossing by the closing of the crossing gates, and who had been thrown upon the ground when the carriage in which she was riding was struck by a train, was suing for her injury, it is stated to be a physical injury to be thrown out of a wagon, or to be compelled to jump out, even though the harm done consists mainly of nervous shock. It has been held that it cannot be said, as a matter of law, that all the physical injury received by the plaintiff in jumping from a wagon about to be struck by an approaching train at a grade crossing was the result of fright, so as to take the case from the jury. *Berard v. Boston & A. R. Co.* (1900) 177 Mass. 179, 58 N. E. 586.

A woman lawfully on a railroad

platform, who was compelled to throw herself on the platform in order to avoid being struck by a timber projecting from one of the cars on a passing train so as to sweep over the platform, was held entitled to recover for injuries sustained thereby in *Buchanan v. West Jersey R. Co.* (1890) 52 N. J. L. 265, 19 Atl. 254. The court says it is not necessary to decide whether mere fright caused by a wrongful accident, which results in physical injury, as, for example, sickness, is or is not actionable.

Recovery has been permitted for the physical consequences of fright at being struck by a car, or at the imminent danger of being struck. Thus it has been held that one who was in a wagon which was struck by a street car going at great speed, and was carried along by the car for some distance before it was stopped, has suffered an actual injury to his person, so that the rule that there can be no recovery for an injury produced by a mere fright is inapplicable. *Consolidated Traction Co. v. Lambertson* (1896) 59 N. J. L. 297, 36 Atl. 100. The damages resulting from a nervous shock caused by the fear of one who had fallen in an excavation negligently allowed to remain between street car tracks by the street car company, that an approaching car would run over her, on account of her inability to arise after she had fallen, may be recovered. *Lowe v. Metropolitan Street R. Co.* (1910) 145 Mo. App. 248, 130 S. W. 119. A woman who, in attempting to escape from a derailed car which was coming in her direction, became frightened and started to run, and, when a short distance away, fell and injured her knee, may recover damages from the railroad company. *Tuttle v. Atlantic City R. Co.* (1901) 66 N. J. L. 327, 54 L.R.A. 582, 88 Am. St. Rep. 491, 49 Atl. 450, 10 Am. Neg. Rep. 134. In this case, however, the damages sought to be recovered seem to have been the result of the contemporaneous physical injury.

Explosions and blastings have been the cause of fright resulting in physical injuries for which recovery has been allowed where there was a con-

temporaneous physical injury. In an action for injury sustained by negligent blasting, the fact that the plaintiff was thrown on a chair by the force of the concussion, and broken particles of glass from a windowpane near by struck her in the face, is sufficient to take the case out of the rule that mere fright, unaccompanied by physical injury, is not sufficient to sustain an action for negligence. *Hess v. American Pipe Mfg Co.* (1908) 221 Pa. 67, 70 Atl. 294. The theory of *Homans v. Boston Elev. R. Co.* (1902) 180 Mass. 456, 57 L.R.A. 291, 91 Am. St. Rep. 324, 62 N. E. 737, 11 Am. Neg. Rep. 248, was approved in *Cameron v. New England Teleph. & Teleg. Co.* (1902) 182 Mass. 312, 65 N. E. 385, 13 Am. Neg. Rep. 86, an action by a woman who was thrown off her chair by an explosion near her home, the court stating that the jury were not called upon to discriminate between the effect of fright and the effect of the blow. In *Conley v. United Drug Co.* (1914) 218 Mass. 238, L.R.A. 1915D, 830, 105 N. E. 975, the rule disallowing damages for fright was held not to apply where physical injuries were caused by a fall consequent upon a faint caused by an explosion due to another's negligence.

Fright resulting from various causes other than those above specified has furnished the basis of a recovery where there was contemporaneous physical injury. A passenger in a mercantile establishment elevator may recover for physical illness due to fright from a fall of the elevator where there was an accompanying jolting, jarring, or shaking of the body in the fall. *McCardle v. George B. Peck Dry Goods Co.* (1915) 191 Mo. App. 263, 177 S. W. 1095. In *Southern R. Co. v. Owen* (1914) 156 Ky. 827, 162 S. W. 110, where a small boy about four years of age was caught in a flood of water which escaped when an elevated water tank belonging to a railway company burst, and was carried about 30 feet, and landed against a fence, the court says that, as there were physical injuries, however slight, caused by the impact of the water and the collision with the fence, it was not error to refuse an instruction that the

jury could find nothing for the plaintiff for mental distress or anxiety unless they found that the same was accompanied by physical injury. In *Armour & Co. v. Kollmeyer* (1908) 16 L.R.A. (N.S.) 1110, 88 C. C. A. 242, 161 Fed. 78, where a wagon driven by the plaintiff was run into by a loaded wagon driven by defendant's servant, and was raised on one side, so that there was reason to believe, and the plaintiff did believe, that there was some danger that it would be overturned and would throw him into the street, whereupon he jumped into the street, where he struck with great force, the court, in permitting a recovery, said that the natural and probable result "which a person of reasonable foresight would have anticipated from carelessly driving a horse and wagon loaded with 1,200 pounds of meat against the side of a light spring wagon loaded with pieces of 2 x 4's, with such force as to raise one side of it a foot or 18 inches from the ground, was some fear of injury, some fright, some shock of the nervous system of the driver of the spring wagon, and its resulting injury, and the fact that the extent of the resulting injury was in its nature indeterminate and impossible of anticipation constituted no bar to a recovery of compensation for the actual pecuniary loss caused by the negligent act."

b. Rule that there may be a recovery.

1. In general.

Another line of cases holds that there may be a recovery for physical pain and suffering resulting from fright, although the fright is unaccompanied by a contemporaneous physical injury.

Alabama.—*Spearman v. McCrary* (1912) 4 Ala. App. 473, 58 So. 927, certiorari denied in (1912) 177 Ala. 672, 58 So. 1038; *Alabama Fuel & I. Co. v. Baladoni* (1916) 15 Ala. App. 316, 73 So. 205. But see *Bachelder v. Morgan* (1912) 179 Ala. 339, 60 So. 815, Ann. Cas. 1915C, 888, *supra*.

Maryland.—*Green v. Shoemaker & Co.* (1909) 111 Md. 69, 23 L.R.A. (N.S.) 667, 73 Atl. 688; *Baltimore & O. R. Co.*

v. Harris (1913) 121 Md. 254, 88 Atl. 282.

Minnesota.—*Purcell v. St. Paul City R. Co.* (1892) 48 Minn. 134, 16 L.R.A. 203, 50 N. W. 1034; *Sanderson v. Northern P. R. Co.* (1902) 88 Minn. 162, 60 L.R.A. 403, 97 Am. St. Rep. 509, 92 N. W. 542; *Lesch v. Great Northern R. Co.* (1906) 97 Minn. 503, 7 L.R.A. (N.S.) 93, 106 N. W. 955.

North Carolina.—*Watkins v. Kaolin Mfg. Co.* (1902) 131 N. C. 536, 60 L.R.A. 617, 42 S. E. 983, 13 Am. Neg. Rep. 197; *Kimberly v. Howland* (1906) 143 N. C. 398, 7 L.R.A. (N.S.) 545, 55 S. E. 778; *Arthur v. Henry* (1911) 157 N. C. 438, 73 S. E. 211.

Rhode Island.—*Simone v. Rhode Island Co.* (1907) 28 R. I. 186, 9 L.R.A. (N.S.) 740, 66 Atl. 202.

South Carolina.—*Mack v. South Bound R. Co.* (1898) 52 S. C. 323, 40 L.R.A. 679, 68 Am. St. Rep. 913, 29 S. E. 905.

South Dakota.—*Sternhagen v. Kozel* (1918) 40 S. D. 396, 167 N. W. 398.

Tennessee.—*Memphis Street R. Co. v. Bernstein* (1917) 137 Tenn. 637, 194 S. W. 902.

Texas.—*Hill v. Kimball* (1890) 76 Tex. 210, 7 L.R.A. 618, 13 S. W. 59; *Gulf, C. & S. F. R. Co. v. Hayter* (1900) 93 Tex. 239, 47 L.R.A. 325, 77 Am. St. Rep. 856, 54 S. W. 944, 7 Am. Neg. Rep. 359; *Yoakum v. Kroeger* (1894) — Tex. Civ. App. —, 27 S. W. 953; *Hendrix v. Texas & P. R. Co.* (1905) 40 Tex. Civ. App. 291, 89 S. W. 461; *St. Louis S. W. R. Co. v. Murdock* (1909) 54 Tex. Civ. App. 249, 116 S. W. 139.

Wisconsin.—*Oliver v. LaValle* (1875) 36 Wis. 592; *Pankopf v. Hinkley* (1909) 141 Wis. 146, 24 L.R.A. (N.S.) 1159, 123 N. W. 625.

England.—*Dulieu v. White* [1901] 2 K. B. 669, 70 L. J. K. B. N. S. 837, 50 Week. Rep. 76, 85 L. T. N. S. 186, 17 Times L. R. 555.

Ireland.—*Bell v. Great Northern R. Co.* (1890) Ir. L. R. 26 Eq. 428; *Byrne v. Great Southern & W. R. Co.* (unreported case referred to in *Bell v. Great Northern R. Co.*).

Scotland.—*Gilligan v. Robb* [1910] S. C. 856, 47 Scot. L. R. 733; *Cooper v.*

Caledonian R. Co. (1902; Scot. Ct. of Sess.) 4 F. 880.

The court in *Kimberly v. Howland* (1906) 143 N. C. 398, 7 L.R.A. (N.S.) 545, 55 S. E. 778, says: "We think the general principles of the law of torts support a right of action for physical injuries resulting from negligence, whether wilful or otherwise, none the less strongly because the physical injury consists of a wrecked nervous system instead of lacerated limbs. Injuries of the former class are frequently more painful and enduring than those of the latter."

The view that there may be a recovery for physical pain and suffering resulting from fright seems to be adopted in *Lindley v. Knowlton* (1918) 179 Cal. 298, 176 Pac. 440, where a recovery was sustained against the owner of a chimpanzee which had been negligently allowed to escape and which entered the dwelling house of the plaintiff, where the mother and her two children were at the time, and attacked the children; the mother contended with the animal and rescued her children, but in consequence thereof was greatly frightened, shocked, and made sick in body and mind. And it has been held that paroxysms of the nervous system, caused by the indignity and humiliation suffered by a passenger on being wrongfully ejected from a train, constitute a bodily injury for which damages are recoverable. *Sloane v. Southern California R. Co.* (1896) 111 Cal. 668, 32 L.R.A. 193, 44 Pac. 320, 8 Am. Neg. Cas. 76.

An approval of this rule was expressed in *Stewart v. Arkansas Southern R. Co.* (1904) 112 La. 763, 36 So. 676, where the plaintiff was on a train which became separated by reason of a defective track, and she was frightened and also was jolted and shocked with the sudden movement of the cars, and, as a result, suffered a miscarriage and consequent illness, and the court states that in that case it was not a question of mere fright, but of fright and a violent shock, to which the illness of plaintiff was traced by sufficient and competent evidence.

The Washington court in *O'Meara*

v. Russell (1916) 90 Wash. 557, L.R.A. 1916E, 743, 156 Pac. 550, favors this view, but in that case the plaintiff, who was suing another who, in blasting, had negligently hurled a stump against her house, sustained injury in an effort to escape the danger which, through fright, seemed to be imminent.

The conduct of a married man in entering stealthily at night into the bedroom of a blind girl who taught music in his family, sitting upon her bed, leaning over her, and soliciting sexual intercourse, which was refused, was held to constitute a trespass and assault in *Newell v. Witcher* (1880) 53 Vt. 589, 38 Am. Rep. 703, for which damages might be recovered for injury to the girl's health because of the fright and shock to her feelings.

A declaration stating that while the plaintiff was riding in a carriage of the defendant railway company a collision occurred between that train and another, owing to the negligence of the company, and that the carriage in which she was riding was broken in and crushed, whereby she was much affrighted, terrified, and alarmed, whereby she became sick, sore, and disordered, and by reason of the terror and alarm occasioned by the collision and of such sickness, she suffered a miscarriage, was held on general demurrer to disclose a good cause of action, in *Fitzpatrick v. Great Western R. Co.* (1855) 12 U. C. Q. B. 645. The court said that the only difficulty suggested was the introduction of the statement of alarm and fright as if preceding and occasioning sickness and disorder; but that they thought they might consider the fright and the commencement of the sickness to be alleged as simultaneous, and that there was no reason why the plaintiff might not prove an inward injury or disorder, as well as an external wound or bruise. And in *Montreal Street R. Co. v. Walker* (1908) Rap. Jud. Quebec 13 B. R. 324, a recovery was allowed for the physical consequences of fright. But see *Toronto R. Co. v. Toms* (1911) 44 Can. S. C. 268, 20 Ann. Cas. 985, 1 N.

C. C. A. 338, and *Henderson v. Canada Atlantic R. Co.* (1898) 25 Ont. App. Rep. 437, *supra*, I. a.

And see *Chicago & N. W. R. Co. v. Hunerberg* (1885) 16 Ill. App. 387, *supra*, I. a, 2.

An action was held maintainable in *Solomon v. Stepney Borough Council* (1905) 69 J. P. (Eng.) 360, 3 L. G. R. 912, for the physical consequences of fright due to an explosion in an electrical conduit to a passer-by who suffered no contemporaneous physical injuries, but there is no discussion of the question under annotation.

It is, of course, assumed in all of these cases that the defendants' negligence has resulted in a legal wrong to the plaintiff. Their legal wrong is emphasized by the Minnesota courts which have stated the rule that "there can be no recovery for fright which results in physical injuries, in the absence of contemporaneous injury to the plaintiff, unless the fright is the proximate result of a legal wrong against the plaintiff by the defendant." *Sanderson v. Northern P. R. Co.* (1903) 88 Minn. 162, 60 L.R.A. 403, 97 Am. St. Rep. 509, 92 N. W. 542. Under this rule a recovery was allowed where a street railway company negligently placed a passenger in a position of such apparent peril as to cause fright resulting in nervous convulsions and illness, the court stating that such negligence was the proximate cause of the injury. *Purcell v. St. Paul City R. Co.* (1892) 48 Minn. 134, 16 L.R.A. 203, 50 N. W. 1034. A railroad company whose employees invaded a private home when the wife of the owner was there alone is liable to the wife, who became frightened by their acts, as a result of which she became sick, feverish, and had spells of vomiting, and was confined to her bed for about two weeks thereafter. *Lesch v. Great Northern R. Co.* (1906) 97 Minn. 503, 7 L.R.A. (N.S.) 93, 106 N. W. 955. In other cases a recovery is denied. Thus, a man who shot a dog in the highway near a residence is not liable to the owner of the residence for affecting the health of the owner's wife, who was in a delicate state of health, ow-

ing to pregnancy, because of fright which was largely caused, or at least greatly aggravated, by the mistaken impression that defendant aimed his gun toward her, when in fact it was aimed at right angles with the direction in which she was standing, where the defendant did not see the plaintiff's wife, nor was he aware of her presence, since the act in itself was not a tort of any kind against the plaintiff, and, further, it cannot be held that the injury to the wife was the proximate result of the defendant's act. *Renner v. Canfield* (1886) 36 Minn. 90, 1 Am. St. Rep. 654, 30 N. W. 435. The act of servants of a railroad company in attempting to remove the plaintiff's husband from a waiting room in which he was sitting with the plaintiff, under the belief that he was not her husband, does not give the plaintiff any cause of action where, by reason thereof, she suffered a nervous shock and became faint, sick, and helpless, since this injury was not the natural or probable result of the act complained of. *Bucknam v. Great Northern R. Co.* (1899) 76 Minn. 373, 79 N. W. 98, 6 Am. Neg. Rep. 302. A railroad company on whose train a man is traveling with his family is not liable to the mother of the family for fright resulting in illness because a boy of the family was removed from the train because of the father's refusal to pay fare, and it was sought to eject a girl. *Sanderson v. Northern P. R. Co.* (Minn.) *supra*.

The cases which adhere to the rule now under consideration deny the validity of the causes assigned for refusing recovery by the courts which adhere to the rule discussed in subd. 1. The fact that there can be no recovery for, fright alone is held not to preclude the allowance of damages for the physical consequences of fright. *Alabama Fuel & I. Co. v. Baladoni* (1916) 15 Ala. App. 316, 73 So. 205.

The following cases, adhering to the foregoing rule, expressly disapprove of the theory of the courts which adhere to the opposite rule, that the damages are too remote:

Alabama.—*Spearman v. McCrary*

(1912) 4 Ala. App. 473, 58 So. 927, certiorari denied in (1912) 177 Ala. 672, 58 So. 1038; Alabama Fuel & I. Co. v. Baladoni (1916) 15 Ala. App. 316, 73 So. 205.

Maryland.—Green v. Shoemaker (1909) 111 Md. 69, 23 L.R.A.(N.S.) 667, 73 Atl. 688.

Minnesota.—Purcell v. St. Paul City R. Co. (1892) 43 Minn. 134, 16 L.R.A. 203, 50 N. W. 1034.

North Carolina.—Watkins v. Kaolin Mfg. Co. (1902) 131 N. C. 536, 60 L.R.A. 617, 42 S. E. 983, 13 Am. Neg. Rep. 197.

South Carolina. — Mack v. South Bound R. Co. (1898) 52 S. C. 323, 40 L.R.A. 679, 68 Am. St. Rep. 913, 29 S. E. 905.

England.—Dulieu v. White [1901] 2 K. B. 669, 70 L. J. K. B. N. S. 837, 50 Week. Rep. 76, 85 L. T. N. S. 186, 17 Times L. R. 555.

Ireland.—Bell v. Great Northern R. Co. (1890) Ir. L. R. 26 Eq. 428.

In *Watkins v. Kaolin Mfg. Co.* (N. C.) *supra*, it is said: "From common experience we know that serious consequences frequently follow violent nervous shocks caused by fright, often resulting in spells of sickness, and sometimes in sudden death. Whether the physical injury was the natural and proximate result of the fright or shock is a question to be determined by the jury upon the evidence showing the condition, circumstances, occurrences, etc. But it must also appear that the defendant could or should have known that such negligent acts would, with reasonable certainty, cause such result, or that the injury resulted from gross carelessness or recklessness, showing utter indifference to the consequences when they should have been contemplated by the party doing such acts. As a condition precedent to recovery in such cases it must appear that defendant must or ought to have known of the plaintiff's perilous position or condition, against which he should have to exercise care, otherwise such injury could not be within the contemplation of the actor, and put him upon notice as to this special care." In this case the defendant company's servant act-

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ed with utter indifference to the plaintiff's safety in blasting near her home, throwing the stones, from the size of a gallon bucket down to small stones, upon and through her house and into her yard and garden. The court in *Mack v. South Bound R. Co.* (S. C.) *supra*, said: "Now, if the fright was the natural consequence of—was brought about, caused by—the circumstances of peril and alarm in which defendant's negligence placed plaintiff, and the fright caused the nervous shock and convulsions and consequent illness, the negligence was the proximate cause of both injuries. That a mental condition or operation on the part of the one injured comes between the negligence and the injury does not necessarily break the required sequence of intermediate causes."

Even under this doctrine some injuries may be too remote to furnish the basis of an action in damages. For example: In *Denison, B. & N. O. R. Co. v. Barry* (1904) 98 Tex. 48, 82 S. W. 5, reversing (1904) — Tex. Civ. App. —, 80 S. W. 634, the right of a woman to recover for physical injuries suffered on account of fright produced by the overflow of surface water on the premises where she was residing, because of the failure of a railway company to construct sufficient openings and sluices in its road-bed for the natural escape of surface water, was denied on the ground that such damages were entirely too remote. No recovery can be had for a shock to the nervous system of a woman, causing her to suffer and continue to suffer in body and mind as the result of the boisterous conduct of a couple of negroes who occupied a part of the same passenger coach in which she was placed. *Norris v. Southern R. Co.* (1909) 84 S. C. 15, 65 S. E. 956.

The cases allowing a recovery for the physical consequences of fright, even though there is no contemporaneous physical injury, also disapprove of the doctrine of expediency set up by the courts adhering to the opposite rule. *Spearman v. McCrary and Alabama Fuel & I. Co. v. Baladoni* (Ala.);

Green v. Shoemaker (Md.); and *Dulieu v. White* (Eng.) *supra*.

2. Application.

The causes of fright under which recovery has been allowed under this theory although there was no contemporaneous physical injury have been quite similar to those which have been held to furnish no basis of recovery under the theory discussed in subd. I. a. Railway passengers have been held entitled to recover for the physical consequences of fright due to a collision. A passenger on a railway train which was struck by a train of another company at a crossing is entitled to recover of the latter company for the physical injuries resulting from the fright, provided the negligence is the proximate cause of the injury, and the injury ought, in the light of all the circumstances, to have been foreseen as a natural and probable consequence thereof. *Gulf, G. & S. F. R. Co. v. Hayter* (1900) 93 Tex. 239, 47 L.R.A. 325, 77 Am. St. Rep. 556, 54 S. W. 944, 7 Am. Neg. Rep. 359. A passenger on a street railway may recover for bodily injuries caused by fright at a collision involving the car on which she was riding, although there was no physical injury at the time of the accident, if the fright was followed by a series of physical ills as a natural consequence, the fright giving rise to nervous disturbances, and those, in turn, to physical trouble. *Simone v. Rhode Island Co.* (1907) 28 R. I. 186, 9 L.R.A. (N.S.) 740, 66 Atl. 202. Averments in an action for damages against a railway company, that while the pursuer, a woman fifty-six years old, was traveling on the defendant's line, one of the doors of the compartment in which she was seated swung open, because of the negligence of the company's servants in failing to have it properly fastened, and almost at the same moment the motion of a passing train caused the open door to swing back and forward with great violence against the carriage, the glass of the window being broken into fragments and the woodwork being splintered; and that it seemed to the pursuer that the passing train

had dashed into collision with the other; and that the pursuer was greatly alarmed, and received a nervous shock resulting in impairment of health and loss of memory,—were held in *Cooper v. Caledonian R. Co.* (1902; Scot. Ct. of Sess.) 4 F. 880, to state a relevant case for inquiry, and an issue was granted. An issue had been refused by the lord ordinary on the ground that it was impossible to say that the terror which the pursuer felt, and which made her ill, was the natural result, in a mind of ordinary strength, of a carriage door swinging open and having its glass broken, but, on appeal, the court said that, while the case was a narrow one, they could not say that it was impossible; and that, since she offered to prove her case, she was entitled to an opportunity to do so. And it has been held that a passenger in a jitney bus which collided with a street car may recover of the street car company and of the owner of the jitney bus, for bodily pain and suffering produced by fright. *Memphis Street R. Co. v. Bernstein* (1917) 137 Tenn. 637, 194 S. W. 902. A similar decision appears in case of miscarriage following fright or shock caused by the negligence of the operator of an automobile in colliding with a carriage in which the plaintiff was riding, it being held in *Pankopf v. Hinkley* (1909) 141 Wis. 146, 24 L.R.A. (N.S.) 1159, 123 N. W. 625, that the one thus suffering was entitled to maintain an action against the operator of the automobile, although there was no physical contact with the person.

See *Purcell v. St. Paul City R. Co.* (1892) 48 Minn. 134, 16 L.R.A. 203, 50 N. W. 1034, *supra*.

Damages for fright resulting in physical injury at being carried past stations have been allowed railway passengers. A railway company which started a train while a passenger was attempting to alight, and which carried her by her station, and put her off the train at a station beyond, was held liable in an action brought by the husband of such passenger for breach of the contractual agreement, for the injury thus sus-

tained by the passenger, which resulted in sickness and suffering. *Texas & P. R. Co. v. Gott* (1899) 20 Tex. Civ. App. 335, 50 S. W. 193. In *Houston & T. C. R. Co. v. McKenzie* (1897) — Tex. Civ. App. —, 41 S. W. 831, an action by a passenger for physical injuries resulting from fright at being carried past her station and made to alight in the night at a dark place, the refusal of the court to instruct that no damages be allowed for fright was held to be correct, the reviewing court saying that the passenger was caused to alight at a place where there were no lights, and with such surroundings as were well calculated to cause her fright, and that her health was impaired by being compelled to leave the train at that place, and that in such a case the measure of damages ordinarily is expenses, loss of time, inconvenience, discomfort, and mental suffering in consequence of the negligence of the company in carrying the passenger beyond the place of destination. In holding liable a railroad company for negligently causing a passenger on one of its freight trains to alight at some distance from the station, knowing that she would have to pass an open culvert and cattle guard, and along a sidetrack on which cars would be shifted, the court, in *Stutz v. Chicago & N. W. R. Co.* (1888) 73 Wis. 147, 9 Am. St. Rep. 769, 40 N. W. 653, allows the plaintiff to recover damages for fright which she experienced by reason of the backing of cars toward her upon the sidetrack while she was in the cattle guard, struggling to extricate herself, although the cars did not come nearer than 100 feet to the cattle guard.

Fright resulting in physical injuries at crossings or on the railway right of way has been held a basis of recovery. A railroad company which negligently operated its train at a crossing so as nearly to strike persons crossing the track is liable to one of the persons, who became ill because of the fright, and was threatened with a miscarriage. *St. Louis S. W. R. Co. v. Murdock* (1909) 54 Tex. Civ. App. 249, 116 S. W. 139. A railroad company was held liable for an injury

resulting to a young woman from a fall due to fright when she was crossing a railroad track directly in front of an engine, caused by the whistle being suddenly blown in an entirely unreasonable manner, and the cylinder cocks opened, permitting an unusual and unnecessary amount of steam to escape, making an unusual noise. *Baltimore & O. R. Co. v. Harris* (1913) 121 Md. 254, 88 Atl. 282. A railroad company that negligently ran its train upon a bridge when persons were crossing such bridge, and frightened one of them so that she was compelled to take to her bed and suffered a miscarriage, is liable therefor in *Hendrix v. Texas & P. R. Co.* (1895) 40 Tex. Civ. App. 291, 89 S. W. 461. A boy who was attempting to get a mule off a railroad right of way, and who was severely frightened at his narrow escape from being struck by a passing train, as a result of which he became sick, was held entitled to recover therefor from the railroad company in *Mack v. South Bound R. Co.* (1898) 52 S. C. 323, 40 L.R.A. 679, 68 Am. St. Rep. 913, 29 S. E. 905. It appeared in this case that the boy, in order to save his life, threw himself down between the crossties just outside of the rail, bruising and injuring his person, so that the case is one in which a recovery might be had in at least some jurisdictions adhering to the contrary rule. No point is made, however, of the contemporaneous injury.

A railroad company which is negligent in running cars off the switch and into an adjoining yard, within about 10 feet of an adjoining house, frightening the occupant, and resulting in her sickness due to such fright and shock, is liable to her for the injury. *Yoakum v. Kroeger* (1894) — Tex. Civ. App. —, 27 S. W. 953.

Recovery for fright at blasting operations has been allowed. A married woman who has suffered actual physical injuries resulting from fright and nervous shock caused by wrongful blasting on adjoining property may recover therefor, although there was no direct physical impact against the body of the person injured. *Green v.*

Shoemaker (1909) 111 Md. 69, 23 L.R.A.(N.S.) 667, 73 Atl. 688. A company which negligently conducts blasting operations so that a near-by resident is frightened thereby to such an extent that she suffers physical pain and is made sick is liable to her for such injury. *Arthur v. Henry* (1911) 157 N. C. 438, 73 S. E. 211. A company which negligently conducted blasting operations so that a rock weighing about 20 pounds was thrown a distance of 175 yards, where it crashed through a portion of the plaintiff's residence, where the plaintiff was lying on her bed in a pregnant condition, with the result that her nervous system suffered a great shock and nearly caused a miscarriage, is liable therefor. *Kimberly v. Howland* (1906) 143 N. C. 398, 7 L.R.A.(N.S.) 545, 55 S. E. 778.

Recovery has been allowed for various other cases of fright. The owner of an automobile, who, in operating it upon the public highway, caused a mule hitched to a buggy containing two of the plaintiff's small children to run away, so frightening and unnerving the plaintiff that she fainted, was made sick, and subjected to physical suffering, is liable to the plaintiff. *Spearman v. McCrary* (1912) 4 Ala. App. 473, 58 So. 927, certiorari denied in (1912) 177 Ala. 672, 58 So. 1038. A mining company whose police officer shot a dog in the mining camp when the dog was only a few feet from a child, and only a few feet from the mother of the child, who, at the time, was pregnant, and who was so unnerved and upset by the occurrence that she took to her bed on the following day and had a miscarriage, from which she never fully recovered, is liable for the damages resulting from the fright. *Alabama Fuel & I. Co. v. Baladoni* (1916) 15 Ala. App. 316, 73 So. 205. A municipal corporation which negligently permitted a bridge to become out of repair was held liable to a woman who was riding with her brother when the horses went through the floor of the bridge, and who was greatly frightened thereby, and, being delicate and nervous, and about four months advanced in preg-

nancy, suffered a miscarriage as a result of fright and exertion in assisting her brother in getting the horses out. *Oliver v. LaValle* (1875) 36 Wis. 592. A pregnant woman waiting at the bar of her husband's public house, into which the defendants, by their servants, negligently drove a team of horses, may recover damages where she in consequence sustained a severe shock and was seriously ill, and two months thereafter gave premature birth to a child. *Dulieu v. White* [1901] 2 K. B. (Eng.) 669, 70 L. J. K. B. N. S. 837, 50 Week. Rep. 76, 85 L. T. N. S. 186, 17 Times L. R. 555. In *Gilligan v. Robb* [1910] S. C. 856, 47 Scot. L. R. 733, it was held that the plaintiff had stated a relevant case in averring in an action for damages that she had suffered in health and had sustained a severe nervous shock as the result of being thrown into a state of terror by the entrance into her house of a cow, which had been negligently driven by the defendant's servants. In an action for trespass to real property, brought by a husband and wife occupying the same, in which it was sought to recover damages for fright to the wife resulting from the trespass, it is stated that the fact that the defendants did not commit an assault or a battery upon the plaintiffs cannot change the result; that they unlawfully trespassed upon their property, and if their acts did not by themselves constitute an actionable wrong, the jury could at least consider them an aggravation of damages. *May v. Western U. Teleg. Co.* (1911) 157 N. C. 416, 37 L.R.A.(N.S.) 912, 72 S. E. 1059. See note to this case in 37 L.R.A.(N.S.) 912, on personal wrong as aggravation of damages for trespass on realty. A miscarriage and serious impairment of the health of a woman occupying leased premises, caused by fright produced by a boisterous, violent assault upon some negroes on the premises and in her presence, by the landlord, who knew her pregnant condition, were held to give a cause of action against him. *Hill v. Kimball* (1890) 76 Tex. 210, 7 L.R.A. 618, 13 S. W. 59.

II. Fright due to wilful tort.

Whatever may be the rule where the defendant's conduct is negligent merely, the authorities agree that there may be a recovery for physical pain and suffering resulting from fright caused by the wilful wrong of another.

Alabama.—*Engle v. Simmons* (1906) 148 Ala. 92, 7 L.R.A.(N.S.) 96, 121 Am. St. Rep. 59, 41 So. 1023, 12 Ann. Cas. 740.

Arkansas.—*ROGERS v. WILLYARD* (reported herewith) ante, 1115.

Illinois.—*Brownback v. Frailey* (1898) 78 Ill. App. 262.

Iowa.—*Watson v. Dilts* (1902) 116 Iowa, 249, 57 L.R.A. 559, 93 Am. St. Rep. 239, 89 N. W. 1068; *Holdorf v. Holdorf* (1918) 185 Iowa, 839, 169 N. W. 737.

Kansas.—*Whitsel v. Watts* (1916) 98 Kan. 508, L.R.A.1917A, 708, 159 Pac. 401.

Missouri.—*Hickey v. Welch* (1901) 91 Mo. App. 4.

New York.—*Preiser v. Wielandt* (1900) 48 App. Div. 569, 62 N. Y. Supp. 890, 7 Am. Neg. Rep. 558; *Williams v. Underhill* (1901) 63 App. Div. 223, 71 N. Y. Supp. 291.

North Carolina.—*Watkins v. Kaolin Mfg. Co.* (1902) 131 N. C. 536, 60 L.R.A. 617, 42 S. E. 983, 13 Am. Neg. Rep. 197.

Texas.—*St. Louis S. W. R. Co. v. Alexander* (1915) 106 Tex. 518, 172 S. W. 709.

Utah.—*Jeppsen v. Jensen* (1916) 47 Utah, 536, L.R.A.1916D, 614, 155 Pac. 429.

England.—*Wilkinson v. Downton* [1897] 2 Q. B. 57, 66 L. J. Q. B. N. S. 493, 76 L. T. N. S. 493, 45 Week. Rep. 525.

See *Green v. Shoemaker* (1909) 111 Md. 69, 23 L.R.A.(N.S.) 667, 73 Atl. 688.

A number of cases have involved fright to pregnant women. Thus, a pregnant woman has been held to have a right to recovery for bodily pain and suffering resulting from fright caused by a trespasser in her home. *Engle v. Simmons* (1906) 148 Ala. 92, 7 L.R.A.(N.S.) 96, 121 Am. St. Rep. 59, 41 So. 1023, 12 Ann. Cas. 740. A tres-

passer who entered the house of a woman in the absence of her husband, and flourished in her presence a whip, and addressed abusive language to her, and threatened to hurt her, is liable in damages for bringing on a miscarriage resulting from the fright occasioned by his conduct. *Brownback v. Frailey* (1898) 78 Ill. App. 262. The owner of a farm on which a tenant is living, who went thereon when very angry, and approached the tenant's wife carrying a club and making demonstrations calculated to inspire in her the fear and belief that he intended to make a violent assault upon her person, is liable to her in damages, where, as a result of such fright, she gave premature birth to a child. *Holdorf v. Holdorf* (1918) 185 Iowa, 839, 169 N. W. 737. A mortgagee of chattels, who went to the mortgagor's house and attempted to obtain possession of the chattels, and, upon the refusal of the wife of the mortgagor to deliver them, advanced upon her with clenched fists in a threatening manner, at the same time using violent, abusive, and insulting language towards her, which led her to fear that he would strike and injure her, is liable to her when, as a result of the fright, she suffers from nervous prostration and had a miscarriage. *Whitsel v. Watts* (1916) 98 Kan. 508, L.R.A.1917A, 708, 159 Pac. 401. An intoxicated man, who, with a drawn pistol, advanced toward a married woman far advanced in pregnancy, while she was sitting in her home, near an open window, and cursed and threatened to shoot her, and entered the house, whereupon the woman fled to escape the threatened danger, and, in the hurry of her flight, jumped or fell from a fence a distance of some 3 feet, and subsequently suffered a miscarriage, was held liable to the woman for more than nominal damages, in *Barbee v. Reese* (1883) 60 Miss. 906. The evidence, as stated by the court, left scarcely a doubt that the unborn child was killed by the fright or exertion of the mother, caused by the attack upon her. A landlord who has begun to tear down the premises after the expira-

tion of the term, but when the wife of the tenant was unable to move because of sickness and pregnancy, is liable for the death of the wife following a miscarriage which resulted from the fright attendant upon the tearing down of the house while she was sick in bed. *Preiser v. Wielandt* (1900) 48 App. Div. 569, 62 N. Y. Supp. 890, 7 Am. Neg. Rep. 558.

One frightening a woman so as to cause nervous prostration, by stealthily entering her home in the nighttime and committing a trespass on her husband's property, is liable to her in damages therefor. *Watson v. Dilts* (1902) 116 Iowa, 249, 57 L.R.A. 559, 93 Am. St. Rep. 239, 89 N. W. 1068.

An owner of leased premises, who commenced a forcible trespass thereon, and applied vituperative and insulting language and epithets to the tenant, pointing a pistol at the tenant's wife, and threatening to shoot her, and afterwards menacing her with a shotgun, is liable for physical injuries resulting from the fright and shock caused by his actions, although there was no immediate physical injury at the time of the wrong. *Hickey v. Welch* (1901) 91 Mo. App. 4.

In *Williams v. Underhill* (1901) 63 App. Div. 223, 71 N. Y. Supp. 291, a servant was held entitled to recover against her master for an assault, where the only damages claimed were for injuries resulting from fright, the court holding that the rule of *Mitchell v. Rochester R. Co.* (1896) 151 N. Y. 107, 34 L.R.A. 781, 56 Am. St. Rep. 604, 45 N. E. 354, 1 Am. Neg. Rep. 121, supra, is not applicable to actions to recover damages for a wilful tort.

A company whose employees acted with utter indifference to the safety of a woman and her little children, who, to their knowledge, were living on adjoining premises, in blasting in such a way that stones from the size of a gallon bucket down to small stones were thrown upon and through her house, into her yard and garden, making it necessary for her and her children to secrete themselves in the basement, behind a chimney, is liable for physical sickness resulting to the woman from the fright and nervous

shock received from the blasting. *Watkins v. Kaolin Mfg. Co.* (1902) 131 N. C. 536, 60 L.R.A. 617, 42 S. E. 983, 13 Am. Neg. Rep. 197.

A husband was held entitled to recover for mental suffering and physical injury suffered by his wife, arising from fright produced by the unlawful act of the servants of a railway company in going upon the premises of the plaintiff in the night, for the purpose of inspecting and examining some lumber in the yards, which the plaintiff was suspected of stealing. *St. Louis S. W. R. Co. v. Alexander* (1915) 106 Tex. 518, 172 S. W. 709.

Damages may be recovered for injury from fright due to the defendant's wilful, wanton, and malicious act in using abusive language to plaintiff's husband in her presence, and threatening to kill him with a weapon which defendant pointed at him. *Jepps v. Jensen* (1916) 47 Utah, 536, L.R.A. 1916D, 614, 155 Pac. 429.

One who, intending a practical joke, falsely represented to a woman that her husband had met with a severe accident, and desired her to go at once to bring him home, as a result of which the woman suffered a violent shock to her nervous system, producing vomiting and other more serious permanent physical consequences, at one time threatening her reason and entailing suffering, and incapacitating to her as well as causing expense to her husband for medical attendance, is liable to the woman. *Wilkinson v. Downton* [1897] 2 Q. B. (Eng.) 57, 66 L. J. Q. B. N. S. 493, 76 L. T. N. S. 493, 45 Week. Rep. 525.

One who goes to a house and represents himself to a woman there living to be an inspector, representing the military authorities, and who charges the woman with being in correspondence with a German spy, as a result of which the woman is frightened and becomes sick, is liable to her in damages. *Janvier v. Sweeney* [1919] 2 K. B. (Eng.) 316, 9 B. R. C. 579, 88 L. J. K. B. N. S. 1231, 121 L. T. N. S. 179, 35 Times L. R. 360, 63 Sol. Jo. 480.

In *Razzo v. Varni* (1889) 81 Cal.

289, 22 Pac. 848, an action for trespass upon the plaintiff's property, the plaintiff was permitted to show that his wife appeared on the scene to get the trespassers to desist from digging the ditch which they had entered to dig, and that she was treated with derision and roughly pushed about, and she testified that she became sick from the fright and excitement.

See *Newell v. Whitcher* (1880) 53 Vt. 589, 38 Am. Rep. 703, *supra*; *Huxley v. Berg* (1815) 1 Starkie (Eng.) 98, *supra*, I. a, 2; and see *Kaas v. Metz* (1898) 78 Ill. App. 46, *supra*, I. a, 2; *Braun v. Craven* (1898) 175 Ill. 401, 42 L.R.A. 199; 51 N. E. 657, 5 Am. Neg. Rep. 15, *supra*, I. a, 2.

III. *Fright at another's peril.*

Recovery for the physical consequences of fright at another's peril has generally been denied. *Cleveland, C. C. & St. L. R. Co. v. Stewart* (1900) 24 Ind. App. 374, 56 N. E. 917; *Mahoney v. Dankwart* (1899) 108 Iowa, 321, 79 N. W. 134, 6 Am. Neg. Rep. 278; *McGee v. Vanover* (1912) 148 Ky. 737, 147 S. W. 742, Ann. Cas. 1913E, 500; *Chesapeake & O. R. Co. v. Robinett* (1913) 151 Ky. 778, 45 L.R.A. (N.S.) 433, 152 S. W. 976; *Smith v. Johnson & Co.* (Eng.) unreported case referred to in *Dulieu v. White* [1901] 2 K. B. (Eng.) 669, at p. 675. But in *Spearman v. McCrary* (1912) 4 Ala. App. 473, 58 So. 927, certiorari denied in (1912) 177 Ala. 672, 58 So. 1038, a recovery was allowed a mother for fright at the dangerous position of her children, who were in a runaway caused by defendant's negligence.

Under the general rule that there can be no recovery for the consequences of fright caused by danger to another, the right to recover damages for permanent impairment of health, or nervous prostration, resulting from the negligence of defendant, is denied in *Cleveland, C. C. & St. L. R. Co. v. Stewart* (Ind.) *supra*, where the fright was occasioned by imminent danger and peril to another. The court says that, under the authorities, if the plaintiff had prosecuted the action to recover for fright occasioned by an apparent and impending

peril to herself, where no personal injury resulted, she could not recover; that her case was greatly weakened because she based her right of action upon fright occasioned by apparent and impending peril to her daughter.

One doing blasting upon his property is not liable for physical injuries resulting from fright to an adjoining owner, where the blasting had been continued for a considerable time, and the plaintiff had been notified of the explosion of which complaint was made, and had left her home, going to a place of safety, while her mother remained in the house, and, upon her return, found the house and furniture in a somewhat shattered condition, and shortly after her mother collapsed, and plaintiff thought she was dying. The court states that the plaintiff's fright was not caused directly by the blast, but rather by its effect upon her mother; and the court concludes that, as her fright was not immediately occasioned by the blast, but was induced by her apprehension for her mother's safety, there could be no recovery. *Mahoney v. Dankwart* (1899) 108 Iowa, 321, 79 N. W. 134, 6 Am. Neg. Rep. 278.

A woman is not entitled to recover for pain and suffering and a miscarriage resulting from fright at an assault upon her husband, where she apprehended no danger or injury to herself from the assailant. *McGee v. Vanover* (1912) 148 Ky. 737, 147 S. W. 742, Ann. Cas. 1913E, 500.

A carrier is not liable for fright of a passenger by wrongfully assaulting her father, and ejecting him from the train, in her presence, and leaving her to pursue her journey alone. *Chesapeake & O. R. Co. v. Robinett* (1913) 151 Ky. 778, 45 L.R.A. (N.S.) 433, 152 S. W. 976.

See *Reed v. Ford* (1908) 129 Ky. 471, 19 L.R.A. (N.S.) 225, 112 S. W. 600, *supra*, I. a, 1.

In *Smith v. Johnson & Co.* (Eng.) an unreported case referred to in *Dulieu v. White* [1901] 2 K. B. (Eng.) 669, at page 675, one who became ill at the sight of another man being killed, as a result of the defendant's

negligence, was held not entitled to recover therefor.

See *Hutchinson v. Stern* (1906) 115 App. Div. 791, 101 N. Y. Supp. 45, supra, appeal dismissed in (1907) 189 N. Y. 577, 82 N. E. 1128, I. a, 2; *Fleming v. Lobel* (1904) — N. J. L. —, 59 Atl. 28, supra, I. a, 2. See *Southern R. Co. v. Jackson* (1916) 146 Ga. 243, 91 S. E. 28, supra, I. a, 3.

In some cases in which the fright was the result of danger to another, recovery is denied expressly on the ground that there was no legal wrong to the plaintiff. *Bucknam v. Great Northern R. Co.* (1899) 76 Minn. 373, 79 N. W. 98, 6 Am. Neg. Rep. 302.

See *Sanderson v. Northern P. R. Co.* (1902) 88 Minn. 162, 60 L.R.A. 403, 97 Am. St. Rep. 509, 92 N. W. 542, supra, I. b, 1.

That there may be a recovery for fright resulting in physical injuries, where the fright is at the danger of another, seems to be the opinion in *Goddard v. Watters* (1914) 14 Ga. App. 722, 82 S. E. 304, 7 N. C. C. A. 1, although recovery was denied in that case on another ground. In that case, where a wife was seeking to recover for a miscarriage resulting from fright at an assault upon her husband, the court, in denying recovery, says that no recovery shall "be had on account of fright alone, caused by less than such gross negligence on the part of one acquainted with the condition of the plaintiff, or with the facts and circumstances surrounding the plaintiff, as would authorize the conclusion that the defendant must have known that certain definite physical injuries would naturally flow from or follow the fright or nervous excitement brought about by him, or unless the fright resulting in physical injuries or impairment of health should have been brought about deliberately, maliciously, or wantonly by the defendant, through an utter disregard of the natural and probable consequences to the injured party, or from a wilful intent so to injure the

party." And see the reported case (*ROGERS v. WILLYARD*, ante, 1115).

A nervous shock resulting in sickness, caused to a servant by the excitement and alarm of an accident to a fellow workman, was held to constitute personal injury to him, caused by an accident arising out of and in the course of his employment, within the meaning of the Workmen's Compensation Act, in *Yates v. South Kirby etc. Collieries* [1910] 2 K. B. (Eng.) 539, 79 L. J. K. B. N. S. 1035, 103 L. T. N. S. 170, 26 Times L. R. 596, 3 B. W. C. C. 418, 3 N. & C. C. A. 225.

In *Pugh v. London, B. & S. C. R. Co.* [1896] 2 Q. B. (Eng.) 248, 65 L. J. Q. B. N. S. 521, 74 L. T. N. S. 724, 44 Week. Rep. 627, an action on a contract of insurance by which the defendant had agreed to pay the plaintiff, who was a signal man in its employ, a weekly allowance in case of his being incapacitated by reason of accident sustained in discharge of his duties, it appeared that, while in the discharge of his duties, the plaintiff saw from his signal box a train approaching on the line, and noticed that, from the condition of one of the carriages, an accident was imminent unless the train were stopped, and took steps to do this, and succeeded in stopping the train without accident; he did not come in any way into contact with the train, but the excitement and alarm caused by the anticipation of the accident, which appeared to be imminent, and the necessity for taking immediate action to prevent it, caused a shock to his nervous system which affected him to such an extent that he became incapacitated for work. It was held that he had been incapacitated by the accident within the meaning of the policy, and the court remarked that this was not a case of mental anguish merely,—that the plaintiff had been subjected to such a shock to his nerves that he had become physically prostrated.

W. A. E.

KNICKERBOCKER ICE COMPANY, Plff. in Err.,
v.

LILLIAN E. STEWART.

United States Supreme Court — May 17, 1920.

(253 U. S. 149, 64 L. ed. 834, 40 Sup. Ct. Rep. 438.)

Admiralty — exclusiveness of Federal jurisdiction — state workmen's compensation laws — power of Congress.

1. Congress exceeded its constitutional power to legislate concerning rights and liabilities within the maritime jurisdiction, and remedies for their enforcement, by attempting, as it did in the Act of October 6, 1917, to permit the application of Workmen's Compensation Laws of the several states to injuries within the admiralty and maritime jurisdiction, thus virtually destroying the harmony and uniformity which the Constitution not only contemplated, but actually established.

[See note on this question beginning on page 1155.]

— state legislation affecting maritime law.

2. The Federal Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law, and empowered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction. Moreover, it took from the states all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law, or to interfere with its proper harmony and uniformity in its international and interstate relations.

To preserve adequate harmony and appropriate uniform rules relating to maritime matters, and bring them within control of the Federal government, was the fundamental purpose; and to such definite end Congress was empowered to legislate within that sphere.

— state and Federal regulations.

3. The mere reservation of partially concurrent cognizance to state courts by an act of Congress conferring an otherwise exclusive admiralty jurisdiction upon the Federal courts could not create substantive rights or obligations, nor indicate assent to their creation by the states.

(Mr. Justice Holmes, Mr. Justice Pitney, Mr. Justice Brandeis, and Mr. Justice Clarke dissent.)

ERROR to the Appellate Division of the Supreme Court, Third Department, of the State of New York, to review a judgment affirmed by the Court of Appeals, upholding an award of the Industrial Commission for injuries received by plaintiff's husband in doing work of a maritime nature. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Frank R. Savidge and Frederick M. Thompson, for plaintiff in error:

The work of unloading a vessel is a maritime employment, and is in performance of a maritime contract.

Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 58 L. ed. 1208, 51 L.R.A. (N.S.) 1157, 34 Sup. Ct. Rep. 733;

Southern P. Co. v. Jensen, 244 U. S. 205, 61 L. ed. 1086, L.R.A.1918C, 451, 37 Sup. Ct. Rep. 524, Ann. Cas. 1917E, 900, 14 N. C. C. A. 597; Anderson v. Johnson Lighterage Co. 224 N. Y. 539, 120 N. E. 55; Doey v. Clarence P. Howland Co. 224 N. Y. 30, 120 N. E. 53; Keator v. Rock Plaster Mfg. Co. 224 N. Y. 540, 120 N. E. 56.

The uniformity of the Maritime Law is preserved for all time in the Constitution.

Southern P. Co. v. Jensen, 244 U. S. 205, 61 L. ed. 1086, L.R.A.1918C, 451, 37 Sup. Ct. Rep. 524, Ann. Cas. 1917E, 900, 14 N. C. C. A. 597; *The Lottawanna* (Rodd v. Heartt) 21 Wall. 558, 22 L. ed. 654.

Congress has power to amend or create the maritime law which shall prevail throughout the country (*Butler v. Boston & S. S. S. Co.* 130 U. S. 527, 32 L. ed. 1017, 9 Sup. Ct. Rep. 612; *Re Garnett*, 141 U. S. 1, 14, 35 L. ed. 631, 634, 11 Sup. Ct. Rep. 840); but that is the limit of its power. It cannot delegate this power to the states, nor, under the limitation of the Constitution, authorize the enactment of laws that will destroy the uniformity of the Maritime Law.

The New York Workmen's Compensation Law, as applied to maritime employments, is also unconstitutional in that an essential part of the law bars rights of action in admiralty, which cannot be barred by legislation of the states.

Jensen v. Southern P. Co. 215 N. Y. 514, L.R.A.1916A, 403, 109 N. E. 600, Ann. Cas. 1916B, 276, 9 N. C. C. A. 286; *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52, 58 L. ed. 1208, 51 L.R.A.(N.S.) 1157, 34 Sup. Ct. Rep. 733; *The Transfer No. 12*, 137 C. C. A. 207, 221 Fed. 409; *Workman v. New York*, 179 U. S. 552, 45 L. ed. 314, 21 Sup. Ct. Rep. 212; *The Max Morris*, 137 U. S. 1, 34 L. ed. 586, 11 Sup. Ct. Rep. 29; *The Thode Fagelund*, 211 Fed. 635; *The Fred E. Sander*, 208 Fed. 724, 4 N. C. C. A. 891; *The Rosalie Mahony*, 218 Fed. 695.

Mr. Mark Ash, as *amicus curiæ*:

The Act of Congress of October 6, 1917, amending the Judicial Code, §§ 24 and 256, has not removed the unconstitutionality of the Workmen's Compensation Law.

Southern P. Co. v. Jensen, 244 U. S. 205, 61 L. ed. 1086, L.R.A.1918C, 451, 37 Sup. Ct. Rep. 524, Ann. Cas. 1917E, 900, 14 N. C. C. A. 597; *The Lottawanna* (Rodd v. Heartt) 21 Wall. 558, 22 L. ed. 654; *The St. Lawrence* (*Meyer v. Tupper*) 1 Black, 526, 527, 17 L. ed. 182, 183; *Martin v. Hunter*, 1 Wheat. 304, 330, 4 L. ed. 97, 103; *Workman v. New York*, 179 U. S. 552, 45 L. ed. 314, 21 Sup. Ct. Rep. 212; *The Chusan*, 2 Story, 455, Fed. Cas. No. 2,717; *Butler v. Boston & S. S. S. Co.*

130 U. S. 527, 555, 32 L. ed. 1017, 1023, 9 Sup. Ct. Rep. 612.

Messrs. E. Clarence Aiken and Charles D. Newton, Attorney General of New York, for defendant in error:

Congress had jurisdiction to enact the amendments to the Judicial Code, reserving the rights and remedies under the compensation law of any state, where such rights and remedies had been given by any state.

Southern P. Co. v. Jensen, 244 U. S. 205, 61 L. ed. 1086, L.R.A.1918C, 451, 37 Sup. Ct. Rep. 524, Ann. Cas. 1917E, 900, 14 N. C. C. A. 597; *Martin v. Hunter*, 1 Wheat. 326, 327, 4 L. ed. 102, 103; *United States v. Bevans*, 3 Wheat. 336, 386, 4 L. ed. 404, 416; *Gibbons v. Ogden*, 9 Wheat. 189, 196, 6 L. ed. 68, 70; *Lottery Case* (*Champion v. Ames*) 188 U. S. 321, 346, 47 L. ed. 492, 497, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; *Passenger Cases*, 7 How. 283, 549, 12 L. ed. 702, 813; *M'Culloch v. Maryland*, 4 Wheat. 316, 407, 4 L. ed. 579, 601; *Rhode Island v. Massachusetts*, 12 Pet. 657, 721, 9 L. ed. 1233, 1259; *Holt v. Indiana Mfg. Co.* 176 U. S. 68, 44 L. ed. 374, 20 Sup. Ct. Rep. 272; *United States v. Sayward*, 160 U. S. 493, 498, 40 L. ed. 508, 509, 16 Sup. Ct. Rep. 371; *Minnesota Rate Cases* (*Simpson v. Shepard*) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18; *People v. Welch*, 141 N. Y. 266, 24 L.R.A. 117, 38 Am. St. Rep. 793, 36 N. E. 328; *Manchester v. Massachusetts*, 139 U. S. 240, 35 L. ed. 159, 11 Sup. Ct. Rep. 559; *McCready v. Virginia*, 94 U. S. 391, 24 L. ed. 248; *The Abbey Dodge*, 223 U. S. 166, 56 L. ed. 390, 32 Sup. Ct. Rep. 310; *Erie R. Co. v. Williams*, 233 U. S. 685, 58 L. ed. 1155, 51 L.R.A.(N.S.) 1097, 34 Sup. Ct. Rep. 761; *Mobile County v. Kimball*, 102 U. S. 691, 697, 26 L. ed. 238, 239; *Huse v. Glover*, 119 U. S. 543, 30 L. ed. 487, 7 Sup. Ct. Rep. 313; *Leovy v. United States*, 177 U. S. 621, 625, 44 L. ed. 914, 916, 20 Sup. Ct. Rep. 797; *Cummings v. Chicago*, 188 U. S. 410, 427, 47 L. ed. 525, 530, 23 Sup. Ct. Rep. 472; *Keokuk Northern Line Packet Co. v. Keokuk*, 95 U. S. 80, 24 L. ed. 377; *Cincinnati, P. B. S. & P. Packet Co. v. Catlettsburg*, 105 U. S. 559, 563, 26 L. ed. 1169, 1171; *Parkersburg & P. River Transp. Co. v. Parkersburg*, 107 U. S. 691, 702, 27 L. ed. 584, 588, 2 Sup. Ct. Rep. 732; *Ouachita & M. River Packet Co. v. Aiken*, 121 U. S. 444, 447, 30 L. ed. 976, 977, 1

Inters. Com. Rep. 379, 7 Sup. Ct. Rep. 907; Sands v. Manistee River Improv. Co. 123 U. S. 288, 295, 31 L. ed. 149, 151, 8 Sup. Ct. Rep. 113; Port Richmond & B. P. Ferry Co. v. Hudson County, 234 U. S. 317, 331, 58 L. ed. 1330, 1336, 34 Sup. Ct. Rep. 821; Clark Distilling Co. v. Western Maryland R. Co. 242 U. S. 311, 61 L. ed. 326, L.R.A. 1917B, 1218, 37 Sup. Ct. Rep. 180, Ann. Cas. 1917B, 845; Wilmington Transp. Co. v. California R. Commission, 236 U. S. 151, 59 L. ed. 508, P.U.R.1915A, 845, 35 Sup. Ct. Rep. 276; Knapp S. & Co. Co. v. McCaffrey, 177 U. S. 638, 644, 44 L. ed. 921, 924, 20 Sup. Ct. Rep. 824; American S. B. Co. v. Chase, 16 Wall. 522, 21 L. ed. 369; Sherlock v. Alling, 93 U. S. 99, 23 L. ed. 819; The Hamilton (Old Dominion S. S. Co. v. Gilmore) 207 U. S. 398, 52 L. ed. 264, 28 Sup. Ct. Rep. 133; Dougan v. Champlain Transp. Co. 56 N. Y. 1.

Mr. Warren H. Pillsbury, as amicus curiæ:

No unconstitutional interference is created by the Johnson Amendment between the judicial power of the states and of the United States.

The Howell, 257 Fed. 578; Holt v. Indiana Mfg. Co. 176 U. S. 68, 44 L. ed. 374, 20 Sup. Ct. Rep. 272; United States v. Sayward, 160 U. S. 493, 498, 40 L. ed. 508, 509, 16 Sup. Ct. Rep. 371; Fishback v. Western U. Teleg. Co. 161 U. S. 96, 40 L. ed. 630, 16 Sup. Ct. Rep. 506; United States v. Union P. R. Co. 98 U. S. 569, 603, 25 L. ed. 143, 150; Cooley, Const. Law, 3d ed. p. 124.

No unconstitutional interference is created by the Johnson Amendment between legislative power of the states and of the United States.

Hobart v. Drogan, 10 Pet. 108, 9 L. ed. 363; Sturges v. Crowninshield, 4 Wheat. 122, 196, 4 L. ed. 529, 548; Cooley, Const. Law, 3d ed. 35.

Neither the New York act nor the Johnson Amendment violates the commerce clause.

Re Rahrer, 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865; Clark Distilling Co. v. Western Maryland R. Co. 242 U. S. 311, 61 L. ed. 326, L.R.A. 1917B, 1218, 37 Sup. Ct. Rep. 180, Ann. Cas. 1917B, 845; The Lottawanna (Rodd v. Heartt) 21 Wall. 558, 22 L. ed. 654.

If the act be considered not to be of uniform application, it still violates no constitutional requirement.

United States v. Union P. R. Co. 98 U. S. 569, 603, 25 L. ed. 143, 150.

The Johnson Amendment is, in its last analysis, of uniform application throughout the country.

Re Rahrer, 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865.

The present case is not one of maritime cognizance, as the injury occurred upon the land.

The Plymouth (Haugh v. Western Transp. Co.) 3 Wall. 20, 18 L. ed. 125; Keator v. Rock Plaster Mfg. Co. 256 Fed. 574.

Mr. Justice McReynolds delivered the opinion of the court:

While employed by Knickerbocker Ice Company as bargeman and doing work of a maritime nature, William M. Stewart fell into the Hudson river and drowned August 3, 1918. His widow, defendant in error, claimed under the Workmen's Compensation Law of New York; the industrial commission granted an award against the company for her and the minor children; and both appellate division and the court of appeals approved it. 226 N. Y. 302, 123 N. E. 382. The latter concluded that the reasons which constrained us to hold the Compensation Law inapplicable to an employee engaged in maritime work (Southern P. Co. v. Jensen, 244 U. S. 205, 61 L. ed. 1086, L.R.A.1918C, 451, 37 Sup. Ct. Rep. 524, Ann. Cas. 1917E, 900, 14 N. C. C. A. 596) had been extinguished by "An Act to Amend Sections Twenty-four and Two Hundred and Fifty-six of the Judicial Code [36 Stat. at L. 1091, 1160, chap. 231, Comp. Stat. §§ 991 (1), 1233, 4 Fed. Stat. Anno. 2d ed. p. 838, 5 Fed. Stat. Anno. 2d ed. p. 921], Relating to the Jurisdiction of the District Courts, So as to Save to Claimants the Rights and Remedies under the Workmen's Compensation Law of Any State," approved October 6, 1917, chap. 97, 40 Stat. at L. 395, Comp. Stat. § 991(3), Fed. Stat. Anno. Supp. 1918, p. 401.

The provision of § 9, Judiciary Act, 1789 (chap. 20, 1 Stat. at L. 76), granting to United States district courts "exclusive original cognizance of all civil causes of admi-

ralty and maritime jurisdiction . . . saving to suitors, in all cases the right of a common-law remedy, where the common law is competent to give it," was carried into the Revised Statutes (§§ 563 and 711, Comp. Stat. §§ 991, 1233), and thence into the Judicial Code (clause 3, §§ 24 and 256). The saving clause remained unchanged until the Statute of October 6, 1917, added: "*and to claimants the rights and remedies under the Workmen's Compensation Law of any state.*"¹

¹ Judiciary Act, September 24, 1789, chap. 20, 1 Stat. at L. 73, 76, 77, Comp. Stat. §§ 530, 991:

Sec. 9. "That the district courts shall have, exclusively of the courts of the several states . . . exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas; saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it; . . ."

Rev. Stat. § 563. "The district courts shall have jurisdiction as follows: . . .

"Eighth. Of all civil causes of admiralty and maritime jurisdiction; saving to suitors in all cases the right of a common-law remedy, where the common law is competent to give it; and of all seizures on land and on waters not within admiralty and maritime jurisdiction. And such jurisdiction shall be exclusive, except in the particular cases where jurisdiction of such causes and seizures is given to the circuit courts. [And shall have original and exclusive cognizance of all prizes brought into the United States, except as provided in ¶ 6 of § 629, Comp. Stat. § 991(3).]"

Rev. Stat. § 711. "The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several states: . . .

"Third. Of all civil causes of admiralty and maritime jurisdiction; saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it."

In *Southern P. Co. v. Jensen* (May, 1917), *supra*, we declared that under § 2, article 3, of the Constitution ("the judicial power shall extend to . . . all cases of admiralty and maritime jurisdiction"), and § 8, art. 1 (Congress may make necessary and proper laws for carrying out granted powers), "in the absence of some controlling statute the general maritime law as accepted by the Federal courts constitutes part of our national law applicable to matters within the admiralty and maritime

The Judicial Code:

"Sec. 24. The district courts shall have original jurisdiction as follows: . . .

"Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it; . . .

"Sec. 256. The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several states: . . .

"Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it."

Act Oct. 6, 1917, chap. 97, 40 Stat. at L. 395, Comp. Stat. § 991(3), Fed. Stat. Anno. Supp. 1918, p. 401.

That clause 3 of § 24 of the Judicial Code is hereby amended to read as follows:

"Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it, and to claimants the rights and remedies under the Workmen's Compensation Law of any state; of all seizures on land or waters not within admiralty and maritime jurisdiction; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize."

Sec. 2. That clause 3 of § 256 of the Judicial Code is hereby amended to read as follows:

"Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it, and to claimants the rights and remedies under the Workmen's Compensation Law of any state."

jurisdiction;" also that "Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country." And we held that, when applied to maritime injuries, the New York Workmen's Compensation Law conflicts with the rules adopted by the Constitution, and to that extent is invalid. "The necessary consequence would be destruction of the very uniformity in respect of maritime matters which the Constitution was designed to establish; and freedom of navigation between the states and with foreign countries would be seriously hampered and impeded."

We also pointed out that the saving clause taken from the original Judiciary Act had no application, since, at most, it only specified common-law remedies, whereas the remedy prescribed by the Compensation Law was unknown to the common law and incapable of enforcement by the ordinary processes of any court. Moreover, if applied to maritime affairs, the statute would obstruct the policy of Congress to encourage investments in ships.

In *Chelentis v. Luckenbach S. S. Co.* (June, 1918) 247 U. S. 372, 62 L. ed. 1171, 38 Sup. Ct. Rep. 501, an action at law seeking full indemnity for injuries received by a sailor while on shipboard, we said: "Under the doctrine approved in *Southern P. Co. v. Jensen*, no state has power to abolish the well-recognized maritime rule concerning measure of recovery, and substitute therefor the full indemnity rule of the common law. Such a substitution would distinctly and definitely change or add to the settled maritime law; and it would be destructive of the 'uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states.'" And, concerning the clause, "saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it," this: "In *Southern P.*

Co. v. Jensen, we definitely ruled that it gave no authority to the several states to enact legislation which would work 'material prejudice to the characteristic features of the general maritime law, or interfere with the proper harmony and uniformity of that law in its international and interstate relations.' . . . Under the saving clause a right sanctioned by the maritime law may be enforced through any appropriate remedy recognized at common law; but we find nothing therein which reveals an intention to give the complaining party an election to determine whether the defendant's liability shall be measured by common-law standards rather than those of the maritime law." Thus we distinctly approved the view that the original saving clause conferred no substantive rights and did not authorize the states so to do. It referred only to remedies, and to the extent specified permitted continued enforcement by the state courts of rights and obligations founded on maritime law.

In *Union Fish Co. v. Erickson*, 248 U. S. 308, 63 L. ed. 261, 39 Sup. Ct. Rep. 112, an admiralty cause, a master sought to recover damages for breach of an oral contract with the owner of a vessel for services to be performed principally upon the sea. The latter claimed invalidity of the contract under a statute of California, where made, because not in writing, and not to be performed within a year. We ruled: "The circuit court of appeals correctly held that this contract was maritime in its nature, and an action in admiralty thereon for its breach could not be defeated by the statute of California relied upon by the petitioner." "In entering into this contract the parties contemplated no services in California. They were making an engagement for the services of the master of the vessel, the duties to be performed in the waters of Alaska, mainly upon the sea. The maritime law controlled in this respect, and was not subject to limitation because the particular engagement happened to be made in California. The par-

ties must be presumed to have had in contemplation the system of maritime law under which it was made." See also *The Blackheath* (United States v. Evans) 195 U. S. 361, 365, 49 L. ed. 236, 237, 25 Sup. Ct. Rep. 46.

As the plain result of these recent opinions and the earlier cases upon which they are based, we accept the following doctrine:

Admiralty—
exclusiveness
of Federal
jurisdiction—
state legislation
affecting mari-
time law.

The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law, and empowered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction. Moreover, it took from the states all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law, or to interfere with its proper harmony and uniformity in its international and interstate relations. To preserve adequate harmony and appropriate uniform rules relating to maritime matters and bring them within control of the Federal government was the fundamental purpose; and to such definite end Congress was empowered to legislate within that sphere.

Since the beginning, Federal courts have recognized and applied the rules and principles of maritime law as something distinct from laws of the several states,—not derived from or dependent on their will. The foundation of the right to do this, the purpose for which it was granted, and the nature of the system so administered, were distinctly pointed out long ago. "That we have a maritime law of our own, operative throughout the United States, cannot be doubted. . . . One thing, however, is unquestionable: the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to

place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states." *The Lottawanna* (Rodd v. Heartt) 21 Wall. 558, 574, 575, 22 L. ed. 654, 661, 662. The field was not left unoccupied; the Constitution itself adopted the rules concerning rights and liabilities applicable therein; and certainly these are not less paramount than they would have been if enacted by Congress. Unless this be true, it is quite impossible to account for a multitude of adjudications by the admiralty courts. See *Workman v. New York*, 179 U. S. 552, 557, et seq., 45 L. ed. 314, 319, 21 Sup. Ct. Rep. 212.

The distinction between the indicated situation created by the Constitution relative to maritime affairs and the one resulting from the mere grant of power to regulate commerce, without more, should not be forgotten. Also, it should be noted that Federal laws are constantly applied in state courts,—unless inhibited, their duty so requires. Const. art. 6, cl. 2; *Second Employers' Liability Cases* (*Mondou v. New York, N. H. & H. R. Co.*) 223 U. S. 1, 55, 56 L. ed. 327, 348, 38 L.R.A. (N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 895. Consequently mere reservation of partially concurrent cognizance to such —state and Federal regulations. courts by an act of Congress conferring an otherwise exclusive jurisdiction upon national courts could not create substantive rights or obligations, or indicate assent to their creation by the states.

When considered with former decisions of this court, a satisfactory interpretation of the Act of October 6, 1917, is difficult, perhaps impossible. *The Howell*, 257 Fed. 578, and *Rhode v. Grant Smith Porter Co.* 259 Fed. 304, illustrate some of the uncertainties. In the first, the

district court in New York dismissed a libel, holding that rights and remedies prescribed by the Compensation Law of that state are exclusive and pro tanto supersede the maritime law. In the second, the district court of Oregon ruled that when an employee seeks redress for a maritime tort by an admiralty court, rights, obligations, and liabilities of the respective parties must be measured by the maritime law, and these cannot be barred, enlarged, or taken away by state legislation. Other difficulties hang upon the unexplained words, "Workmen's Compensation Law of any state."

Moreover, the act only undertook to add certain specified rights and remedies to a saving clause within a Code section conferring jurisdiction. We have held that before the amendment, and irrespective of that section, such rights and remedies did not apply to maritime torts because they were inconsistent with paramount Federal law,—within that field they had no existence. Were the added words therefore wholly ineffective? The usual function of a saving clause is to preserve some-

thing from immediate interference,—not to create; and the rule is that expression by the legislature of an erroneous opinion concerning the law does not alter it. Endlich, Interpretation of Stat. § 372.

Neither branch of Congress devoted much debate to the act under consideration—altogether, less than two pages of the Record (65th Cong., pp. 7605, 7843). The Judiciary Committee of the House made no report; but a brief one by the Senate Judiciary Committee, copied below,* probably indicates the general legislative purpose. And with this and accompanying circumstances, the words must be read.

Having regard to all these things, we conclude that Congress undertook to permit application of Workmen's Compensation Laws of the several states to injuries within the admiralty and maritime jurisdiction, and to save such statutes from the objections pointed out by *Southern P. Co. v. Jensen*. It sought to authorize and sanction action by the states in prescribing and enforcing, as to all parties concerned, rights, obligations, liabilities, and remedies

* 65th Congress, 1st Session. Senate Report No. 139. Amending the Judicial Code. October 2, 1917. Ordered to be printed. Mr. Ashurst, from the Committee on the Judiciary, submitted the following report. [To accompany S 2916.]

The Committee on the Judiciary, to which was referred the bill (S. 2916) to amend §§ 24 and 256 of the Judicial Code, relating to the jurisdiction of the district courts, so as to save to claimants the rights and remedies under the Workmen's Compensation Law of any state, having considered the same, recommend its passage without amendment.

The Judicial Code, by §§ 24 and 256, confers exclusive jurisdiction on the district courts of the United States of all civil cases of admiralty and maritime jurisdiction, "saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it." It was declared by the Supreme Court of the United States in the case of *Southern P. Co. v. Jensen* that "the remedy which the Compensation statute attempts to give is of a character wholly unknown to the common law, incapable of enforcement

by the ordinary processes of any court, and is not saved to suitors from the grant of exclusive jurisdiction." The bill (S. 2916) proposes only to amend the Judicial Code by so enlarging the saving clause as to include the rights and remedies under the Compensation Law of any state. Inasmuch as not only the remedy but sometimes the right under the compensation plan is unknown to the common law, both rights and remedies are included in the bill. The bill, if enacted, will not disrupt the admiralty jurisdiction of the Federal courts. The most that can be said of it will be that it is a recognition by Congress that a concurrent jurisdiction, state and Federal, should exist over certain matters. Actions that were formerly triable in admiralty courts will still be triable there. Where the cases were formerly triable only in such courts, it will now be possible for the state, through its compensation plan, to determine the rights of the parties concerned. In other words, there being concurrent jurisdiction, the injured party, or his dependents, may bring an action in admiralty or submit a claim under the compensation plan.

designed to provide compensation for injuries suffered by employees engaged in maritime work.

And, so construed, we think the enactment is beyond the power of Congress. Its power to legislate concerning rights and liabilities within the maritime jurisdiction, and remedies for their enforcement, arises from the Constitution, as above indicated. The definite object of the grant was to commit direct control to the Federal government; to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation; and to establish, so far as practicable, harmonious and uniform rules applicable throughout every part of the Union.

Considering the fundamental purpose in view and the definite end for which such rules were accepted, we must conclude that in their characteristic features and essential international and interstate relations, the latter may not be repealed, amended, or changed except by legislation which embodies both the will and deliberate judgment of Congress. The subject was intrusted to it, to be dealt with according to its discretion,—not for delegation to others. To say that because Congress could have enacted a compensation act applicable to maritime injuries, it could authorize the states to do so, as they might desire, is false reasoning. Moreover, such an authorization would inevitably destroy the harmony and uniformity which the Constitution not only contemplated, but actually established,—it would defeat the very purpose of the grant. See *Sudden & Christenson v. Industrial Acci. Commission*, — Cal. —, 188 Pac. 803.

Congress cannot transfer its legislative power to the states,—by nature this is nondelegable. Re *Rahrer*, 140 U. S. 545, 560, 35 L. ed. 572, 576, 11 Sup. Ct. Rep. 865; *Marshall Field & Co. v. Clark*, 143 U. S. 649, 692, 36 L. ed. 294, 309, 12 Sup. Ct. Rep. 495; *Buttfield v.*

Stranahan, 192 U. S. 470, 496, 48 L. ed. 525, 535, 24 Sup. Ct. Rep. 349; *Butte City Water Co. v. Baker*, 196 U. S. 119, 126, 49 L. ed. 409, 412, 25 Sup. Ct. Rep. 211; *Interstate Commerce Commission v. Goodrich Transit Co.* 224 U. S. 194, 214, 56 L. ed. 729, 737, 32 Sup. Ct. Rep. 436.

In *Clark Distilling Co. v. Western Maryland R. Co.* 242 U. S. 311, 61 L. ed. 326, L.R.A.1917B, 1218, 37 Sup. Ct. Rep. 180, Ann. Cas. 1917B, 845, notwithstanding the contention that it violated the Constitution (art. 1, § 8, clause 3), this court sustained an act of Congress which prohibited the shipment of intoxicating liquors from one state into another when intended for use contrary to the latter's laws. Among other things, it was there stated that "the argument as to delegation to the states rests upon a mere misconception. It is true the regulation which the Webb-Kenyon Act [March 1, 1913, 37 Stat. at L. 699, chap. 90, Comp. Stat. § 8739, 4 Fed. Stat. Anno. 2d ed. p. 593] contains, permits state prohibitions to apply to movements of liquor from one state into another, but the will which causes the prohibitions to be applicable is that of Congress;" i. e., Congress itself forbade shipments of a designated character. And further: "The exceptional nature of the subject here regulated is the basis upon which the exceptional power exerted must rest," i. e., different considerations would apply to innocuous articles of commerce.

The reasoning of that opinion proceeded upon the postulate that because of the peculiar nature of intoxicants, which gives enlarged power concerning them, Congress might go so far as entirely to prohibit their transportation in interstate commerce. The statute did less. "We can see no reason for saying that although Congress, in view of the nature and character of intoxicants, had a power to forbid their movement in interstate commerce, it had not the authority to so deal with the subject as to establish a regulation

(which is what was done by the Webb-Kenyon Law) making it impossible for one state to violate the prohibitions of the laws of another through the channels of interstate commerce. Indeed, we can see no escape from the conclusion that if we accepted the proposition urged, we would be obliged to announce the contradiction in terms that because Congress had exerted a regulation lesser in power than it was authorized to exert, therefore its action was void for excess of power." See *Delamater v. South Dakota*, 205 U. S. 93, 97, 51 L. ed. 724, 728, 27 Sup. Ct. Rep. 447, 10 Ann. Cas. 733.

Here, we are concerned with a wholly different constitutional provision,—one which, for the purpose of securing harmony and uniformity, prescribes a set of rules, empowers Congress to legislate to that end, and prohibits material interference by the states. Obviously, if every state may freely declare the rights and liabilities incident to maritime employment, there will at once arise the confusion and uncertainty which framers of the Constitution both foresaw and undertook to prevent.

In *The Hamilton* (Old Dominion S. S. Co. v. *Gilmore*) 207 U. S. 398, 52 L. ed. 264, 28 Sup. Ct. Rep. 133, an admiralty proceeding, effect was given, as against a ship registered in Delaware, to a statute of that state which permitted recovery by an ordinary action for fatal injuries, and the power of a state to supplement the maritime law to that extent was recognized. But here the state enactment prescribes exclusive rights and liabilities, undertakes to secure their observance by heavy penalties and onerous conditions, and provides novel remedies incapable of enforcement by an admiralty court. See *New York C. R. Co. v. White*, 243 U. S. 188, 61 L. ed. 667, L.R.A.1917D, 1, 37 Sup. Ct. Rep. 247, Ann. Cas. 1917D, 629, 13 N. C. C. A. 943; *New York C. R. Co. v. Winfield*, 244 U. S. 147, 61 L. ed. 1045, L.R.A.1918C, 439, 37 Sup. Ct. Rep. 546, Ann. Cas. 1917D, 1139, 14 N. C. C. A. 680; *Southern P. Co. v.*

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Jensen, supra. The doctrine of *The Hamilton* may not be extended to such a situation.

The judgment of the court below must be reversed and the cause remanded with directions to take further proceedings not inconsistent with this opinion.

Reversed and remanded.

Mr. Justice Holmes, dissenting:

In *Southern P. Co. v. Jensen*, 244 U. S. 205, 61 L. ed. 1086, L.R.A. 1918C, 451, 37 Sup. Ct. Rep. 524, Ann. Cas. 1917E, 900, 14 N. C. C. A. 596, the question was whether there was anything in the Constitution or laws of the United States to prevent a state from imposing upon an employer a limited but absolute liability for the death of an employee upon a gangplank between a vessel and a wharf, which the state unquestionably could have imposed had the death occurred on the wharf. A majority of the court held the state's attempt invalid, and thereupon, by an Act of October 6, 1917, chap. 97, 40 Stat. at L. 395, Comp. Stat. § 991(3), Fed. Stat. Anno. Supp. 1918, p. 401, Congress tried to meet the effect of the decision by amending § 24, cl. 3, and § 256, cl. 3, of the Judicial Code; Act of March 3, 1911, chap. 231, 36 Stat. at L. 1087, Comp. Stat. § 968, 4 Fed. Stat. Anno. 2d ed. p. 815. Those sections in similar terms declared the jurisdiction of the district court and the exclusive jurisdiction of the courts of the United States, "of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it. The amendment added, "and to claimants the rights and remedies under the Workmen's Compensation Law of any state." I thought that claimants had those rights before. I think that they do now, both for the old reasons and for new ones.

I do not suppose that anyone would say that the words, "The judicial power shall extend . . . to all cases of admiralty and maritime jurisdiction" (Const. art. 3, §

3), by implication enacted a whole code for master and servant at sea, that could be modified only by a constitutional amendment. But somehow or other, the ordinary common-law rules of liability as between master and servant have come to be applied to a considerable extent in the admiralty. If my explanation, that the source is the common law of the several states, is not accepted, I can only say, I do not know how, unless by the fiat of the judges. But surely the power that imposed the liability can change it, and I suppose that Congress can do as much as the judges who introduced the rules. For we know that they were introduced, and cannot have been elicited by logic alone from the medieval sea laws.

But if Congress can legislate, it has done so. It has adopted statutes that were in force when the Act of October 6, 1917, was passed, and to that extent has acted as definitely as if it had repeated the words used by the several states,—a not unfamiliar form of law. *Gibbons v. Ogden*, 9 Wheat. 1, 207, 6 L. ed. 23, 72; *Hobart v. Drohan*, 10 Pet. 108, 119, 9 L. ed. 363, 367; *Cooley v. Port Wardens*, 12 How. 299, 317, 318, 13 L. ed. 996, 1004; *Interstate Consol. Street R. Co. v. Massachusetts*, 207 U. S. 79, 84, 85, 52 L. ed. 111, 114, 115, 28 Sup. Ct. Rep. 26, 12 Ann. Cas. 555; *Franklin v. United States*, 216 U. S. 559, 54 L. ed. 615, 30 Sup. Ct. Rep. 434; *Louisville & N. R. Co. v. Western U. Teleg. Co.* 237 U. S. 300, 303, 59 L. ed. 965, 966, 35 Sup. Ct. Rep. 598. An act of Congress, we always say, will be construed so as to sustain it, if possible, and therefore, if it were necessary, the words "rights and remedies under the Workmen's Compensation Law of any state" should be taken to refer solely to laws existing at the time, as it certainly does at least include them. See *United States v. Paul*, 6 Pet. 141, 8 L. ed. 348. Taking the act as so limited, it is to be read as if it set out at length certain rules for New York, certain others more or less different for California,

and so on. So construed, the single objection that I have heard to the law is that it makes different rules for different places, and I see nothing in the Constitution to prevent that. The only matters with regard to which uniformity is provided for in the instrument, so far as I now remember, are duties, imposts, and excises, naturalization and bankruptcy, in article 1, § 8. As to the purpose of the clause concerning the judicial power in these cases nothing is said in the instrument itself. To read into it a requirement of uniformity more mechanical than is educed from the express requirement of equality in the 14th Amendment seems to me extravagant. Indeed, it is contrary to the construction of the Constitution in the very clause of the Judiciary Act that is before us. The saving of a common-law remedy adopted the common law of the several states within their several jurisdictions, and, I may add by way of anticipation, included at least some subsequent statutory changes. *American S. B. Co. v. Chase*, 16 Wall. 522, 530-534, 21 L. ed. 369, 371-373; *Knapp, S. & Co. v. McCaffrey*, 177 U. S. 638, 645, 646, 44 L. ed. 921, 925, 20 Sup. Ct. Rep. 824; *Rounds v. Cloverport Foundry & Mach. Co.* 237 U. S. 303, 307, 59 L. ed. 966, 35 Sup. Ct. Rep. 596. I cannot doubt that in matters with which Congress is empowered to deal it may make different arrangements for widely different localities with perhaps widely different needs. See *United States v. Press Pub. Co.* 219 U. S. 1, 9, 55 L. ed. 65, 66, 31 Sup. Ct. Rep. 212, 21 Ann. Cas. 942.

I thought that *Clark Distilling Co. v. Western Maryland R. Co.* 242 U. S. 311, 61 L. ed. 326, L.R.A.1917B, 1218, 37 Sup. Ct. Rep. 180, Ann. Cas. 1917B, 845, went pretty far in justifying the adoption of state legislation in advance, as I cannot for a moment believe that, apart from the 18th Amendment, special constitutional principles exist against strong drink. The fathers of the Constitution, so far as I know, approved it.

But I can see no constitutional objection to such an adoption in this case if the act of Congress be given that effect. I assume that Congress could not delegate to state legislatures the simple power to decide what the law of the United States should be in that district. But when institutions are established for ends within the power of the states, and not for any purpose of affecting the law of the United States, I take it to be an admitted power of Congress to provide that the law of the United States shall conform as nearly as may be to what, for the time being, exists. A familiar example is the law directing the common-law practice, etc., in the district courts, to "conform, as near as may be, to the practice," etc., "existing at the time" in the state courts. Rev. Stat. § 914, Comp. Stat. § 1537, 6 Fed. Stat. Anno. 2d ed. p. 21. This was held by the unanimous court to be binding in *Amy v. Watertown*, 130 U. S. 301, 32 L. ed. 946, 9 Sup. Ct. Rep. 530. See *Gibbons v. Ogden*, 9 Wheat. 1, 207, 208, 6 L. ed. 23, 72, 73; *Cooley v. Port Wardens*, 12 How. 299, 317, 318, 13 L. ed. 996, 1004. I have mentioned the scope

given to the saving of a common-law remedy, and have referred to cases on the statutes adopting state pilotage laws. Other instances are to be found in the acts of Congress, but these are enough. I think that the same principle applies here. It should be observed that the objection now dealt with is the only one peculiar to the adoption of local law in advance. That of want of uniformity applies equally to the adoption of the laws in force in 1917. Furthermore, we are not called on now to consider the collateral effects of the act. The only question before us is whether the words in the Constitution, "The judicial power shall extend to . . . all cases of admiralty and maritime jurisdiction," prohibit Congress from passing a law in the form of the New York Workmen's Compensation Act; if not in its present form, at least in the form in which it stood on October 6, 1917. I am of opinion that the New York law at the time of the trial should be applied, and that the judgment should be affirmed.

Mr. Justice Pitney, Mr. Justice Brandeis, and Mr. Justice Clarke concur in this opinion.

ANNOTATION.

Power of Congress to permit application of state workmen's compensation laws to injuries within admiralty jurisdiction.

In *Southern P. Co. v. Jensen* (1917) 244 U. S. 205, 61 L. ed. 1086, L.R.A. 1918C, 451, 37 Sup. Ct. Rep. 524, Ann. Cas. 1917E, 900, 14 N. C. C. A. 697, the United States Supreme Court decided that the New York Workmen's Compensation Law, which substituted a new remedy in lieu of that at common law, was, as applied to an injury to a longshoreman while unloading in a New York port an ocean-going steamship plying between ports of different states, invalid as conflicting with art. 3, § 2, of the United States Constitution, providing that the judicial power of the United States should extend to all cases of admiralty and maritime jurisdiction, and art. 1, § 8, giving

Congress power to make all laws necessary to carry into execution the powers vested in the Federal government, and Judicial Code, §§ 24, 256, giving Federal district courts exclusive judicial cognizance of all civil causes of admiralty, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it. The court in that case took the position that Congress had the paramount power to fix and determine the maritime law which should prevail throughout the country. And this case was held conclusive on the question in *Clyde S. S. Co. v. Walker* (1917) 244 U. S. 255, 61 L. ed. 1116, 37 Sup. Ct. Rep. 545.

Subsequently, and undoubtedly because of the decision in the Jensen Case (U. S.) supra, the Judiciary Act, giving district courts "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . . saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it," was amended by adding the clause here considered, reading, "and to claimants the rights and remedies under the workmen's compensation law of any state."

Prior to the decision of the United States Supreme Court in the reported case (*KNICKERBOCKER ICE Co. v. STEWART*, ante, 1145), the view had been taken in a number of cases, however, that the amendment of the Judicial Code under consideration was valid and constitutional. *The Howell* (1919) 257 Fed. 578; *Cimmino v. John T. Clark & Son* (1918) 184 App. Div. 745, 172 N. Y. Supp. 478; *Ruddy v. Morse Dry Dock & Repair Co.* (1919) 107 Misc. 199, 176 N. Y. Supp. 731.

But it will be observed that in the reported case (*KNICKERBOCKER ICE Co. v. STEWART*) the United States Supreme Court, by a divided court, held that Congress, in passing the clause permitting the application of the workmen's compensation acts of the several states within the admiralty jurisdiction, had exceeded its constitutional power to legislate concerning rights and liabilities within the maritime jurisdiction, the majority of the court holding that the act virtually destroyed the harmony and uniformity which the Constitution contemplated and established, concerning admiralty jurisdiction. The soundness of the reasoning of the majority that this clause violated the provision of the Constitution that the judicial power of United States courts should extend to all cases of admiralty and maritime jurisdiction, because the act in question had the effect of making operative different rules of law in different places, seems at least questionable. It will be noted that the constitutional provision in question merely defines the scope of the judicial powers of United States courts, and, aside from

the matter of jurisdiction, appears to have no reference to the powers of Congress. The dissenting opinion of Mr. Justice Holmes, which was concurred in by Mr. Justice Pitney, Mr. Justice Brandeis, and Mr. Justice Clarke, would give effect to the intention of Congress by upholding the act, and at the same time appears to show that it was within the constitutional power of Congress.

The conclusion of the majority in the reported case (*KNICKERBOCKER ICE Co. v. STEWART*) is supported by the holding in *Sudden & Christenson v. Industrial Acci. Commission* (1920) — Cal. —, 188 Pac. 803, that the amendment in question was invalid, on the ground that it was in conflict with art. 3, § 2, of the United States Constitution, and undertook to authorize, under Federal sanction, the exercise of a power of disposal and regeneration over the rules and limits of maritime law, which was fatal to the uniformity and consistency which was one of the primary objects of the Constitution.

The decision in the reported case (*KNICKERBOCKER ICE Co. v. STEWART*), that it was beyond the power of Congress to enact legislation permitting the application of workmen's compensation acts to injuries within the admiralty jurisdiction, was recognized as conclusive on the question in *Campoccia v. Panama R. Co.* (1920) 182 N. Y. Supp. 807, and a state workmen's compensation act was accordingly held unconstitutional in so far as it provided for compensation for injuries suffered by one engaged in maritime work.

And in *Dworkowitz v. Harlem River Towboat Line* (1920) 192 App. Div. 855, 183 N. Y. Supp. 458, where an injury was sustained by an employee on a boat while navigating public waters, the case was held within the exclusive jurisdiction of admiralty, notwithstanding the amendment by Congress attempting to place cases of this character within the operation of the state workmen's compensation acts, since that act was held squarely unconstitutional in the reported case (*KNICKERBOCKER ICE Co. v. STEWART*).

J. T. W.

W. P. WHITAKER et al., Appts.,
v.
L. W. LANE, JR., et al.

Virginia Supreme Court of Appeals — September 16, 1920.

(— Va. —, 104 S. E. 252.)

Vendor and purchaser — parol condition to delivery of sealed contract to purchase.

1. A parol condition may be attached to a delivery to the vendor of a sealed contract to purchase real estate, that it shall not be effective except upon fulfilment of a larger transaction of which it is a part.

[See note on this question beginning on page 1174.]

Courts — stare decisis — when precedents not followed.

2. The courts should cease to follow a rule established by precedent which is highly technical, and finds its origin in reasons which no longer exist, exceptions to it having been found necessary from time to time, to meet the needs and methods of doing business in modern times.

[See 7 R. C. L. 1008.]

Deed — necessity of delivery.

3. A sealed instrument is not obligatory unless delivered.

[See 8 R. C. L. 973, 974.]

Evidence — parol to vary writing — scope.

4. The parol-evidence rule does not, in a controversy between the parties, forbid the use of parol evidence to establish any fact that does not vary, alter, or contradict the terms of the instrument, or the legal effect of the terms used.

[See 10 R. C. L. 1019.]

— purpose of delivery of instrument.

5. The parol-evidence rule does not

forbid the use of such evidence to show the circumstances under which and the purpose for which an instrument was delivered.

[See 10 R. C. L. 1039.]

— to show that written contract was part of larger transaction.

6. Parol evidence is admissible to show that a written contract for the purchase of a farm was part of an agreement for the enlargement of the capital of a bank and its removal to another locality, and that the remainder of the transaction was not incorporated in the writing at the instance of the vendor.

[See 10 R. C. L. 1036, 1038.]

Jury — conflicting evidence — equity cases.

7. Where the evidence is conflicting as to whether or not a contract to purchase real estate was delivered on condition that it should not be binding unless the bank, of which the vendor was president, was moved and its capital enlarged, the issues should be submitted to a jury.

[See 10 R. C. L. 530, 531.]

APPEAL by complainants from a decree of the Circuit Court of the City of Williamsburg and County of James City, sustaining a demurrer to and dismissing a bill filed to enjoin the prosecution of certain actions at law. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. T. J. Wool and W. L. Williams, for appellants:

Parol evidence was admissible.

4 Wigmore, Ev. §§ 2430 et seq.; Durkin v. Cobleigh, 17 L.R.A. 270, and note, 156 Mass. 108, 32 Am. St. Rep. 436, 30 N. E. 474; Hawse v. First Nat. Bank, 118 Va. 588, 75 S. E. 127; Catt v. Olivier, 98 Va. 580, 36 S. E. 980;

Anson, Contract, 3d Am. ed. 1919, § 349, p. 309.

Messrs. Ashton Dovell and Meredith & Meredith, for appellees:

Evidence to vary or contradict by oral testimony a written contract, complete in itself and absolute, is illegal, and must be rejected.

Towner v. Lucas, 13 Gratt. 705;

Woodward v. Foster, 18 Gratt. 200; Martin v. Lewis, 30 Gratt. 672, 32 Am. Rep. 682; Citizens Nat. Bank v. Walton, 96 Va. 435, 31 S. E. 890; Carlin v. Fraser, 105 Va. 216, 53 S. E. 145; Slaughter v. Smither, 97 Va. 202, 33 S. E. 544; Cranes Nest Coal & Coke Co. v. Virginia Iron, Coal & Coke Co. 105 Va. 785, 54 S. E. 884; Trout v. Norfolk & W. R. Co. 107 Va. 576, 17 L.R.A.(N.S.) 702, 59 S. E. 394; Lynch v. O'Brien, 115 Va. 350, 79 S. E. 389; White v. Hall, 113 Va. 427, 74 S. E. 212; Percy v. First Nat. Bank, 110 Va. 129, 65 S. E. 475; Broughton v. Coffey, 18 Gratt. 184; Woodward v. Foster, 18 Gratt. 200; Sangston v. Gordon, 22 Gratt. 765; Calhoun v. Wilson, 27 Gratt. 647; McLean v. Piedmont & A. L. Ins. Co. 29 Gratt. 371; Barnett v. Barnett, 83 Va. 508, 2 S. E. 733; Tait v. Central Lunatic Asylum, 84 Va. 280, 4 S. E. 697; Shenandoah Valley R. Co. v. Dunlop, 86 Va. 352, 10 S. E. 239; Peyton v. Stuart, 88 Va. 76, 13 S. E. 408, 16 S. E. 160; Bonsack Mach. Co. v. Woodrum, 88 Va. 516, 13 S. E. 994; Persinger v. Chapman, 93 Va. 352, 25 S. E. 5; Richardson v. Planters Bank, 94 Va. 136, 26 S. E. 413; Beach v. Bellwood, 104 Va. 184, 51 S. E. 184; Metropolitan L. Ins. Co. v. Hall, 104 Va. 575, 52 S. E. 345; Carlin v. Fraser, 105 Va. 221, 53 S. E. 145; Farmers' Mfg. Co. v. Woodworth, 109 Va. 600, 64 S. E. 986; White v. Hall, 113 Va. 427, 74 S. E. 212; Miller v. Fletcher, 27 Gratt. 403, 21 Am. Rep. 356; Blair v. Security Bank, 103 Va. 762, 50 S. E. 262.

Burks, J., delivered the opinion of the court:

On October 15, 1917, the appellants entered into a written contract with L. W. Lane, Jr., to purchase of him his tract of land near the city of Williamsburg at the price of \$42,500, of which \$12,500 was to be paid five days after the date of the contract, and the residue in instalments specified in the contract. This contract was complete on its face, and set forth in detail all the essentials of a written contract for the sale of real estate. Notes were executed by the appellants in accordance with the terms of the written contract, and an action was instituted on the note for \$12,500 in January, 1918. Another action was also instituted against the appellants by the firm of

Land & Christian to recover for money furnished by them for supplies and labor used on the said tract of land. In February, 1918, the bill in the present suit was filed to enjoin the prosecution of the two actions at law aforesaid. The injunction was granted as prayed for, and at a subsequent date the defendants' demurrer to the bill was sustained and the bill dismissed. The correctness of that ruling is dependent upon the allegations of the bill.

The case made by the bill is as follows: The appellee, L. W. Lane, Jr., was president of the Peninsula Bank & Trust Company, hereinafter called the bank. Sometime in the year 1917 the bank desired to increase its capital stock from \$100,000 to \$500,000, and to change the location of its principal office from the city of Williamsburg to the city of Newport News, and retain a branch office at Williamsburg. The bank entered into an agreement with the appellants, under the style of the Peninsula Finance Corporation, of which they owned all the stock, to sell and dispose of the additional \$400,000 of capital stock as soon as its charter had been amended; Lane undertaking to procure the necessary amendment. Acting upon the assumption that the amendment to the charter to the bank would be granted, tentative arrangements were considered with reference to the sale of the additional stock, and the removal of the principal office to Newport News, in accordance with the tentative agreement which had been entered into between the bank and the appellants. During these negotiations it developed that, in order for Lane to continue as president of the bank, it would be necessary for him to remove his residence to Newport News, where the principal office was to be located when the proposed amendment became effective, and he then stated to the appellants that his interest was so great in and near Williamsburg that he did not see how he could change his residence from Williamsburg to Newport

News unless, he could dispose of his farm near Williamsburg, and so important did the appellants consider it that Lane should continue as president of the bank that a conditional agreement was entered into between the appellants and Lane, whereby the appellants were to purchase his farm at a fair and reasonable price and upon terms agreed upon, and Lane was to obtain the necessary amendment of the charter and subscribe to \$25,000 of the additional stock of the corporation, and make payments therefor as agreed on. Lane was to continue as president of the new bank, and also to assist in the sale of the additional stock without further compensation. This agreement was only to have force and effect when proper authority had been granted by the state corporation commission to increase the capital stock of the bank, and when the stock had been actually subscribed. Accordingly the agreement for the purchase of the farm of Lane by the appellants was reduced to writing, and promissory notes were executed in accordance with the terms thereof, and Lane subscribed, through the appellants, to 800 shares of the increased capital stock of the said bank, and gave his promissory note for the sum of \$4,000, to represent the first payment thereon. It was understood and agreed at the time the contract for the farm was executed and delivered, and when Lane subscribed for the stock, that they were parts and parcels of one single contract, and that the contract should only be effective and binding when the amendment of the charter was granted and the stock subscribed for; and, should the said corporation commission refuse to grant the amendment, that the contract for the purchase of the farm and the subscription to the stock should be null and void, and that the same, together with the promissory notes given by the parties, were to be canceled and returned, with no obligation upon either party. It is also averred that the contract for the

purchase of the farm was executed and delivered so as to set forth the terms upon which the farm was to be purchased in the event that the amendment to the charter was obtained, the plan for removal carried out, and Lane made his subscription, as aforesaid.

It was further averred in the bill that all of the details of the mutual undertakings of the parties, as hereinbefore set forth, were fully agreed upon between the appellants and Lane, but that only that part which referred to the purchase of the farm had been reduced to writing, and that the residue had not been put in the contract for the sale of the farm, or in any other writing, upon the express request of Lane, because he thought it might in some way affect deleteriously the sale of the stock; that the appellants had suggested and requested that the whole should be set up in one writing, but that the omission was made at the special instance and request of Lane, for the reasons aforesaid.

The bill then avers that the corporation commission refused to grant the desired amendment to the charter, and that the appellants had returned to Lane his subscription to the increased stock and his note for \$4,000, and had requested him to return the contract and notes given for the farm, which he had refused to do, and that he is now seeking to enforce the contract for the sale of the farm and the note given for the cash payment thereon, in contravention of the express agreement of the parties, and the bill asked that the contract for the sale of the farm should be rescinded, and declared void, or else that the contract should be so reformed as to set forth the true agreement entered into between the parties, and that, in the meantime, Lane be enjoined and restrained from further prosecuting his action on the note for \$12,500. Lane demurred to and answered the bill at length, denying in detail every material allegation of the bill, and the parties took full proof on the subject. The grounds of the

demurrer were: (1) That the bill was multifarious, because it attempts in one suit to enjoin two actions at law in which there were different plaintiffs; (2) because it attempts to vary and contradict by extraneous testimony the terms of the note and of the contract under which the note sued on was given.

In the written opinion, made a part of the record, the trial court sustained the demurrer, and directed that the bill be dismissed and the parties left to their remedy at law. The decree appealed from, based on said written opinion, states: "Upon consideration whereof, the court being of opinion, for reasons stated in writing and filed in the record as a part thereof, that the injunction heretofore awarded in this cause should not have been granted, and that the complaint set forth in the bill of complaint is without merit, and that the demurrer be sustained, and the bill dismissed upon its merits, and the parties left to their remedy at law, doth so adjudge, order, and decree, and doth further adjudge and decree that said injunction be, and the same is hereby, dissolved."

It appears from the written opinion aforesaid that the trial court excluded all of the parol testimony of the appellants, and for that reason not only sustained the demurrer, but dismissed the bill on its merits.

The contract for the sale of the real estate was under seal; the notes given for the deferred payments were not. The complainants, Whitaker & Fowle, do not deny the execution and delivery of the contract and notes aforesaid, but charge that it was agreed that the contract "should only be effective and binding" when the bank was authorized to increase its capital stock to \$500,000; and that, "should the proper state authorities refuse to grant the amendment . . . the said contract should be null and void, and the same, with the promissory notes given respectively, were to be canceled and returned without any obligation upon either party." If the complainants

are permitted to show a delivery of the contract on such condition, and that the condition has not been fulfilled, they will be relieved from liability under the contract without violating the parol-evidence rule. The evidence of the alleged conditional delivery was excluded by the trial court. The question, therefore, with which we are confronted, is whether or not a contract for the sale of real estate can be delivered by the purchaser to his vendor on condition, and whether or not parol evidence may be received to show that the condition on which it was delivered has not been complied with.

The courts have held, with singular unanimity, that a sealed instrument, and especially a conveyance of land, cannot be delivered to the obligee or grantee upon condition; that words of condition at the time of delivery are inconsistent with the act of delivery, and are as ineffective as if they had never been uttered. The cases considering the question are so numerous that it would be inexpedient, in a single opinion, to make any effort to review them. Many of the cases will be found cited in the notes in 16 Cyc. 644, and 130 Am. St. Rep. 929. Some of them are also reviewed by Staples, J., in *Miller v. Fletcher*, 27 Gratt. 403, 21 Am. Rep. 356, and, after referring to the cases, he says: "A doctrine sustained by such an array of authorities—a doctrine which has survived all the changes and innovations of modern reform—must have something to commend it to the approbation of the courts beyond its mere antiquity. It is not to be overturned by denunciation. The chief argument against it is that it recognizes distinctions technical and unsatisfactory in the extreme."

This is undoubtedly true; and while great consideration should be given to precedent, especially to one of long duration and general acceptance, it cannot be that a rule merely established by precedent is infallible. This would stay all progress

and forbid all development. If the rule established by precedent is highly technical, and finds its origin in reasons which no longer exist, and the courts have, from time to time, found it necessary to make exceptions thereto to meet the needs and methods of doing business in modern times, it would seem that the courts should adapt their procedure to the age in which we live,

Courts—stare
decisis—when
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and cease to follow a precedent for which they have always to apologize, and declare that it is highly technical, and not justified either by reason or policy.

A common-law seal was an actual seal, and needed no recognition in the body of the instrument. The seal was proved by simple inspection, and whether it were the seal of a particular party was a matter of proof, as any other fact would be. When the instrument was duly executed and the seal attached, it was not simply evidence of the obligation, but the obligation itself; and "even though the instrument had been paid or performed according to its terms, it formerly still remained a binding obligation unless canceled or destroyed, and could be again enforced against the maker. And for the same reason, the destruction of the instrument necessarily involved the destruction of the obligation." 1 Williston, Contracts, § 205. It was this knowledge of the effect of a seal, as pointed out by Professor Williston, that caused Shakespeare to put in the mouth of Shylock the words:

"Till thou can'st rail the seal from off this bond
Thou but offend'st thy lungs to speak so loud."

And it was this knowledge that was the foundation of the oft-quoted language of the Touchstone, that if I seal my deed and deliver it to the party himself upon condition, the deed is absolute and the condition is void, as the declaration of the condition is inconsistent with the act of delivery which gives

effect to the instrument. Such undoubtedly was the effect of the seal at common law; but, as pointed out by Wigmore, such is no longer its effect in England, the home of its origin. Speaking of the effect of the delivery of a sealed instrument to the grantee, he says: "A conditional delivery in escrow to the grantee, however, has come down to us traditionally, as a complete act, the condition being deemed vain. But this is an arbitrary distinction; no reason and no policy justifies it. In England the old rule, as handed down in Coke's treatises, has, for more than two generations, been repudiated." 4 Wigmore, Ev. § 2408.

This statement of the text is supported by *Johnson v. Baker*, 4 Barn. & Ald. 440, 106 Eng. Reprint, 998 (1821), where the delivery of a deed of covenant by a debtor to a creditor was made on condition of obtaining every creditor's signature, and it was held that the surety, who signed and delivered the deed on condition that all the other creditors should sign, was released because their signatures were not obtained; and by *Hudson v. Revett*, 5 Bing. 368, 130 Eng. Reprint, 1103 (1829), where deeds were delivered by a debtor to the creditor's agent, with a blank for the amount of a certain claim, which was afterwards filled in according to the understanding by the creditor's agent. Best, Chief Justice, said: "This position about delivery as an escrow is merely a technical subtlety. . . . I decide it [the case] on this: That it either was no deed at all until the sums were written in, and that then the jury were warranted in presuming a delivery to make it a deed; or, if it were a deed, it was delivered only to have operation from the time that those sums were written in which were to give it all its effect."

Bowker v. Burdekin, 11 Mees. & W. 128, 146, 152 Eng. Reprint, 744 (1843), was a case where a conveyance in fraud of creditors by one partner was delivered to the grantee, to take effect upon execution by the other two partners. Parke, Baron,

said: "I take it now to be settled, though the law was otherwise in ancient times, as appears by Sheppard's Touchstone, that, in order to constitute the delivery of a writing as an escrow, it is not necessary it should be done by express words, but you are to look at all the facts attending the execution."

In *Gudgen v. Besset*, 6 El. & Bl. 986, 119 Eng. Reprint, 1131, 26 L. J. Q. B. N. S. 36, 3 Jur. N. S. 212, 5 Week. Rep. 47, 8 Eng. Rul. Cas. 612 (1856), a lease was signed, sealed, and delivered to the lessee, although after said delivery the grantor retained said lease in his possession. The agreement was that it was not to take effect until the lessee paid £100, £50 only having been paid. It was held that the clear inference was that the instrument should not operate as a lease until full payment, and if there was such an agreement, though no express words of delivery as an escrow were used, it would not operate as a deed until payment was made; Campbell, Chief Justice, holding that the formality of delivering the instrument to the third person as an escrow was not essential when it was intended to operate as such. Mr. Wigmore also cites *Xenos v. Wickham*, L. R. 2 H. L. 296, 36 L. J. C. P. N. S. 313, 16 L. T. N. S. 800, 16 Week. Rep. 38, 13 Eng. Rul. Cas. 422 (1866), and *Watkins v. Nash*, L. R. 20 Eq. 262, 44 L. J. Ch. N. S. 505, 23 Week. Rep. 647 (1875).

In *Miller v. Fletcher*, 27 Gratt. at page 408, 21 Am. Rep. 356, Judge Staples makes the following comment on *Hudson v. Revett*, supra: "The case of *Hudson v. Revett* was decided upon the ground that the deed was incomplete when it passed into the hands of the grantee; and the observations of the chief justice were wholly unnecessary to the decision."

It will be observed, however, from the quotation hereinbefore made, that the chief justice did not rest his conclusion upon the incompleteness of the instrument. Judge Staples also makes the following

comments on *Johnson v. Baker*, supra: "There is one other case decided by an English court, sometimes relied on as opposing the doctrine of the text in Sheppard and the other common-law writers. I mean the case of *Johnson v. Baker*, supra, in which it was held it might be shown by parol that a composition deed was delivered as an escrow, upon condition it should be void unless executed by certain other creditors, which was not done. It will be seen, however, that the instrument was a deed of composition, whereby payments were to be made to all the creditors, each of whom was to release his claim, and, if any should refuse, the entire purpose of the deed was defeated. Nor does it appear that the creditor to whom the delivery was made was then a party to the deed, and he was therefore in no condition to insist upon the estoppel."

In *Bowker v. Burdekin*, supra, the deed was delivered to the party who was to take a benefit under it, and while the court held that it was an absolute delivery, the judges admitted obiter that it might have been delivered conditionally by the party, and, if so, it would not take effect until the condition was performed.

In addition to the authorities cited by Wigmore, there is a dictum in *London Freehold & Leasehold Property Co. v. Suffield* [1897] 2 Ch. at page 621, to the effect that a deed may be delivered to the grantee on condition. Based upon this case, Anson, in speaking of escrows, says:

"There is an old rule that a deed thus conditionally delivered must not be delivered to one who is a party to it, else it takes effect at once, on the ground that a delivery in fact outweighs verbal conditions. But the modern cases appear to show that the intention of the parties prevails if they clearly meant the deed to be delivered conditionally." Anson, *Contr. Am. ed.* § 82.

"As far back as 1601 an effort had been made to get away from the

technical doctrine of the common law, and it was held in *Hawksland v. Gatchel*, Cro. Eliz. pt. 2, p. 835, 78 Eng. Reprint, 1062, that there is not any difference where it is delivered to the party himself as an escrow and where to a stranger. . . . When it is first delivered as an escrow, though to the party himself, it is clear that it is not his deed until it is performed; . . . for if upon delivery the word spoken by the obligor purported that it was not to be his deed, it is clear that it is not."

Of this decision it is said, in *Thoroughgood's Case*, 9 Coke, 137, 77 Eng. Reprint, 926, "to have been made *ex improviso*." Wigmore's comment is that "the authority and vogue of Coke's and Sheppard's writings obscured and suppressed prematurely this progressive conception." 4 Wigmore, Ev. § 2405.

In *Blewitt v. Boorum*, 142 N. Y. 357, 40 Am. St. Rep. 600, 37 N. E. 119, Judge Peckham reviews some of the English cases hereinbefore recited, and concludes his review with this statement: "As a result of the examination of the English authorities, I think it is clear that the presence of a seal on a writing was not the reason for prohibiting parol evidence of a condition attached to a delivery to a party, but that where parol evidence was disallowed it was on the theory that otherwise it would be contradicting the writing. The rule was overthrown in England by the cases cited, which permit parol evidence that the delivery of the writing, although under seal, may be shown to have been under an agreement that it was not to operate as such until the happening of some future event."

Judge Peckham also says that the common-law rule that a sealed instrument cannot be delivered to the obligee on condition has been repudiated in New York, except as to a conveyance of real estate. The latter is upheld simply on a precedent, without passing on whether there is any sound basis for a dis-

tinction between cases relating to real estate and other kinds of written instruments.

In 14 *Columbia L. Rev.* 389, there is an article by Mr. Herbert T. Tiffany, which he supports by abundant authority, in which it is said at page 391: "That the mere physical transfer of the instrument should in any jurisdiction be allowed to override the grantor's explicit declaration of intention that the instrument shall not be immediately operative is a striking illustration of the primitive formalism before referred to. An instrument may be handed to the grantee or obligee without effecting any delivery whatsoever; and it is difficult to say why it could not be so handed without effecting more than a conditional delivery. So far as the danger of misleading an innocent third person is concerned, the danger is as great when there is no delivery as when the delivery is conditional only. The view referred to has by a number of courts been repudiated in connection with bills and notes, with the effect of upholding a conditional delivery thereof in spite of a manual transfer to the payee, and the same considerations in favor of its repudiation would seem to apply in the case of deeds of conveyance. A tendency to break in upon such a rule is indicated by decisions that it does not apply if the instrument shows on its face an intention that others than those who have executed it shall join in its execution before it shall become operative, as well as by decisions that the grantor can hand the instrument to the grantee, to be in turn handed by the latter to a third person to hold in escrow, without thereby rendering it immediately operative."

In *Williston on Contracts*, § 212, it is said: "It was the rule of the common law that though delivery could be thus made to a third person as an escrow, it could not be so made to the grantee, and the rule still seems generally accepted that the delivery to the grantee necessarily makes the deed immediately effective, though

there are occasional inconsistent decisions, and the distinction is somewhat fine between delivering in escrow to the obligee and intrusting the manual possession to him without the intention necessary to constitute a delivery."

We have thus far confined what we had to say to deeds, and have said nothing about the delivery of unsealed instruments on condition. The right to deliver such unsealed instruments on condition seems to be freely allowed by the English courts. The leading case on the subject is *Pym v. Campbell*, 6 El. & Bl. 370, 119 Eng. Reprint, 903, 25 L. J. Q. B. N. S. 277, 2 Jur. N. S. 641, which corresponds very much to *Burke v. Dulaney*, 153 U. S. 228, 38 L. ed. 698, 14 Sup. Ct. Rep. 816, and *Catt v. Olivier*, 98 Va. 580, 36 S. E. 980.

The cases in the Supreme Court of the United States bearing on the question under consideration are few, and not entirely satisfactory. In *Pawling v. United States*, 4 Cranch, 219, 2 L. ed. 601, Marshall, Chief Justice, said:

"The point in issue between the parties was the delivery of the instrument on which the suit was instituted; the plaintiffs below contending that it was delivered absolutely, the defendants that it was delivered as an escrow.

"The bond, upon its face, purports to be delivered absolutely; and it is not to be doubted that obligees would be much more secure against fraud, if the evidence that the writing was delivered as an escrow appeared upon its face, than by admitting parol testimony of that fact. But the law is settled otherwise, and is not to be disturbed by this court.

"The subscribing witnesses to the bond were examined to prove its delivery. Henry Pawling executed it at one time; the other defendants, Kennedy, Todd, and Adair, at a different time. With respect to Pawling, the testimony is as complete as can be required. William G. Bryant deposes that Pawling signed the

bond, on condition that other persons, whom he named, should also sign it. The witness understood that, if those other persons should not sign it, Pawling should be exonerated. Elijah Stapp, the other subscribing witness, . . . deposed that 'he saw Pawling acknowledge it as his act and deed, upon condition that others, whom he mentioned, should also sign it.'

"These are the subscribing witnesses to the bond, and certainly a jury, believing them, could not have avoided declaring, by their verdict, that the bond was delivered on condition. That condition not having been performed, the bond, as to Pawling, remains an escrow."

This would be entirely satisfactory, but, in speaking of the liability of the other obligors, the Chief Justice says that one of the obligors "then sat down and inserted in the body of the bond the names of other persons who, he said, were also to execute the instrument which he then held in his hand." This was apparently done after Pawling had signed, but the opinion is not altogether clear on that point. It is said of this case in *Dair v. United States*, 16 Wall. at page 5, 21 L. ed. 492, that "the additional securities to be procured in that case were named on the face of the bond, and this fact is stated in the plea." But in the official report of the case it is stated that the "defendants severed in their pleas," and in the opinion of the Chief Justice it is stated that "Henry Pawling executed it at one time; the other defendants . . . at a different time;" and it further appears from said opinion that the names of the other proposed obligors were inserted by Todd when he and the other sureties signed. The natural inference is that Pawling signed first, and that the names of the other proposed obligors had not then been inserted in the bond. Moreover, in the case next hereinafter commented on, *Pawling v. United States* is cited for the proposition that a conditional delivery by

an obligor to the obligee "might have been admissible."

In *Philadelphia & W. & B. R. Co. v. Heward*, 13 How. 307, 334, 14 L. ed. 157, 168, an officer of a corporation was directed not to affix the seal of the corporation to an instrument until it was executed by Hiram Howard. In speaking of this matter, Curtis, J., speaking for the court, said: "If the offer had been to prove that, at the time the corporate seal was affixed, it was agreed the instrument should not be the deed of the company unless, or until, Hiram Howard should execute it, the evidence might have been admissible. *Pawling v. United States*, supra; *Derby Canal Co. v. Wilmot*, 9 East, 360, 103 Eng. Reprint, 610, 9 Revised Rep. 577; *Bell v. Ingestre*, 12 Q. B. 317, 116 Eng. Reprint, 888. But the understanding, to which the question points, was prior to the sealing, and in no way connected with that act, of which the witness had no knowledge. It did not bear upon the question whether the instrument was the deed of the company, and was properly rejected."

In *Peugh v. Davis*, 96 U. S. 336, 24 L. ed. 776, it was held that a deed of conveyance of real estate, absolute on its face, may be shown by parol to be a mortgage to secure a debt. It was said that a court of equity will look "beyond the terms of the instrument to the real transaction; and when that is shown to be one of security, and not of sale, it will give effect to the actual contract of the parties. As the equity upon which the court acts in such cases arises from the real character of the transaction, any evidence, written or oral, tending to show this, is admissible. The rule which excludes parol testimony to contradict or vary a written instrument has reference to the language used by the parties. That cannot be qualified or varied from its natural import, but must speak for itself. The rule does not forbid an inquiry into the object of the parties in executing and receiving the instrument. Thus it may be shown that a deed was made to defraud

creditors, or to give a preference, or to secure a loan, or for any other object not apparent on its face. The object of the parties in such cases will be considered by a court of equity; it constitutes a ground for the exercise of its jurisdiction which will always be asserted to prevent fraud or oppression, and to promote justice." (Italics supplied.)

In *Ware v. Allen*, 128 U. S. 590, 32 L. ed. 563, 9 Sup. Ct. Rep. 174, ¶ 2 of the syllabus is as follows: "Parol evidence is admissible, in an action between the parties, to show that a written instrument, executed and delivered by the party obligor to the party obligee, absolute on its face, was conditional, and was not intended to take effect until another event should take place."

If the words "obligor" and "obligee" are construed in a technical sense, that is, as referring to parties to a sealed instrument, the language is not warranted by the facts, as the instrument sued on was not sealed. But the opinion is valuable as showing a distinction between varying the terms of a written instrument by parol evidence, and showing by such evidence that the instrument, with all its terms intact, was not an operative or binding instrument at all. Mr. Justice Miller, speaking for the court, says: "We are of opinion that this evidence shows that the contract upon which this suit is brought never went into effect; that the condition upon which it was to become operative never occurred, and that it was not a question of contradicting or varying a written instrument by parol testimony, but that it is one of that class of cases, well recognized in the law, by which an instrument, whether delivered to a third person as an escrow, or to the obligee in it, is made to depend, as to its going into operation, upon events to occur or to be ascertained thereafter."

The justice quotes approvingly from the court of Queen's bench, in *Pym v. Campbell*, 6 El. & Bl. 370, 373, 119 Eng. Reprint, 903, where the instrument was also not sealed,

the following language: "The distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible."

Justice Miller draws no distinction between sealed and unsealed instruments, and I do not know that there was any occasion to do so; but he cites and comments favorably upon *Pawling v. United States*, *supra*, where the instrument was sealed.

Burke v. Dulaney, 153 U. S. 228, 38 L. ed. 698, 14 Sup. Ct. Rep. 816, is the leading authority for the proposition that, in an action by the payee of a negotiable promissory note against the maker, evidence is admissible to show a parol agreement between the parties, made at the time of the making of the note, that it should not become operative as a note until the happening of a future event. Here, of course, the instrument was not under seal.

We have not attempted any careful examination of the cases in other states. They are too numerous for review in a single opinion, but a casual observation discloses a disposition on the part of some of the courts to depart from the strictness of the common-law rule in some of its aspects, without saying so. This is especially noticeable in the matter of delivery to the grantee as custodian, or depository, which is, in substance, one of the claims of the appellants. Thus, in *Rountree v. Smith*, 152 Ill. 493, 38 N. E. 680, several deeds were delivered to the grantee upon condition that they should take effect only upon certain securities being furnished the grantor, and with the further understanding that they were not to be recorded, but to remain subject to the control of the grantor, she to continue to have control of the property, and the right to sell and convey any part of it and receive the purchase money. It was held that the rights of the parties were precisely the same as though the grantor had never parted with the manual

control of the deeds. In *Bunn v. Stuart*, 183 Mo. 375, 81 S. W. 1091, deeds were made, without consideration, to the grantor's grandchildren, and delivered to them upon the understanding that they should be returned to the grantor whenever he should call for them, and in no event should they be recorded unless he consented thereto. It was held that the deeds were never delivered so as to pass title. In *Lee v. Richmond*, 90 Iowa, 695, 57 N. W. 613, a deed was executed and delivered to the grantee upon the condition that a criminal prosecution instituted by the grantee and his partner against the grantor's son should be stopped, and upon the further condition that, if it was not satisfactory to the grantee's partner, it should be returned to the grantor. It was held that as the criminal prosecution was not stopped, or the settlement approved by the grantee's partner, there was never in law any delivery, and that the deed was without effect.

In *Haviland v. Haviland*, 130 Iowa, 611, 5 L.R.A.(N.S.) 281, 105 N. W. 354, a deed was made by an heir, conveying his interest in the estate to his mother. The deed was delivered to her upon condition that it was not to be effective until it was executed by the other heirs, which was not done. The court held that, as the deed was not executed by the other children, it conveyed nothing, even though delivered. To the same effect, see *Kenney v. Parks*, 137 Cal. 527, 70 Pac. 556; *Oswald v. Caldwell*, 225 Ill. 224, 80 N. E. 131; *Farmers' & T. Bank v. Haney*, 87 Iowa, 101, 54 N. W. 61; *Comer v. Baldwin*, 16 Minn. 172, Gil. 151; *Gaylord v. Gaylord*, 150 N. C. 222, 63 S. E. 1028; *Clark v. Clark*, 56 Or. 218, 107 Pac. 23; *Re Nicholls*, 190 Pa. 308, 42 Atl. 692; *Dwinell v. Bliss*, 58 Vt. 353, 5 Atl. 317; *Zoerb v. Paetz*, 137 Wis. 59, 117 N. W. 793.

It has been stated a number of times in opinions of this court that a deed cannot be delivered to an obligee in escrow; that the delivery in such case is absolute, and the deed takes effect presently, and the

party is not bound to perform the condition. But the point has really been involved in only two cases. In all the cases in this state the foundation for the doctrine has been Coke upon Littleton and Sheppard's Touchstone, or previous cases decided on the authority of these common-law writers. The doctrine was first announced in Hicks v. Goode, 12 Leigh, 479, 37 Am. Dec. 677. The instrument in that case was a bond for the payment of money, which began, "We, G. & J., promise to," etc., signed and sealed by "G." only, and delivered to one of the obligees on condition that it was not to be binding upon "G." unless and until it was signed, sealed, and delivered by "J." also. In an action by the obligees against "G.," it was held that parol evidence was admissible to show the condition, and that, the condition having been shown, "G." was not bound. What is said in that case on the question under consideration was rested on the statements of Coke and Sheppard, and on the case of Williams v. Green, Cro. Eliz. pt. 2, p. 884, 78 Eng. Reprint, 1109, hereinbefore commented upon. The reason assigned in that case was, "that if it were allowed, 'a bare averment without any writing would make void every deed.'" Judge Cabell said of that decision "that the reasoning on which it is founded is not only very technical, but it is unsatisfactory to my mind."

In Ward v. Churn, 18 Gratt. 801, 98 Am. Dec. 749, the instrument began: "We A., B., C., D., and E., promise," was not signed by "C.," but a seal with a blank space opposite was left for his signature. Here again the court stated the doctrine about delivering a deed to the obligee in escrow, and relied upon the Touchstone for authority. Judge Joynes, however, speaking of that doctrine, said: "A doctrine which thus overrules and disregards the intention of the parties is strict and technical to the last degree."

In the course of his opinion he further said: "In Hicks v. Goode, supra, Judge Cabell made some com-

ments on this doctrine and on the reasons assigned for it, and expressed the opinion that it rests on technical and unsatisfactory grounds. He did not controvert its existence, however, as a rule of law; nor is it necessary for me to do so in the present case. *I mean to express no opinion on this subject.*" (Italics supplied.)

It will be observed that in both these cases the bond was not perfect on its face, and hence what was said was in a sense obiter.

In Miller v. Fletcher, 27 Gratt. 403, 21 Am. Rep. 356, a bond, perfect on its face, was signed by three obligors, one of whom pleaded and offered to prove that he had signed and delivered the bond to the obligee on the express condition that two other parties mentioned by him should sign and seal, and that if they should fail or refuse to execute and deliver it as their bond, he was not to be held bound for it. It was held that the plea was bad; that the bond was perfect on its face, and the defendant would not be allowed to plead a delivery by him to the obligee on condition. Here again the court relies on the statement in Sheppard, and on Hicks v. Goode, and Ward v. Churn, supra, in neither of which was the question involved. The court then proceeds with the examination of a number of cases from other states. It cites Simonton's Estate, 4 Watts, 180, where the court held that to prevent the reception of such evidence would not only put it in the power of the grantee to practise a fraud upon the community by means of it, in obtaining credit that otherwise would not be given him, but would be opening a wide door for the introduction of frauds and perjuries. Of this case it may be said, in passing, that the same objection would apply to the instrument whether it was sealed or unsealed; and that the reason assigned is not sufficient as a basis for the distinction between the two classes of instruments. The court also relied on Duncan v. Pope, 47 Ga. 445, where it will be found,

upon examination, that the court simply relies upon the bare statement of the rule, without giving any reason for it. The case of *Cincinnati, W. & Z. R. Co. v. Iliff*, 13 Ohio St. 235, is also relied upon. But here also no reason is assigned, except that the doctrine is "according to the uniform current of authority." *Ward v. Lewis*, 4 Pick. 518, is also relied upon, but the reasons there assigned for the application of the rule were that to permit such parol evidence would "be not only a violation of the fundamental rules of evidence, but productive of great injustice and mischief." Here, again, no reason is assigned for the distinction between sealed and unsealed instruments. *Currie v. Donald*, 2 Wash. (Va.) 59, is likewise cited, but no reason is assigned in that case for the distinction between sealed and unsealed instruments, except that, "if it had been intended as an escrow, it ought to have been so stated." The court also relies upon 2 Lomax's Dig. 38, and 3 Washb. Real Prop. 268, but the quotations relied upon show that these authors simply announced the doctrine, but gave no reasons for it. At the conclusion of the cases above analyzed, there are also cited a number of authorities from other states without giving the facts or the reasons upon which they are based. We have not examined these cases for the reason, hereinabove mentioned, that they are too numerous to review in a single opinion. No doubt the court selected for comment and review the cases most strongly sustaining the doctrine, and these we have commented upon.

The case of *Nash v. Fugate* came to this court twice, and is reported in 24 Gratt. 202, 18 Am. Rep. 640, and 32 Gratt. 595, 34 Am. Rep. 780, and when it was here the second time the opinion states what was the holding on the first trial. In 32 Gratt., at page 601, referring to the first decision, it is said:

"This court held that, where the surety intrusts the bond to the principal obligor, and there is nothing

on the face of the paper to indicate that others are also to sign as sureties, the obligee cannot be affected by any agreement or understanding between the principal obligor and the surety that others were also to sign before delivery, unless it was made to appear that the obligee, at the time that he received the bond, had notice of the condition upon which the surety had so signed.

"This decision was based merely upon the ground that as the surety gave confidence to the representations of the principal obligor, he must stand the hazard of their performance, and he cannot implicate the obligee in any responsibility in the matter unless the latter is guilty of fraud or gross negligence in accepting the security."

It appears that no obligors were named in the bond. There were simply more signatures than seals, and it was held that this did not constitute incompleteness, and that the bond was perfect on its face. On the first hearing it was held that such a bond could not be delivered by the obligors to the obligee on condition, and that the condition was void; but, when the case went back, the pleadings were changed, and it was averred that the surety executed the bond and delivered it, not to the obligee, but to the principal obligor, on the condition that it was not to be his bond when delivered to the obligee until executed by other persons; that it had been delivered by the principal obligor to the obligee without obtaining the signatures of the other sureties, but that the obligee had notice of the condition. It was held that if these facts could be proved, they presented a good defense. The court distinguished the case from *Miller v. Fletcher*, supra, and held that, while a bond complete on its face could not be delivered by the obligors to the obligee on condition, it might be delivered by one obligor to a co-obligor on a condition, and if the obligee had notice thereof, the obligor so delivering upon condition would not

be bound unless the condition was fulfilled. The court again relies on Sheppard's Touchstone as authority for the position that a bond cannot be delivered to the obligee on condition. In the course of the opinion, however, it is said: "The rule which prohibits the admission of parol testimony to vary a deed or other writing is not infringed by the introduction of evidence relating to the delivery of the deed. Such evidence does not tend to contradict the deed or the recitals therein, but merely to show there has been no valid delivery."

Again: "Indeed, it seems to be well settled that whatever relates to the point of execution, whether tending to show the time of delivery, or that the delivery is in the nature of an escrow, or to disprove it altogether, may be established by parol."

And again: "But while parol evidence is properly admissible for the purpose of establishing that the bond was executed on a condition which has not been performed, and that the obligee had notice of the fact, such evidence, where there is nothing on the face of the paper to put the obligee on his inquiry, ought to be very clear and satisfactory."

Just why these statements do not apply as well to a sealed instrument as to an unsealed instrument, or to a delivery as well to the grantee as to a co-obligor, is not made to appear, except upon the authority of the oft-quoted statements of Coke and Littleton.

In *Wendlinger v. Smith*, 75 Va. 309, 40 Am. Rep. 727, the instrument was sealed, but was held to be incomplete on its face, and therefore parol evidence was admissible to show that the devisees who signed and delivered it did so on condition that they were not to be bound unless all the devisees executed it. This holding was based upon the authority of *Hicks v. Goode*, 12 Leigh, 479, 37 Am. Dec. 677; *Ward v. Churn*, 18 Gratt. 801, 98 Am. Dec. 749; and *Nash v. Fugate*, supra. After citing the cases

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last mentioned, the opinion continues: "These cases establish the proposition that the rule of law that a deed cannot be delivered to a party to whom it is made as an escrow, to be the deed of the obligor only on condition, and that in such case the delivery is absolute and the condition nugatory, is applicable only to the case of deeds which are upon their face complete contracts, requiring nothing but delivery to make them perfect according to the intention of the parties; not to deeds which, upon their face, import that something more is to be done besides delivery to make them complete and perfect contracts according to the intention of the parties."

There are other cases in which the general statement is made that a bond, perfect on its face, cannot be delivered by the obligor, or by all of the obligors, to the obligee on condition, but it is not necessary to notice them, as in none of them, except the case next hereinafter mentioned, was the question involved.

In *Blair v. Security Bank*, 103 Va. 762, 50 S. E. 262, the instrument was sealed, and it was held that, if perfect on its face, it could not be delivered in escrow to the obligee, and that parol evidence was not admissible to affect its validity. The statement is made solely on the authority of *Miller v. Fletcher*, 27 Gratt. 403, 21 Am. Rep. 356, *Ward v. Churn*, supra, and *Bishop, Contr.* § 357. We have already pointed out the foundation on which *Miller v. Fletcher* rests, and that the question was not involved in *Ward v. Churn*. The passage relied on from *Bishop* is as follows: "The delivery of a deed to the grantee in person gives it immediate force, even though accompanied by an oral stipulation that it shall not take effect until a specified contingency has transpired. Such stipulation or condition is simply void. But it is otherwise of a written contract not under seal; a parol condition that its operation shall commence only on the transpiring of a future event

will be good. If, at the first impression, this distinction seems technical, a minuter examination will show it to be otherwise. In the case of a specialty, there could be no incorporation into it of a parol condition postponing its effect without destroying its character as a sealed instrument; but, oral and written simple contracts being equally parol ones, the degree of this instrument is not reduced by the oral condition."

The reasons given by him that, "in the case of a specialty there could be no incorporation into it of a parol condition postponing its effect without destroying its character as a sealed instrument," would seem to be inapplicable to a condition affecting the very existence and validity of the paper. The proposed condition does not simply postpone the effect of the paper, but denies its effect altogether, because the condition has not been complied with.

It seems to be generally conceded that "where an instrument indicates on its face that others were to execute it besides those who did execute it, it may be shown by evidence that the delivery, though made to the grantee or obligee, was conditional upon the execution of the instrument by the other parties, and not absolute." Ward v. Churn, *supra*, and cases cited.

This language was employed as applicable to sealed instruments; but, aside from the doctrine laid down by Coke and Sheppard as to the ancient common law, can any reason be given why the same rule of restriction should not have been applied to unsealed instruments? Or, to state the proposition conversely, if an unsealed instrument, perfect on its face, may be delivered on condition, why may not the same rule be applied to sealed instruments? In either case, it is a question of intention and notice. If an instrument concluding, "Witness my hand and seal," has no scroll attached to it, it is not a sealed instrument; but if a scroll is attached opposite the signature, it is sealed. The sole dif-

ference between the two is the attachment of the scroll. It is difficult to understand, at this day, when the courts are striving to enforce the substantial rights of parties, regardless of mere forms and technicalities, why one of these instruments may be delivered on a condition and the other not.

Whatever may have been the rule of the ancient common law, it is now conceded everywhere that it is as essential to the validity of a sealed instrument as to an unsealed instrument that it shall be delivered. In this respect, at least, the

Deed—necessity of delivery.

two stand on the same footing. If delivery is essential to make the instrument operative in one case, it is equally so in the other. Undoubtedly, there can be an absolute and unconditional delivery of a sealed instrument to the obligee therein, and upon the same principle that the power to pardon carries with it a power to annex conditions to the pardon, that is, the greater includes the less (*Lee v. Murphy*, 22 Gratt. 789, 12 Am. Rep. 563); no good reason is perceived why the power to deliver does not carry with it the power to annex conditions to such delivery.

Vendor and purchaser—parol condition to delivery of sealed contract to purchase.

In the present advanced state of civilization, we think we should say of sealed contracts what the court of errors of Connecticut said of unsealed contracts. "Such a contract cannot become a binding obligation until it has been delivered. Its delivery may be absolute or conditional. If the latter, then it does not become a binding obligation until the condition upon which its delivery depends has been fulfilled. If the payee of a note has it in his possession, that fact would be *prima facie* evidence that it had been delivered; but it would be only *prima facie* evidence. The fact could be shown to be otherwise and by parol evidence. Such parol evidence does not contradict the note or seek to vary its terms. It merely goes to the point of its

nondelivery. The note in its terms is precisely what both the maker and the payee intended it to be. No one desires to vary its terms or to contradict them." *McFarland v. Sikes*, 54 Conn. 250-252, 1 Am. St. Rep. 111, 7 Atl. 408.

The common-law rule has been trenched upon in many respects, is not adapted to present-day methods, and the whole situation is amply provided for by the parol-evidence rule. We have already referred to decisions in this state permitting incomplete sealed instruments to be delivered on condition, and to decisions in several other states permitting delivery to the grantee as custodian or depository; to the statement of Professor Williston as to this "nice distinction," and to the views of other recent distinguished law writers. We propose now to notice some of the departures in this state from the strictness of the common law; as well as the full protection afforded by the parol-evidence rule. The quotation from the *Touchstone* says nothing about instruments complete on their face, so that the line of cases referring to incomplete instruments and the right to show by parol the delivery thereof on condition is itself a departure from the common-law rule. To this must be added other departures. Of course, it is admitted everywhere that it can be shown that there never was any delivery at all. In addition, we have held that a deed absolute on its face may be shown by parol to be a mortgage, which is nothing more than a condition for the payment of money (*Holladay v. Willis*, 101 Va. 274, 43 S. E. 616; *Motley v. Carstairs*, 114 Va. 429, 76 S. E. 948); that parol evidence will be received to show that a consideration expressed in a conveyance of land as paid by one was in fact paid by another, the effect of which is to create a resulting trust in favor of the party paying the money (*Bank of United States v. Carrington*, 7 Leigh, 566; *Jesser v. Armentrout*, 100 Va. 666, 42 S. E. 681); that a deed absolute on its face may

be shown to be subject to an expressed parol trust (*Young v. Holland*, 117 Va. 433, 84 S. E. 637); and that in suits for the specific performance of contracts for the sale of land it may be shown that the plaintiff is not entitled to have performance. This is placed on the ground that specific performance is not a matter of right, but of grace, and that the object of the evidence is to rebut an equity. This last proposition, though not expressly decided, appears to be a *concessum* in *Towner v. Lucas*, 13 Gratt. 713.

So that, so far as concerns the decisions in England, in the Supreme Court of the United States, and in Virginia,—notwithstanding the great array of authority in the state courts in favor of the doctrine,—there is little left upon which to uphold the common-law rule, except the statements of Coke and of Sheppard, that a sealed instrument cannot be delivered by the obligor to the obligee on condition, and the cases based thereon, and "no reason and no policy justifies" the further adherence to the rule. The whole situation is amply cared for by the parol-evidence rule, which applies as well to sealed as to unsealed instruments.

In a controversy between the immediate parties to a written instrument, the parol-evidence rule does not forbid the use of parol evidence to establish any fact that does not vary, alter, or contradict the terms of the instrument, or the legal effect of the terms used. These are concluded by the writing, and the parties are estopped to deny them. Thus it is not permissible for a party who has signed and delivered a valid written instrument to show that there was an agreement that he was not to be bound at all, or that suit was never to be brought on it, or that it was to be paid only out of a particular fund, or that a blank indorsement was without recourse, or that it was to be paid at a different time from that stated, or that indorser should be

Evidence—
parol to vary
writing—scope.

liable only as an assignor, or that a promise to pay money was to be discharged in some other manner, or any other similar defense. For such defenses vary the legal effect of the language used in the instrument. *Towner v. Lucas*, 13 Gratt. 705; *Woodward v. Foster*, 18 Gratt. 200; *Lynch v. O'Brien*, 115 Va. 350, 79 S. E. 389; *Metropolitan L. Ins. Co. v. Hall*, 104 Va. 575, 52 S. E. 345; *Citizens Nat. Bank v. Walton*, 96 Va. 435, 31 S. E. 890; *Rector v. Hancock*, 127 Va. —, 102 S. E. 663; *Brown v. Spofford*, 95 U. S. 474, 24 L. ed. 508; *Martin v. Cole*, 104 U. S. 30, 26 L. ed. 647. But the rule does

—purpose of
delivery of
instrument.

not forbid the use of parol evidence to show the circumstances of delivery of unsealed instruments, as that an instrument executed and delivered for one purpose was being diverted and used for a different purpose, or that it was delivered to the payee, promisee, or beneficiary on a condition that it was not to take effect except in a given event, or under given conditions. So, also, as between the immediate parties to negotiable paper, it may be shown who is principal and who is surety, or the agreement between indorsers as to the order of liability between themselves. None of these defenses vary the legal effect of the language of the instrument. *Solenberger v. Gilbert*, 86 Va. 778, 11 S. E. 789; *Catt v. Oliver*, 98 Va. 580, 36 S. E. 980; *Hawse v. First Nat. Bank*, 113 Va. 588, 75 S. E. 127; *Ware v. Allen*, 128 U. S. 590, 32 L. ed. 563, 9 Sup. Ct. Rep. 174; *Burke v. Dulaney*, 153 U. S. 228, 38 L. ed. 698, 14 Sup. Ct. Rep. 816; *Kelly v. Olivier*, 113 N. C. 442, 18 S. E. 698; *Bigelow, Bills & Notes*, pp. 96, 97, 103, and cases cited. I have stated the last proposition as applicable to unsealed instruments because the cases cited arose on that class of instruments, and some of them mention that fact; but, as pointed out in *Greenleaf on Evidence*, § 276: "This rule 'was introduced in early times, when the most frequent mode of ascertaining

a party to a contract was by his seal affixed to the instrument; and it has been continued in force since the vast multiplication of written contracts, in consequence of the increased business and commerce of the world. . . . The rule of excluding oral testimony has heretofore been applied generally, if not universally, to simple contracts in writing, to the same extent and with the same exceptions as to specialties or contracts under seal.' "

In the preceding discussion, we have had reference to suits or actions between the immediate parties to the instrument, and not to controversies with third persons. The application of the parol-evidence rule to unsealed instruments has proved to be exceedingly satisfactory, and ample for the protection of the rights of all concerned. Its strict enforcement ought not to be relaxed, and when parol evidence is admissible in contravention of the prima facie right of another, it should be clear, unequivocal and convincing. *Nash v. Fugate*, 24 Gratt. 202, 18 Am. Rep. 640, 32 Gratt. 595, 34 Am. Rep. 780; *Motley v. Carstairs*, supra. But we are unable to see any reason why the same rule should not be applied to sealed as to unsealed instruments. There was a time when illiteracy was so common in England that a man who could read was regarded as such a valuable asset to the community that he was given the benefit of clergy, and exempt from the punishment of death except for treason. The method of evidencing legal liability was by seal; nay, more; a bond for the payment of money was not merely the evidence of a debt, but was the debt itself. At that time the affixing of a seal was a very solemn and serious matter, and all the attending circumstances became fixed in the minds and memories of those who affixed it or were interested in it. It occurred very seldom, sometimes not more than once in the lifetime of the party affixing it. But all this has passed away. The average business man knows little, if any-

thing about the distinction between sealed and unsealed instruments, and frequently cannot tell a few hours after signing a paper whether it had a scroll by way of seal affixed to it or not. No solemnity is attached to the affixing of a mere scroll, and while there may exist good reasons for retaining a scroll to certain instruments in order to dispense with consideration, or to extend the period of limitation, yet, as a mere matter of evidence, we can perceive no good reason for the distinction. The reasoning upon which parol evidence will not be received to vary or alter the terms of a valid written instrument applies with equal force, and like limitations, to sealed and unsealed instruments. There is now no more solemnity in making one than in making the other, and we are unable to see anything in reason, policy, or expediency, that demands of the courts the further maintenance of a doctrine that is "highly technical and unsatisfactory," and wholly unnecessary for the protection of the rights of litigants.

The appellants also insist that, prior to the execution of the contract for the sale of the farm, there was a complete oral contract between them and Lane for the sale of the farm, and the enlargement of the capital of the bank, and the part to be performed thereunder by Lane, valid in every respect except as to the required writing, and that the part only relating to the farm was reduced to writing. It is also charged that this part was omitted at the special instance of Lane. This stated a case for the admission

of parol evidence, —to show that written contract was part of larger transaction. not forbidden by the parol-evidence rule, and the evidence was admissible

under the principle announced in *Brent v. Richards*, 2 Gratt. 539, and *Beach v. Bellwood*, 104 Va. 170, 51 S. E. 184.

We are of opinion, therefore, that the circuit court erred in sustaining

the demurrer to the complainants' bill.

The case was fully developed by the evidence on both sides before the demurrer was passed upon, and the decree appealed from not only sustained the demurrer to the bill, but also dismissed the case "upon its merits." The court had excluded the parol evidence of the complainants, tending to show the conditional delivery of the contract, and, of course, did not consider it in coming to the conclusion to dismiss the case on its merits. In speaking of this testimony, the trial court, in its written opinion, says: "The evidence sought to be introduced, the court would say in passing, is absolute, contradictory and conflicting, and, if it were admissible, the court would find much difficulty in reaching a conclusion."

We fully concur in this statement. The case is rendered doubtful by the character of the evidence introduced, and is in such condition that this court cannot safely say what decree should be entered in it. The case made by the pleadings and evidence is one in which an issue should have been ordered to be tried

by a jury, and we think it should be Jury—conflicting evidence—equity cases. remanded to the trial court, with directions to award a proper issue to be tried by a jury at its bar to determine whether or not it was agreed between the appellants and the appellee, L. W. Lane, Jr., that the contract of October 15, 1917, whereby appellants contracted to purchase of said Lane the farm mentioned in the bill, should be void or of no effect in the event that the proper state authorities should refuse to grant the amendment of the charter of the Peninsula Bank & Trust Company, set forth and referred to in said bill, and upon the trial of such issue the appellants shall be permitted to introduce parol testimony and to use such of the depositions taken in this cause as to it shall seem proper. We do not mean, however, to hold the trial court down to the specific issue .

designated. It should be permitted to order such issue and in such form as will determine whether or not it was agreed between the parties that the validity and binding effect of the contract for the purchase of the farm was dependent upon the increase of the capital stock of the

Peninsula Bank & Trust Company, and the subscription to such increase by the said Lane, set forth in appellants' bill.

Reversed and remanded.

Petition for rehearing denied November 26, 1920.

ANNOTATION.

Admissibility of parol evidence to show that sealed instrument was delivered subject to condition.

It is a view generally accepted that the rule which excludes parol evidence to modify a written contract does not—at least, as regards contracts not under seal—prevent its introduction to show that a written instrument was delivered on condition. 10 R. C. L. p. 1054, § 250. The opinion in the reported case (*WHITAKER v. LANE*, ante, 1157) contains an exhaustive discussion of the admissibility of parol evidence to show that a sealed instrument was delivered subject to condition. The conclusion reached therein, that such evidence is admissible, is in accord with the growing tendency in modern times to minimize the importance of a seal, and to apply to sealed contracts the same rule as that applied to unsealed contracts. As regards conveyances of real estate, there seems to be little, if any, relaxation of the original rule that such instruments cannot be delivered to the grantee upon condition. This rule, however, rests upon two grounds: (1) the inadmissibility of parol evidence to prove the condition, and (2) that such delivery is an attempt to deliver the deed in escrow to the grantee, and that this cannot be done. So that, even though the first ground should be modified, the latter would, in a proper case, prevent the introduction of the evidence.

For application of the rule as to conveyances of real estate, see *Wipfler v. Wipfler* (1908) 153 Mich. 18, 16 L.R.A.(N.S.) 941, 116 N. W. 544; *Reed v. Reed* (1918) 117 Me. 281, 104 Atl. 227. That a delivery in escrow cannot be made to the grantee is held in *Dorr*

v. Midelburg (1909) 65 W. Va. 778, 23 L.R.A.(N.S.) 987, 65 S. E. 97. *Tiffany*, in the second edition (1920) of his work on Real Property, § 462, says: "The manual transfer of the instrument [deed], which is ordinarily assumed to be essential to a conditional delivery, must, according to the authorities in this country, be to a person other than the grantee, it being held that if the grantor, intending to make a conditional delivery, hands the instrument to the grantee, there is necessarily an absolute delivery. In England the older authorities are generally to the same effect, but there are occasional modern dicta to the contrary. That the mere physical transfer of the instrument should, in any jurisdiction, be allowed to override the grantor's explicit declaration of intention that the instrument shall not be immediately operative, is a striking illustration of the persistence of the primitive formalism before referred to. . . . A tendency to break in upon such a rule is indicated by decisions that it does not apply if the instrument shows on its face an intention that others than those who have executed it shall join in its execution before it shall become operative, as well as by decisions that the grantor can hand the instrument to the grantee, to be in turn handed by the latter to a third person, to hold it in escrow, without thereby rendering it immediately operative." The author refers to the rule as to contracts generally permitting a conditional delivery to the grantee, thus repudiating

the ancient rule, and says: "The same considerations in favor of its repudiation would seem to apply in case of deeds of conveyance." A tendency to abandon the rule is seen in *Inman v. Quirey* (1917) 128 Ark. 605, 194 S. W. 858, where it was held competent to show by parol that deeds

which had been delivered to the grantees were delivered on the express condition that they should not become effective except in a certain event. The court, however, says that such evidence did not show an attempt to deliver the deed in escrow to the grantees. W. A. E.

CITY OF ENTERPRISE, Appt.,
v.
J. RAWLS.

Alabama Supreme Court — October 14, 1920.

(— Ala. —, 86 So. 374.)

Tax — crediting amount on judgment.

1. A taxpayer cannot discharge his obligation by crediting the amount, with the consent of the municipal authorities, upon a judgment which he holds against the municipality.

[See note on this question beginning on page 1177.]

— method of collection.

2. Municipal taxes may be collected by assumpsit in the absence of a statutory provision to the contrary.

[See 26 R. C. L. 380, 381.]

— how discharged.

3. A tax is a contribution for support of government, to be discharged in money.

[See 26 R. C. L. 13, 376.]

Municipal corporation — duty to notice power of servant.

4. One dealing with municipal governments or their officers or agents is bound to take notice of the powers and their limits conferred upon or exercisable by such governmental agencies and their administrators.

[See 19 R. C. L. 1066.]

APPEAL by plaintiff from a judgment of the Circuit Court for Coffee County (Foster, J.) in favor of defendant in an action brought to enforce payment of delinquent city taxes. *Reversed.*

The facts sufficiently appear in the opinion of the court.

Mr. W. W. Sanders, for appellant:

Plaintiff has the right to sue in an action of assumpsit to recover the taxes, notwithstanding a statutory remedy is also given to enforce their payment.

Winter v. Montgomery, 79 Ala. 481; *Marion County v. Woodburn Mercantile Co.* 60 Or. 367, 41 L.R.A. (N.S.) 734, 119 Pac. 487.

A taxpayer cannot be allowed to set off a private obligation owing to himself, against his obligation for payment of taxes.

37 Cyc. 1247.

Messrs. Sollie & Sollie for appellee.

McClellan, J., delivered the opinion of the court:

The appellant, a municipal corporation, brought this action in assumpsit against the appellee, a taxpayer therein, to collect municipal taxes for the years 1911 to 1915, inclusive. The only plea was the general issue. There was judgment for the defendant, appellee.

For some reason not disclosed by the record the appellant was indebted to appellee, for which appellant had given the appellee a note. A

receipt, over the signature of the "clerk and treasurer" of the municipality, recites that the appellee's taxes for the tax year 1911 were "paid" by the giving by the appellee of credit on that note for the amount of appellee's taxes for that tax year "and taking judgment [on the note, we interpolate] for the balance in the circuit court . . . as per the agreement on same by the mayor and city attorney representing the city of Enterprise and O. C. Doster representing J. Rawls," appellee. The taxes for the years 1912 to 1915, inclusive, were claimed to be paid, in effect, by a process of crediting their annually accruing amounts on appellee's judgment against the municipality.

No question appears to have been made in the trial court with respect to the appellee's liability for taxes for the tax years stated, though there is evidence to the effect that the sums annually due from the appellee were less than the respective sums claimed in the complaint. The sole defense was "payment" of the taxes annually demandable of the appellee in the manner indicated. In the absence of statute prescribing a remedy excluding recourse to assumpsit, municipal taxes may be collected through that process. *Winter v. Montgomery*, 79 Ala. 481; *Southern R. Co. v. State*, 150 Ala. 527, 530, 531, 43 So. 718; *Greil Bros. Co. v. Montgomery*, 182 Ala. 291, 300, 62 So. 692, Ann. Cas. 1915D, 738. We are not advised that any such restrictive provision precludes this municipality from employing assumpsit to collect taxes due it.

Taxes are not debts; they do not result from contractual obligations; they are contributions required for the support of the government. *Judson*, Taxn. (2d ed.) § 452; 37 Cyc. 706. Unless qualified in the context, the term "taxes" or "tax" is used in the sense of money—an exaction to be alone discharged in

money. *Desty*, Taxn. p. 6; *Galloway v. Tavares*, 37 Fla. 58, 19 So. 171; 37 Cyc. 706, 708; 1 *Cooley*, Taxn. p. 15, and note 2; *Shreveport v. Gregg*, 28 La. Ann. 836, 837. We are advised of no statute, applicable to this municipality, the context of provisions of which would admit of a construction that did or would warrant a taxpayer therein to discharge or pay his taxes in anything but money. It is not, as appears, contended that the taxes demandable for the years 1911 to 1915, inclusive, were paid in money. From considerations suggested by the fact, among others, that taxes, as before defined, are designed and collected solely for the purpose of supporting the governments and maintaining their proper activities and functions, it has been well decided elsewhere that the general rule is that a set-off or counterclaim cannot be interposed in an action for the recovery of delinquent taxes. 37 Cyc. 710, 1233, 1247. Taxes are not "assets which can be seized by attachment or other judicial process, and subjected to the payment of municipal indebtedness. They are not the subject of set-off, either on behalf of the state or the municipality for which they are imposed, or of the collector, or on behalf of the person taxed, as against such state, municipality, or collector," unless that process is authorized by law. This is quoted from 1 *Cooley*, Taxn. p. 20. Supporting authorities are collated in the notes thereto. If the debts of a municipality, held by a taxpayer, cannot be set off against taxes due the municipality—and no such authority is known to this court—municipal officers, as well as municipal governing bodies, are powerless to effect the same result by agreement with the creditor-taxpayer; this, because no such power or authority is conferred on them, so far as this court is advised. Persons dealing with municipal govern-

Tax—method of collection.

—how discharged.

—crediting amount on judgment.

ments or their officers or agents are bound to take notice of the powers and their limits conferred upon or exercisable by such governmental agencies and their administrators. *General Electric Co. v. Ft. Deposit*, 174 Ala. 179, 183, 56 So. 802.

According to the record now under review, this arrangement, to which appellee attributes his right to the benefit of the character of tax discharge disclosed, was undertaken to be made through officers or agents of the municipality, who do not appear to have had any such power or authority. Being without authority to make such an engagement or to

validly carry into effect such an arrangement, the agreement to the end designed or the actual accomplishment of it through mere credits and receipts was and is vain. Unless some other defense or bar is shown, the appellee was liable for the true amount of the taxes due the appellant for the years 1911 to 1915, inclusive. Hence, the court, trying the case without a jury, erred in rendering judgment for the defendant, appellee. The judgment is reversed, and the cause is remanded for final ascertainment of the correct amount for which judgment should be rendered.

Anderson, Ch. J., and Somerville and Thomas, JJ., concur.

ANNOTATION.

Validity and effect of agreement that claim may be applied upon or set off against taxes.

Cases under valid statutes allowing the payment of taxes in warrants, coupons, etc., are excluded, as are cases under agreements, made in advance of the assessment of taxes, that services to a city shall be in lieu of taxes.

In the absence of constitutional or statutory authority, taxes can only be paid in money, and any agreement that a pre-existing claim may be set off against taxes is of no effect.

ENTERPRISE v. RAWLS (reported herewith) ante, 1175; *Scobey v. Decatur County* (1880) 72 Ind. 552; *Wyman v. Searle* (1910) 88 Neb. 26, 128 N. W. 801; *Bindley v. Pittsburgh* (1916) 64 Pa. Super. Ct. 371; *Wagner v. Porter* (1900) — Tex. Civ. App. —, 56 S. W. 561; *Houston v. Stewart* (1905) 40 Tex. Civ. App. 499, 90 S. W. 49; *Figures v. State* (1907) — Tex. Civ. App. —, 99 S. W. 412; *Oneida County v. Tibbits* (1905) 125 Wis. 9, 102 N. W. 897; *Oneida County v. Kessler* (1905) 125 Wis. 18, 102 N. W. 1135.

It will be seen that it is held in the reported case (*ENTERPRISE v. RAWLS*) that the mayor and attorney of a city could not agree that a taxpayer might pay his taxes by crediting the amount

upon a judgment against the city, and that such agreement was no defense to an action by the city for the taxes.

In *Scobey v. Decatur County* (1880) 72 Ind. 552, supra, it was said and held: "It is settled law that a set-off cannot prevail against taxes levied for general or local governmental purposes. *Cooley*, Taxn. 13. The county commissioners could have no power to declare, even by express contract, a man's taxes paid before they were assessed, and certainly merely ministerial officers, such as the treasurer and auditor, would have no such authority."

"The mistake of a treasurer in accepting coupons in payment for district general taxes will not deprive the public of its right to collect such taxes, nor will such payment subrogate the purchaser to the rights of the district." *Wyman v. Searle* (1910) 88 Neb. 26, 128 N. W. 801, supra.

Where town treasurers have unlawfully accepted in payment of county taxes certificates of county expenses, though duly issued, the county treasurer may recover the amount thereof from them. *Oneida County v. Tibbits* (1905) 125 Wis. 9, 102 N. W. 897, and

Oneida County v. Keppler (1905) 125 Wis. 18, 102 N. W. 1135, *supra*.

In a suit by a state for taxes, it is no defense to show that the tax collector was given credit for the taxes by the taxpayer in his account with the collector, as the collector, being only authorized to receive cash for taxes due the state and county, could not bind his principal by such a transaction. *Figures v. State* (1907) — Tex. Civ. App. —, 99 S. W. 412, *supra*.

A city is not liable upon its contract to receive for taxes its scrip, issued in violation of law and public policy. *Lindsey v. Rottaken* (1878) 32 Ark. 619. So, as to its illegal warrants. *Fuller v. Chicago* (1878) 89 Ill. 282.

An owner may recover from a city, on a breach of covenant, sums paid by him for assessments for a sewer and for paving, etc., for which writs of *scire facias* had issued against him, where the premises at the time of the assessment were under a lease to the city which provided for rent and contained an agreement, further, that the city was "also to pay all city taxes, or assessments, made against said property by the city, and make all improvements at its own cost and expense;" as the owner could not have set off the claim under the lease if it had matured, and it had not matured until the owner was compelled to pay. *Bindley v. Pittsburgh* (1916) 64 Pa. Super. Ct. 371, *supra*.

In *Wagner v. Porter* (1900) — Tex. Civ. App. —, 56 S. W. 561, *supra*, it was held that an employment by a city of an attorney in certain pending suits for a reasonable fee, to be applied to the payment of taxes then due and to become due to said city by such attorney, was null and void so far as it allowed him to pay the taxes due and to become due to the city by a credit upon the amount which might be due him by said city under such contract, and that he could not recover for conversion of property levied upon for the payment of such taxes. The court said: "If the city of Greenville has accepted the services of appellee, and received the benefit of the same, it

would be responsible to him, on a quantum meruit, for the reasonable value of such services; but appellee cannot, under the Constitution and law, offset the amount so due him against the taxes due by him to the city, and which were levied to pay current expenses, and the interest and sinking fund of the bonds of said city. We think the uncontroverted evidence in this case shows that appellee has, and can have, no right of recovery in this suit against the city of Greenville."

The court will set aside a settlement of taxes based in part on a city's unlawful receipt of certificates and of a warrant, under an ordinance unlawfully making such certificates receivable for taxes. *Houston v. Stewart* (1905) 40 Tex. Civ. App. 499, 90 S. W. 49, *supra*.

It may be noted that in *McCracken v. Elder* (1859) 34 Pa. 239, it was held in a suit for a tax by a school tax collector, who had paid the amount of such tax to the school board, that the defendant could not set off unliquidated damages arising out of a breach of contract between himself and the school board. The defendant was refused leave to prove that, after this tax had been assessed, the school directors entered into a contract with him for the building of a schoolhouse, for which they were to pay him a certain sum and to release him from any school tax he then owed the township, that he was ready and willing to perform his contract in manner and form as agreed upon, but that the directors refused to allow such house to be built. The court said: "In a suit by the collector, the defendant could not set off unliquidated damages arising out of a breach of a contract between himself, and the school district. Certainly not under the pleadings in this case. That was a transaction between other parties; and if it were not, we are not prepared to admit that a taxpayer can interpose a claim of set-off against the collection of the tax assessed upon him."

But on the other hand, in *New Orleans v. New Orleans Waterworks Co.*

(1884) 36 La. Ann. 432, where a city brought an action to recover taxes assessed for a period during which the defendant had furnished water to the city in consideration of a void statutory exemption from taxation, it was held that the defendant could recover for water furnished, to the extent that the exemption was the consideration of defendant's obligation to supply free water.

It may be noted that in *Cobb v. Elizabeth City* (1876) 75 N. C. 1, the court said: "Debts owing by the town corporation, in whatever form they may be evidenced, cannot be set off against a demand for town taxes, un-

less there be a special contract to that effect."

It seems to have been held in the briefly reported case of *Gess v. Common School Dist.* (1893) 15 Ky. L. Rep. 30, that the trustees of a common-school district have the power to accept a donation of land upon condition that it shall revert to the donor in the event it shall cease to be used for school purposes, and that, in consideration of the donation of land upon which to build a schoolhouse, the trustees of a school district have the power to release the donor from the payment of taxes levied to build the schoolhouse.

B. B. B.

TIMOTHY BURNS, Plff. in Err.,
v.
WRAY FARMERS' GRAIN COMPANY.

Colorado Supreme Court — December 2, 1918.

(65 Colo. 425, 176 Pac. 487.)

Monopoly — by-law of corporation — restraint of competition.

1. A by-law of a corporation organized to purchase farm produce, whose stock is held by the farmers of a community, imposing a penalty on each member who sells produce to a competitor of the corporation, is invalid as an unreasonable restraint of competition.

[See note on this question beginning on page 1185.]

Contract — validity — restraint of competition.

2. A contract which tends or is designed to destroy or stifle competition is as much against public policy as is one in restraint of trade.

[See 6 R. C. L. 787.]

— ground of illegality.

3. The illegality of a contract or combination for the restraint of competition does not lie in the agreement

not to compete, but in its reflex injury to the public.

[See 19 R. C. L. 41, 42.]

— reasonableness — question of fact.

4. Each case in which the question of reasonableness in restraint of competition in a contract arises must be determined according to its own particular facts.

[See 19 R. C. L. 43.]

ERROR to the District Court for Yuma County (Burke, J.) to review a judgment in favor of plaintiff in an action brought to recover money alleged to be due under the provisions of a certain by-law of the company.
Reversed.

The facts are stated in the opinion of the court.

Mr. Louis Henke, for plaintiff in error:

The by-law in question is illegal, tends to stifle competition, is in re-

straint of trade, and contrary to public policy.

Louisville Fire Underwriters v. Johnson, 183 Ky. 797, 24 L.R.A. (N.S.)

153, 119 S. W. 153; *People ex rel. McIlhany v. Chicago Live Stock Exch.* 170 Ill. 556, 39 L.R.A. 373, 62 Am. St. Rep. 404, 48 N. E. 1062; 6 R. C. L. 788, § 192; *Slaughter v. Thacker Coal & Coke Co.* 55 W. Va. 642, 65 L.R.A. 342, 104 Am. St. Rep. 1013, 47 S. E. 247, 2 Ann. Cas. 335; *W. W. Montague & Co. v. Lowry*, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307; *More v. Bennett*, 140 Ill. 69, 15 L.R.A. 361, 33 Am. St. Rep. 216, 29 N. E. 888; *State ex rel. Snyder v. Portland Natural Gas & Oil Co.* 153 Ind. 483, 53 L.R.A. 413, 74 Am. St. Rep. 314, 53 N. E. 1089; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; *Richardson v. Buhl*, 77 Mich. 632, 6 L.R.A. 457, 48 N. W. 1102; *State ex rel. Watson v. Standard Oil Co.* 49 Ohio St. 137, 15 L.R.A. 145, 34 Am. St. Rep. 541, 30 N. E. 279; *Beechley v. Mulville*, 102 Iowa, 602, 63 Am. St. Rep. 479, 70 N. W. 107, 71 N. W. 428; *Cohen v. Berlin & J. Envelope Co.* 166 N. Y. 292, 59 N. E. 906; *Ford v. Chicago Milk Shippers' Asso.* 155 Ill. 166, 27 L.R.A. 298, 39 N. E. 651; *Vulcan Powder Co. v. Hercules Powder Co.* 96 Cal. 510, 31 Am. St. Rep. 242, 31 Pac. 581; *Pacific Factor Co. v. Adler*, 90 Cal. 110, 25 Am. St. Rep. 102, 27 Pac. 36; *Martell v. White*, 185 Mass. 255, 64 L.R.A. 260, 102 Am. St. Rep. 341, 69 N. E. 1085; *Ellis v. Inman, P. & Co.* 65 C. C. A. 488, 131 Fed. 182; *Jackson v. Stanfield*, 137 Ind. 592, 23 L.R.A. 588, 36 N. E. 345, 37 N. E. 14; *Ludowese v. Farmers' Mut. Co-op. Co.* 164 Iowa, 197, 145 N. W. 475; *Inter-Ocean Pub. Co. v. Associated Press*, 184 Ill. 438, 48 L.R.A. 568, 75 Am. St. Rep. 184, 56 N. E. 822; *Re Long Island R. Co.* 19 Wend. 37, 32 Am. Dec. 429; *Stewart v. Stearns & C. Lumber Co.* 56 Fla. 570, 24 L.R.A. (N.S.) 649, 48 So. 19; *Pocahontas Coke Co. v. Powhatan Coal & Coke Co.* 60 W. Va. 508, 10 L.R.A. (N.S.) 268, 116 Am. St. Rep. 901, 56 S. E. 264, 9 Ann. Cas. 667.

Mr. M. M. Bulkeley, for defendant in error:

Agreements, by-laws, associations, and corporations that impose only a partial restraint upon trade, and which are reasonable, are valid and enforceable by the courts.

Freudenthal v. Espey, 45 Colo. 488, 26 L.R.A. (N.S.) 961, 102 Pac. 280; *Barrows v. McMurtry Mfg. Co.* 54 Colo. 432, 131 Pac. 430; *Jewel Tea Co. v. Watkins*, 26 Colo. App. 494, 145 Pac. 719; *People ex rel. Pinckney v. New*

York Fire Underwriters, 54 How. Pr. 240; *Louisville Fire Underwriters v. Johnson*, 133 Ky. 797, 24 L.R.A. (N.S.) 153, 119 S. W. 153; *Standard Oil Co. v. United States*, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A. (N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; *State v. Duluth Bd. of Trade*, 107 Minn. 506, 23 L.R.A. (N.S.) 1260, 121 N. W. 395; *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 60 Am. Rep. 464, 13 N. E. 419; *Walter A. Wood Mowing & Reaping Co. v. Greenwood Hardware Co.* 75 S. C. 378, 9 L.R.A. (N.S.) 501, 55 S. E. 973, 9 Ann. Cas. 902; *Matthews v. Associated Press*, 136 N. Y. 333, 32 Am. St. Rep. 741, 32 N. E. 981; *National Protective Asso. v. Cumming*, 170 N. Y. 315, 58 L.R.A. 135, 88 Am. St. Rep. 648, 63 N. E. 369; *National Enameling & Stamping Co. v. Haberman*, 120 Fed. 415; *McCurry v. Gibson*, 108 Ala. 451, 54 Am. St. Rep. 177, 18 So. 806; *Watertown Thermometer Co. v. Pool*, 51 Hun. 157, 4 N. Y. Supp. 861; *Pulp Wood Co. v. Green Bay Paper & Fiber Co.* 157 Wis. 604, 147 N. W. 1058; *Merriman v. Cover*, 104 Va. 428, 51 S. E. 817; *Ripy v. Art Wall Paper Mills*, 41 Okla. 20, 51 L.R.A. (N.S.) 33, 136 Pac. 1080; *Fleckenstein Bros. Co. v. George Fleckenstein*, 76 N. J. L. 613, 24 L.R.A. (N.S.) 913, 71 Atl. 265; *Hall Mfg. Co. v. Western Steel & I. Works*, L.R.A. 1916C, 620, 142 C. C. A. 220, 227 Fed. 588; *Baird v. Smith*, 128 Tenn. 410, L.R.A. 1917A, 376, 161 S. W. 492; *Ray, Contractual Lim.* chap. 9; 6 R. C. L. 785-790, §§ 190-194; *Clark, Contr.* p. 399.

Allen, J., delivered the opinion of the court:

This is an action brought by the Wray Farmers' Grain Company, a corporation, against one of its stockholders, to recover a sum of money alleged to be due to the corporation under the provisions of a certain by-law of the company. The plaintiff obtained a judgment, and the defendant brings error.

The main question presented for our determination is the validity of the by-law upon which the plaintiff's right to recover is predicated. It is proper, at the outset, to note the following admitted and undisputed facts:

The plaintiff is a corporation, organized under the laws of Colorado, and having its principal place of

business and its office in the town of Wray, Colorado. Its business is that of buying, selling, and storing grain, and dealing in hogs and in coal. It buys and sells to "members and non-members." The capital stock of the plaintiff corporation is divided into 400 shares, of \$25 each. There are 230 stockholders. The defendant is a farmer residing near the town of Wray, and owns two shares of the capital stock. The following is a by-law of the plaintiff, being the by-law which is involved in this controversy: "The stockholders of this company may sell grain to competitors in Wray, only, by paying to the secretary of the Wray Farmers' Grain Company the sum of 1 cent per bushel for each bushel of grain so sold, as his proportional share of the maintenance of the company; provided grain sold to local feeders and grain sold for seed for use in our immediate locality shall be exempt from penalty. If any stockholder is found guilty of avoiding this by-law his stock shall be liable to forfeiture in this corporation."

The foregoing by-law was regularly adopted by the plaintiff grain company at a meeting of the stockholders, at which meeting defendant was present and assented to the adoption of this by-law. While the by-law in question was in full force and effect, the defendant sold and delivered about 3,500 bushels of wheat to a competitor of the plaintiff in the town of Wray.

Under the by-law above quoted the plaintiff below claims the right to recover from the defendant the sum of \$35 on account of his having sold 3,500 bushels of grain to plaintiff's competitor in Wray, the by-law providing that a stockholder selling to such competitor shall pay the grain company "the sum of 1 cent per bushel for each bushel of grain so sold."

It was contended by the defendant in the trial court, as it is contended here, that the by-law above quoted is invalid, as being "in restraint of trade," and that it "tends to stifle competition" and "is contrary to

public policy." The trial court held the by-law valid, evidently upon the ground appearing in the following remark of the trial judge: "I find nothing in that contract [by-law] which is an unreasonable restraint of trade."

Both parties treat the by-law in question from the standpoint of a contract, applying to it the same tests as are applied in determining the validity of contracts. The method thus taken is undoubtedly proper. Numerous by-laws not repugnant to public policy have been upheld as reasonable, and, on the other hand, by-laws operating in restraint of trade have been held invalid. 7 R. C. L. 146, § 118.

The validity of the by-law in the instant case is questioned, and therefore must be determined, solely with regard to whether or not it is in such restraint of trade as to be contrary to public policy.

"The question is thus reduced to the inquiry whether at common law the contract here involved is violative of any canon of public policy. In considering this question, much confusion may be avoided by marking the distinction, not always observed in the adjudicated cases, between those contracts which, since the earliest history of the law on the subject, have been designated as 'contracts in restraint of trade,' and those more correctly designated as 'contracts in restraint of competition.' The term 'contracts in restraint of trade' has so long been applied to undertakings not to pursue a particular profession, trade, or business, and has so thoroughly acquired that conventional significance, as to render its use in any other connection confusing. The rules relating to such contracts are of long standing and thoroughly established." *Fisher Flouring Mills Co. v. Swanson*, 76 Wash. 649, 51 L.R.A.(N.S.) 522, 137 Pac. 144.

The law in this state as to the class of contracts last mentioned in the foregoing quotations has been announced in *Freudenthal v. Espey*, 45 Colo. 488, 26 L.R.A.(N.S.) 961,

102 Pac. 280, and in *Barrows v. McMurtry Mfg. Co.* 54 Colo. 432, 131 Pac. 430. If the by-law now under consideration, properly treated as a contract, is in restraint of trade in the broad sense, it does not belong to that class of contracts which was dealt with in the two Colorado cases above cited, but belongs to that class described in 2 *Elliott on Contracts*, 125, § 790, as follows: "One class of contracts in restraint of trade consists of such as tend or are designed to destroy or stifle competition, effect a monopoly, artificially maintain prices, or by other means hamper or obstruct the course of trade as it would be carried on if left to the control of the natural law governing trade or commerce."

Both classes of contracts, when unreasonable and to the injury of the public, are alike illegal and against public policy. The illegality of a contract or combination for the restraint of competition does not lie in the agreement not to compete, but in its reflex injury to the public. 6 R. C. L. 787, § 191. The rule inhibiting interference with public interests invalidates contracts, the tendency of which is to lessen competition. 13 C. J. 480, § 423. In *Barrows v. McMurtry Mfg. Co.* supra, it was said: "The law looks with high disfavor upon any condition which tends to stifle the free and unimpeded course of competitive buying and selling in the open market of commodities which are necessities, and contribute to the general comfort and well-being of humanity."

Contract—
validity—
restraint of
competition.

—ground of
illegality.

A restriction upon competition is not necessarily illegal, and the existence of the element of combination in no way necessarily involves the existence of an illegal restriction upon competition. *Cooke, Combinations, Monopolies, Labor Unions*, § 135, p. 271. In *Fisher Flouring Mills Co. v. Swanson*, supra, it was said: "Those engaged in any trade or business may, to such limited extent as may be fairly necessary to protect their interests, enter into agreements which will result in diminishing competition and increasing prices. Just the extent to which this may be done the courts have been careful not to define, just as they have refused to set monuments along the line between fairness and fraud."

Each case in which the question of reasonableness of restraint arises must be determined according to its own particular facts. 13 C. J. 475. In *Cooke, Combinations, Monopolies & Labor Unions*, § 133, p. 267, it is said: "The proper answer to the further question, What constitutes reasonableness? may be that the restriction is reasonable, and therefore not illegal, if 'the public is not injured' thereby. Obviously, however, so broad and general a test is incapable of very close application, each case that arises being left to 'be decided upon its own merits and upon the particular circumstances developed.'"

From the circumstances just indicated, it follows that numerous authorities may be cited and discussed in support of the contention on either side in the instant case, with the possibility that no one of them, even if fully approved, would be decisive of the case at bar.

We find, however, that the supreme court of Iowa, in two cases, has decided practically the same identical question which is presented in the instant case. The first of these cases is *Reeves v. Decorah Farmer's Co-op. Soc.* 160 Iowa, 194, 44 L.R.A. (N.S.) 1104, 140 N. W. 844, decided April 10, 1913. In that case the defendant society was a corporation organized for the purpose of buying, selling, and shipping hogs at the town of Decorah, Iowa. There were 350 individual stockholders, composed of farmers living in the vicinity of Decorah. The corporation had a by-law, similar in its effect to the by-law involved in the instant case. The by-law there was in the following language: "In order to insure

future success and prosperity of this society, its members and shareholders are required to sell all their marketable produce and live stock to the society. Any member or stockholder who may prefer to sell his produce or live stock to a competitor in this market shall forfeit to the company and pay over to its treasurer, from the proceeds received for produce or live stock so sold to other firms or competitors, the amount as follows: Five cents for every one hundredweight sold to any competitor."

The foregoing by-law was held by the court to be invalid, as being in "undue restraint of competition." The court, after citing and reviewing a number of authorities on combinations and contracts in restraint of trade and of competition, uses the following language in reaching its conclusion: "So long as competition is regarded as the life of trade, all combinations, contracts, arrangements, or agreements made to stifle it, or which may have that effect, are regarded as unlawful, save as heretofore stated, where connected incidentally with some other contract, as of purchase or sale, or with contracts of employment, etc., so long as such restraints are reasonable and just. But where disconnected with some other contract, and made enforceable by fine or penalty, we think they come within the ban of the law. True it is that each of the members of this association might have concluded not to sell any of his hogs to the plaintiff, and, perhaps, all might have agreed in advance not to do so. This would have been freedom of trade. But here there is freedom of trade in form, but annexed thereto is a fine or penalty for exercising such freedom. This is restraint of trade, or rather restraint of competition. That such fine or penalty made the society an illegal one is, to our minds, too clear for argument. Plaintiff [a competitor of the association] was placed at a disadvantage, and could not compete with the society in purchasing hogs from its members, and the

members were not free to deal with plaintiff. If they dealt with him, he either forfeited his profits, by reason of having to pay too much for his hogs, or they forfeited a part of the purchase price as a penalty for selling to another. To our minds, this was undue restraint of competition, or, as the term is now understood, 'restraint of trade.'"

The foregoing expressions of the Iowa court are each and all as fully applicable to the facts in the instant case as to the facts in the Iowa case. Here, as there, the combination is that of farmers, as stockholders in a corporation, agreeing in a by-law not to sell their products to a competitor of their company in the town where it does business. In both cases the by-law imposes a penalty for its violation.

Under the admitted facts in the instant case the corporation "has paid dividends to its stockholders each year since its organization," while in the Iowa case the testimony was that the society "was formed primarily as a selling agency," and that there "was no purpose to distribute a dividend." From this it appears that the by-law in the instant case is less necessary as a fair protection to the stockholders than it was in the Iowa case, and therefore the restraint would be unreasonable in a greater degree than it was in that case.

We need not assume that the stockholders of the Wray Farmers' Grain Company deliberately entered into a scheme or combination, by means of this by-law, for the purpose of preventing any other grain buyer from doing business in Wray. The by-law would be invalid without proof of this intent. Neither is it necessary to find that competition has actually been stifled. In *Anderson v. Shawnee Compress Co.* 17 Okla. 231, 15 L.R.A.(N.S.) 846, 87 Pac. 315, it is said: "Nor, in order to vitiate a contract, is it essential that its results should be a complete monopoly; it is sufficient if it really tends to that end, and to deprive the

public of the advantages derived from free competition."

From the agreed statement of facts filed in this case, the tendency of the by-law to stifle competition is manifest. It is practically impossible for a competitor of the plaintiff company in Wray to secure the patronage of the 230 existing stockholders in the grain company. The number of such stockholders may increase, since there are 400 shares of capital stock. Such stockholders may comprise all, or nearly all, of the farmers residing in the vicinity of Wray. If these farmers do not want to sell grain to their own company, they are allowed to sell to any competitor outside of Wray, but not to any competitor in Wray, unless they pay the penalty of 1 cent per bushel for each bushel of grain so sold in Wray. It follows that they will not sell to a competitor in Wray unless they receive 1 cent or more per bushel more than what is offered by their own company. The competitor must offer this additional amount, or else lose the business. The by-law, if enforced, unquestion-

**Monopoly—
by-law of
corporation—
restraint of
competition.**

ably would tend to drive out of business any other grain buyer in Wray, and give the plaintiff company a monopoly. This effect renders the by-law unreasonable.

There is another feature of the by-law which makes it unreasonable. That is its restriction upon the stockholders themselves. They are restricted in their right to sell their product to whomsoever they please, and there is an absence of circumstances which render such restriction fairly necessary for their own protection. According to the by-law, they are required to sell to no grain buyer in Wray, which is their nearest and most convenient place of market, except to the Wray Farmers' Grain Company. If they violate this agreement, they are subject to the penalty prescribed in the by-law.

The unreasonableness in the two respects above noted is due to the

resulting injury to the public, which injury is assumed to exist or be inflicted under circumstances of this kind, according to the well-settled doctrines having to do with public policy. Our conclusion in this case, as well as the conclusion of the Iowa court, is amply supported by numerous adjudications upon contracts surrounded by facts somewhat analogous to those existing in the case at bar.

In the case of *People ex rel. McIlhany v. Chicago Live Stock Exch.* 170 Ill. 556, 39 L.R.A. 373, 62 Am. St. Rep. 404, 48 N. E. 1062, the court held invalid a by-law of the Chicago Live Stock Exchange which prohibits members from employing trade solicitors not members of the association, and which limits the number of solicitors which may be employed by members in certain states. In that case the court said: "Combinations and associations of men have no right to place restrictions upon the right of an individual to contract and engage in business, employing such means and agencies as are not prohibited by law. The natural flow of trade and commerce must be unrestricted, and men engaged therein may accelerate its current by all means not unlawful. . . . Efforts to prevent competition and to restrict individual efforts and freedom of action in trade and commerce are restrictions hostile to the public welfare, not consonant with the spirit of our institutions, and in violation of law. . . . Attempts to place restrictions on trade and commerce and to fetter individual liberty of action by preventing competition are hostile to public welfare and affect the interests of the people."

In 19 R. C. L. 36, § 20, it is said: "Every contract, combination, or arrangement whose direct purpose, probable effect, or necessary tendency is to stifle or unduly to restrict competition, is unlawful, at common law, and by statute."

Among cases more or less supporting the Iowa cases herein discussed may be cited the following:

Inter-Ocean Pub. Co. v. Associated Press, 184 Ill. 438, 48 L.R.A. 568, 75 Am. St. Rep. 184, 56 N. E. 822; United States v. Addyston Pipe & Steel Co. 46 L.R.A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 271; Anderson v. Jett, 89 Ky. 375, 6 L.R.A. 390, 12 S. W. 670; Arnold & Co. v. Jones Cotton Co. 152 Ala. 501, 12 L.R.A. (N.S.) 150, 44 So. 662; Martell v. White, 185 Mass. 255, 64 L.R.A. 260, 102 Am. St. Rep. 341, 69 N. E. 1085.

The doctrine or ruling of *Reeves v. Decorah Farmer's Co-op. Soc.* 160 Iowa, 194, 44 L.R.A. (N.S.) 1104, 140 N. W. 844, the Iowa case above discussed, was reaffirmed in *Ludowese v. Farmers' Mut. Co-op. Co.* 164 Iowa, 197, 145 N. W. 475. In the latter case the by-law imposed a penalty upon the stockholder if he sold grain or live stock to a competitor of his company; the penalty as to grain being 1 cent per bushel, as in the case at bar. The court held that "the by-law was clearly in restraint of competition, and therefore illegal." It further announced that

it adheres to its decision in the *Reeves Case*.

The decision in these Iowa cases is criticized by the defendant in error, the plaintiff below, on the ground that the Iowa court "did not consider the proposition as to whether the by-law was a reasonable or unreasonable restraint of trade." True, there is no direct expression upon this point. Nevertheless the doctrine as to reasonableness was in the mind of the court, and regarded as a settled proposition, since the court in one part of the opinion uses this language: "Again, the doctrine of restraint as applied to the early cases has been broadened, and all contracts in unreasonable restraint of competition are now understood to be in restraint of trade."

In our opinion the decisions in the Iowa cases above cited are sound, and for the reasons above indicated we hold the by-law involved in the instant case void and illegal, as being in undue restraint of competition. The cause is therefore reversed and remanded, with directions to dismiss the case.

ANNOTATION.

Legality of combination among farmers.

The legislatures of the country which have attempted to regulate trusts and combinations have made a strong effort to except associations of farmers from the operation of the statutes. These efforts have, however, met with little success. Even the act of Congress approved October 15, 1914, and known as the Clayton Act, had a provision that nothing contained in the Anti-trust Laws should be construed to forbid the existence and operation of agricultural or horticultural organizations, instituted for the purpose of mutual help, and not having capital stock or conducted for profit. Nor should such organizations be held or construed to be illegal combinations or conspiracies in restraint of trade, under the Anti-trust Laws. And the statutes of several of the states have similar provisions.

11 A.L.R.—75.

In *United States v. King* (1916) 250 Fed. 908, it was held that the provisions of the Clayton Act did not mean that farmers' organizations are privileged to adopt methods of carrying on their business which are not permitted to other lawful organizations.

In *Connolly v. Union Sewer Pipe Co.* (1902) 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431, affirming (1900) 99 Fed. 354, an Illinois statute was held unconstitutional for attempting to exempt agricultural products and live stock in the hands of the producer or raiser, from its operations. The court says: "If combinations of capital, skill, or acts, in respect of the sale or purchase of goods, merchandise, or commodities, whereby such combinations may, for their benefit exclusively, control or establish prices, are hurtful to the public in-

terests and should be suppressed, it is impossible to perceive why like combinations in respect of agricultural products and live stock are not also hurtful. Two or more engaged in selling dry goods, or groceries, or meats, or fuel, or clothing, or medicines are, under the statute, criminals and subject to a fine, if they combine their capital, skill, or acts for the purpose of establishing, controlling, increasing, or reducing prices, or of preventing free and unrestrained competition amongst themselves or others in the sale of their goods or merchandise; but their neighbors, who happen to be agriculturists and live-stock raisers, may make combinations of that character in reference to their grain or live stock without incurring the prescribed penalty. Under what rule of permissible classification can such legislation be sustained as consistent with the equal protection of the laws?"

The Alabama statute passed in 1909 provides for the formation of co-operative associations, but, to conform to it, the association must not become a business association conducted for profit. *Baldwin County Producers' Corp. v. Frishkorn* (1919) — Ala. App. 81 So. 862.

In Kentucky, statutes making lawful combinations or pools among farmers, for the purpose of disposing of their produce at a price not above the actual value, were at first sustained. *Owen County Burley Tobacco Soc. v. Brumback* (1908) 128 Ky. 137, 107 S. W. 710.

And under these statutes a combination is lawful where organized for the expressed purpose of fostering and promoting the interest of growers of certain tobacco, and to encourage the improvement of the quality, methods of growing and handling such tobacco, and to act as agents of the raisers thereof, and of others, in selling same, and to assist them in securing remunerative prices. *Louisville & N. R. Co. v. Burley Tobacco Co.* (1912) 147 Ky. 22, 143 S. W. 1040.

But in order to sustain these statutes, their provisions were broadened by the courts so as to make the ex-

emption apply to all combinations if they were not for the purpose of fixing a price that was greater than the real value of the article. *American Seeding Mach. Co. v. Com.* (1913) 152 Ky. 589, 153 S. W. 972; *Com. v. International Harvester Co.* (1909) 131 Ky. 551, 133 Am. St. Rep. 256, 115 S. W. 703.

This ruling was, however, reversed by the Supreme Court of the United States in (1914) 234 U. S. 216, 58 L. ed. 1284, 34 Sup. Ct. Rep. 853.

And the Kentucky court then held that a statute conferring upon agriculturists the right to combine and pool their crops, and sell the same as a whole, for the purpose of obtaining a higher price than they could obtain if the crops were sold separately, is invalid as conferring special privileges and immunities. *Gay v. Brent* (1915) 166 Ky. 833, 179 S. W. 1051.

And the general rule now seems to be that the transactions of farmers' associations will be judged by the same standards which apply generally in the enforcement of Anti-trust Laws and transactions in restraint of trade.

A farmers' association organized to establish a market for hogs raised by the stockholders, which requires members to ship their stock through the association, under penalty of 5 cents per hundredweight in case of sale to another, is an unlawful monopoly. The court does not consider the question of the effect of the fact that defendant was a farmers' association, but treats the case as it would any other where the facts show a restraint of competition. *Reeves v. Decorah Farmer's Co-op. Soc.* (1913) 160 Iowa, 194, 44 L.R.A.(N.S.) 1104, 140 N. W. 844.

And in *Ludowese v. Farmers' Mut. Co-op. Co.* (1914) 164 Iowa, 197, 145 N. W. 475, a by-law of a farmers' association, imposing a penalty on members for selling produce to others than the association, was held void.

An agricultural association cannot circulate a black list among outsiders to prevent them from trading with persons whom the association deems undesirable. *United States v. King* (1915) 229 Fed. 275.

A milk shippers' association, composed of producers who undertake to ship their milk to the association, which guarantees payment to them and fixes the price to dealers, is within a statute providing punishment for persons or corporations forming pools, trusts, and combinations. The court says the purpose of the arrangement between the corporation and its stockholders was to fix the price, and control and limit the amount shipped. This purpose was illegal. It is a combination in violation of the statute, and in restraint of trade, and no recovery can be had for milk sold by it. *Ford v. Chicago Milk Shippers' Asso.* (1895) 155 Ill. 166, 27 L.R.A. 298, 39 N. E. 651.

An agreement to take a share of stock in an association to market fruit which contemplates handling at least 60 per cent of the fruit grown in the state, and pay a penalty for all fruit delivered to others than the association, in consideration of a protected market and consequent enhanced price, is invalid. *Georgia Fruit Exch. v. Turnipseed* (1913) 9 Ala. App. 123, 62 So. 542. The court says: "It cannot fairly be doubted but what the parties to the contract contemplated that this expected protected market and resultant enhanced price was to come only as a consequence of plaintiff's success in subsequently procuring or securing other peach growers, in such number as, with defendant, would amount to the producers of at least 60 per cent of the peach crop, to . . . pledge plaintiff the absolute right to handle their fruit crop. . . . Plaintiff thereby became master of the situation, so far as regarded the sale and disposition of at least 60 per cent of the peach crop of the country, . . . and would remain such master so long as the parties, defendant and the other required number of growers, kept their contracts with plaintiff to market their crop through it. . . . It gave plaintiff a commanding position in fixing the prices of peaches in this section of the country. It could direct the market to which any shipment was to go, and withhold from any market all ship-

ments, or limit the supply at a particular market, thus forcing up the price. It is clear that the real design was to stifle and destroy, at the various markets, competition between defendant and the other growers who became members of the plaintiff association, by allowing plaintiff to divert the crop from the channels of trade in which it would have ordinarily flowed if each grower had been left to act independently and to choose his own market, and to so direct the shipments of these several growers as to avoid competition between them at markets where they before competed." And, the court concludes, this amounts to nothing more nor less than an agreement or combination between the members of the association to place the disposition and sale of the crop each year in the hands of a joint agent, for the purpose of avoiding, so far as possible, competition among themselves, and thereby to raise the price of their products.

But in *Ex parte Baldwin County Producers' Corp.* (1919) 203 Ala. 345, 83 So. 69, the court held that a by-law of a farmers' association, requiring members to pay the association a certain percentage of their sales whether sold through the association or not, was not in restraint of trade. The court thereby reversed (1919) — Ala. App. —, 81 So. 862, which held that the by-law was in restraint of trade.

In *Castorland Milk & Cheese Co. v. Shantz* (1919) 179 N. Y. Supp. 131, it was held that an agreement among stockholders of a corporation, organized to establish a milk station at a particular place, to deliver all milk purchased by them at the station under penalty, did not offend the law as being an illegal monopoly or an unreasonable restraint of trade.

And in *Bullville Milk Producers Asso. v. Armstrong* (1919) 108 Misc. 582, 178 N. Y. Supp. 612, an agreement by persons who organized a corporation to construct a creamery, to haul the milk from a certain station, to deliver, under penalty, all milk produced by them at such place to the creamery, is valid. The court says

the agreement is not void as being against public policy or in restraint of trade. The incorporators of this association desired to engage in the business of shipping milk, and it was quite necessary that they be assured of the continued patronage of their

members, in order to justify the expense of erecting the creamery. It cannot be said that an agreement such as this would tend to restrain trade or stifle competition. And the court thereby affirmed (1920) 190 App. Div. 952, 180 N. Y. Supp. 932. H. P. F.

ELFEGO BACA

v.

ZACARIAS PADILLA, Appt.

New Mexico Supreme Court — June 9, 1920.

(— N. M. —, 190 Pac. 730.)

Attorney and client — contingent fee — assisting prosecution.

1. Contracts by attorneys at law for contingent fees are generally upheld by the courts, but a contract by an attorney at law to assist in the prosecution of a criminal case for a contingent fee, dependent upon the conviction of the accused, is contrary to public policy.

[See note on this question beginning on page 1192.]

Criminal law — private counsel for prosecution.

2. Section 1860, Code 1915, by implication; authorizes the appearance of private counsel on behalf of the state in criminal proceedings "on order of the court, with the consent of the district attorney or attorney general."

[See 22 R. C. L. 93 et seq.]

Attorney and client — validity of contract.

3. Where an attorney at law enters into a contract with another to assist in the prosecution of a criminal case for a contingent fee, the contract is void and there can be no recovery on the contract, but such a contract is not inherently *malum in se* or *malum pro-*

hibitum, and the attorney may recover the reasonable value of his services on a quantum meruit.

[See 2 R. C. L. 1046.]

Contract — quantum meruit — illegality.

4. When the illegality, either in whole or in part, is in the thing which the party seeking to recover was to do, then there can be no recovery upon a quantum meruit, but where the illegality was not in what the plaintiff was to do, but in the manner in which he was to be compensated for doing the legal thing, then he can recover upon a quantum meruit for the reasonable value of his services.

[See 2 R. C. L. 1046.]

Headnotes by ROBERTS, J.

APPEAL by defendant from a judgment of the District Court for Socorro County (Mechem, J.) in favor of plaintiff in an action brought to recover an amount alleged to be due on a contract for the performance of professional services rendered by plaintiff for defendant. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. Neill B. Field, for appellant:

Plaintiff was disqualified to represent the state in the trial of the indictment, because it was a matter in which he was interested.

Hare v. Headley, 52 N. J. Eq. 496,

28 Atl. 452; *Biemel v. State*, 71 Wis. 444, 37 N. W. 244, 7 Am. Crim. Rep. 556; *Rock v. Ekern*, 162 Wis. 291, L.R.A.1916D, 459, 156 N. W. 197.

Improper conduct of a law officer of the state or of private counsel em-

ployed in a criminal case would, if properly brought to the attention of the court, justify a reversal.

State v. Sedillo, 24 N. M. 549, 174 Pac. 985; State v. Graves, 21 N. M. 556, 157 Pac. 160; Territory v. Chamberlain, 8 N. M. 538, 45 Pac. 1118; Chacon v. Territory, 7 N. M. 241, 34 Pac. 448.

It is clearly against public policy to permit the enforcement of such a contract as the one in question.

9 Cyc. 481; Sampliner v. Motion Picture Patents Co. 168 C. C. A. 202, 255 Fed. 242; Price v. Caperton, 1 Duv. (Ky.) 207.

Mr. M. C. Spicer, for appellee:

Under the terms of the statute it makes no difference whether the plaintiff was interested in the prosecution or not; he was qualified to act.

Bank of Commerce v. Baird Min. Co. 13 N. M. 424, 85 Pac. 970; Radcliffe v. Chaves, 15 N. M. 258, 110 Pac. 699; Enderstein v. Atchison, T. & S. F. R. Co. 21 N. M. 548, 157 Pac. 670.

The public policy of a state of which the courts will take notice and to which they give effect must be determined from its Constitution, laws, and judicial decisions, and the courts will not resort to other sources of information.

Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co. 175 U. S. 91, 44 L. ed. 84, 20 Sup. Ct. Rep. 33; Denson v. Alabama Fuel & I. Co. 193 Ala. 383, 73 So. 525; Arlington Hotel Co. v. Rector, 124 Ark. 90, 186 S. W. 622; Alpers v. Hunt, 86 Cal. 78, 9 L.R.A. 483, 21 Am. St. Rep. 17, 24 Pac. 846; Mutual L. Ins. Co. v. Durden, 9 Ga. App. 797, 72 S. E. 295; Zeigler v. Illinois Trust & Sav. Bank, 245 Ill. 180, 28 L.R.A. (N.S.) 1112, 91 N. E. 1041, 19 Ann. Cas. 127; Hogston v. Bell, 185 Ind. 536, 112 N. E. 883; Chreste v. Louisville R. Co. 167 Ky. 75, L.R.A. 1917B, 1123, 180 S. W. 49, Ann. Cas. 1917C, 367; State v. American Sugar Ref. Co. 138 La. 1005, 71 So. 137; Orrell v. Bay Mfg. Co. 83 Miss. 800, 70 L.R.A. 881, 36 So. 561; Roselle v. Farmers' Bank, 141 Mo. 36, 64 Am. St. Rep. 501, 39 S. W. 274; Parchen v. Chessman, 49 Mont. 326, 142 Pac. 631, 146 Pac. 469, Ann. Cas. 1916A, 681; Langdon v. Conlin, 67 Neb. 243, 60 L.R.A. 429, 108 Am. St. Rep. 643, 93 N. W. 389, 2 Ann. Cas. 834; Huber v. Culp, 46 Okla. 570, 49 Pac. 216; Sullivan-Sanford Lumber Co. v. Watson, — Tex. Civ. App. —, 135 S. W. 635.

The public is interested to see that persons are not unnecessarily restricted in their freedom to make their own contracts, unless such contracts are contrary to some established policy which is plainly to be seen.

Godfrey v. Roessle, 5 App. D. C. 299.

Roberts, J., delivered the opinion of the court:

Appellee brought this suit to recover the sum of \$5,000, alleged to be due on a contract to perform professional services as an attorney at law for the appellant, at his request, in the prosecution of a certain criminal case pending in Valencia county, New Mexico, for which services it was alleged the appellant agreed to pay appellee a reasonable fee. Appellant filed a general denial and also pleaded payment and the Statute of Limitations. The case was tried to the court, and after the evidence was heard the court made a general finding that plaintiff was entitled to recover the sum of \$500. Appellant submitted a finding of fact which, in so far as material, found that appellee accepted employment on the following terms, i. e., if the parties he was to prosecute were acquitted he should be paid a reasonable fee, and if convicted he should receive a "big fee," and that in pursuance to such agreement appellee prosecuted the said action and obtained a verdict of guilty against the defendants therein. Appellant asked the court to conclude, as a matter of law, from the foregoing facts specially found, that the contract made and entered into between the appellant and appellee was and is contrary to public policy and void. The conclusion of law was refused, and judgment was entered in favor of appellee in the sum of \$500.

The controlling question in this case is as to whether or not an attorney at law can enter into a valid contract with a client to assist in the prosecution of a criminal case upon a contingent fee. Appellant argues that it is contrary to the public policy of this state for a private prosecutor to appear in a criminal case. Section 1860, Code 1915, by

implication, authorizes the appearance of private counsel on behalf of the state in criminal proceedings "on order of the court, with the consent of the district attorney or attorney general." And in the case of *State v. Lucero*, 20 N. M. 55, 146 Pac. 407, the right of such private counsel to appear was recognized by this court. This question, then, may be laid aside, and attention directed to a consideration of the question which disposes of this case.

Contracts for contingent fees by attorneys at law were not tolerated at all at common law, but in most of the states such contracts are allowed and their validity sustained; this principally upon two grounds: First, that of necessity, the argument being that otherwise many poor suitors with meritorious causes of action would be denied access to the courts because too poverty-stricken to pay counsel; that instead of perverting justice the allowance of such fees is the means of securing the same. The second ground is that at common law the practice of law was followed because of the honor it bestowed upon the lawyer, and not for profit or as a means of livelihood; possibly a false assumption, but nevertheless always religiously adhered to in the profession. In this country the sham has been cast aside, and the courts universally recognize that, while the profession of the law is most honorable, a man who follows the profession must be able to earn a living, and while jealously guarding the relations between attorney and client, and never hesitating to enforce fair dealing on the part of the attorney toward the client, any contract between the attorney and client for the attorney's compensation for legal services, so long as the same is fair, reasonable, and valid, will be enforced.

Many cases will be found cited in the note to § 421, Thornton on Attorneys at Law, upholding the validity of contracts for contingent

fees generally. We do not believe any case will be found which upholds the validity of a contingent fee beyond the rule of necessity, that is to say, the courts will not uphold such contracts where provisions may be made for the prosecution of the suit by the court in other ways. The most familiar illustration is that offered by suits for divorce and alimony. Contracts have been made by attorneys to prosecute such suits for a designated portion of the alimony recovered, and all such contracts, so far as we are aware, have been declared invalid upon one ground or the other, i. e.: (1) That there was no necessity for permitting such contracts, because the court was authorized by law to require the husband to pay suit money, thus enabling the wife to prosecute her action; (2) that it is the policy of the law that reconciliation should be effected between husband and wife, and the attorney, having a great interest in the amount of alimony recovered, which depended, of course, upon the prosecution of the suit to a conclusion, would at all times be standing in the way of such reconciliation. This matter, in so far as divorce cases are concerned, was ably discussed by the supreme court of California in the case of *Newman v. Freitas*, 129 Cal. 283, 50 L.R.A. 548, 61 Pac. 907. Many other similar cases will be found referred to in the note to the case of *Roller v. Murray*, 38 L.R.A. (N.S.) 1202; *Barngrover v. Pettigrew*, 2 L.R.A. (N.S.) 260. Many of these cases, while not discussing the reason for the rule, held that such contracts are void as against public policy.

There is no case directly in point on the proposition involved in the case now under consideration. There is a discussion of the question in the case of *Price v. Caperton*, 1 Duv. (Ky.) 207, but what was said there on the subject was obiter. The only point decided was the right of private prosecutors to appear in the state's case, and the right was upheld.

If the right of a private prosecutor to accept employment for a contingent fee is viewed from the point of necessity, clearly the contract would not be upheld, because the state by its prosecuting officers is presumed to be able to attend to the prosecution of all criminal cases, and, again, probably the power rests in the court, in a case of necessity, to appoint some member of the bar to appear and assist in the prosecution. So there would be no occasion for invoking the law of necessity, as is done by the courts in upholding the contingent fee contract in civil cases. Hence it could not be said that the necessities of the case would result in the abrogation of the common-law rule. Unlike a civil suit, where the liability of the plaintiff to pay any fee might depend upon the establishment of his cause of action, here, under no conceivable aspect of the case could the party's ability to employ a private prosecutor in a criminal case be increased or diminished by the outcome of the prosecution. On the other hand, we have injected into the prosecution of a criminal case a prosecutor whose personal interests would be subserved best by securing the conviction of the defendant, and this regardless of the question as to whether or not the defendant were guilty or innocent; that is to say, the size of his fee, or possibly whether he receive any fee at all, would be dependent upon the conviction of the defendant, however

Attorney and
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prosecuting attorney, pays him a salary, and no part of his compensation is dependent upon the conviction or acquittal of those charged with infractions of the state law. He is supposed to be a disinterested person, interested only in seeing that justice is administered and the guilty persons punished. To permit and sanction the appearance on behalf of the state of a private prose-

cutor, vitally interested personally in securing the conviction of the accused, not for the purpose of upholding the laws of the state, but in order that the private purse of the prosecutor may be fattened, is abhorrent to the sense of justice, and would not, we believe, be tolerated by any court.

But assuming, for the sake of argument, that the express contract which the court found had been made was contrary to public policy and void, because appellee was to receive a contingent fee, the question nevertheless remains as to whether the decision of the court is sustainable notwithstanding. The appellee in his complaint did not declare especially on the original contract, but generally *indebitatus assumpsit*. The appellant has not brought up the evidence, and consequently we are unable to tell just how the express contract got into the case, but it will be observed from the finding made by the court as to the terms of the express contract, there was no illegality in that which appellee agreed to do, i. e., assist in the prosecution of the criminal case. The illegality was in the manner by which he was to be compensated. In *Thornton on Attorneys at Law*, vol. 2, § 438, the author says: "The general rule undoubtedly is that an attorney is not precluded from recovering compensation for valuable services by the mere fact that such services were rendered under a void or voidable contract. There can, of course, be no recovery on the contract, but where it is not inherently —validity of contract.
malum in se or
malum prohibitum the attorney may recover the reasonable value of his services on a quantum meruit."

The author of the note to the case of *Barngrover v. Pettigrew*, 2 L.R.A.(N.S.) 260, says:

"There is an obvious distinction bearing upon the right of an attorney to recover upon a quantum meruit for services rendered pursuant to an illegal contract, between a case where the contract

is illegal because the services agreed to be rendered in performance thereof are illegal, and a case where the contract is illegal only because of some improper provision relating to the mode of compensation, or an illegal stipulation against the right of the client to compromise the claim without the consent of the attorney. It is apparent, in the first case, that every objection to permitting a recovery upon an express contract applies with equal force to a recovery upon a quantum meruit. And this is true even when the services are not intrinsically illegal, but are improper and contrary to public policy because of the circumstances under which they are rendered.

"Thus, it was held in *Gammons v. Johnson*, 76 Minn. 76, 78 N. W. 1035, and *Gammons v. Gulbranson*, 78 Minn. 21, 80 N. W. 779, that an attorney who enters into a barratrous contract to bring suits cannot recover upon an implied contract for services rendered in a suit brought pursuant to such contract, though the services are not, in themselves, and apart from the barratrous contract, improper or illegal. But the weight of authority seems to support the proposition that, if the services performed by the attorney are not themselves illegal, either intrinsically or by reason of the circumstances under which they are rendered, the attorney may recover

upon a quantum meruit for their reasonable value, notwithstanding that the contract is, for other reasons, champertous and illegal."

Later cases drawing the same distinction will be found cited in a note to the case of *Roller v. Murray*, supra. A reading of the cases cited in these two notes (and the notes are very full and complete and further citation would only be as to subsequent cases) will show that when the distinction pointed out by the author of the note in the case first referred to is kept in mind the authorities are all in agreement. When the illegality, either in whole or in part, is in the thing which the party seeking to recover was to do,

Contract—
quantum meruit
—illegality.

then there can be no recovery upon a quantum meruit. But where the illegality was not in what the plaintiff was to do, but in the manner in which he was to be compensated for doing the legal thing, then he can recover upon a quantum meruit for the reasonable value of his services. This was evidently the theory upon which the court below gave judgment for appellee, and upon this theory the judgment is sustainable.

The judgment will therefore be affirmed; and it is so ordered.

Parker, Ch. J., and Reynolds, J., concur.

ANNOTATION.

Validity of contract by attorney to prosecute or assist in prosecution of criminal case on contingent fee.

Public policy is made the basis for the decision in the reported case (*BACA v. PADILLA*, ante, 1188) to the effect that a contract is unenforceable which provides a fee, contingent on a conviction, for one assisting a prosecuting attorney. The decision appears to imply that it is not the sole duty of an attorney prosecuting a criminal action to obtain a conviction, and that a financial interest of the attorney in the outcome of the action may jeopardize the rights of the person on trial. A

search has failed to disclose any other case directly in point, though, as stated in the opinion, the decision has the support of a dictum in a Kentucky case, *Price v. Caperton* (1864) 1 Duv. (Ky.) 207. A recovery of compensation was sought in that case, for the employment of the plaintiff's assignor by the defendant to assist a prosecuting attorney in the trial of two indictments, one for the shooting of the defendant, and the other for the murder of his son. The court said: "A

contingent fee dependent on conviction ought never to be permitted to stimulate assistant counsel; and, so far, it might be the policy of the law to withhold its remedies for enforcing

such a contract. But we cannot see any consistent reason for denouncing the mere employment, or withholding a reasonable compensation, either conventional or implied." W. S. R.

CLAY COUNTY CO-OPERATIVE TELEPHONE ASSOCIATION,
Appt.,
v.

SOUTHWESTERN BELL TELEPHONE COMPANY et al.

Kansas Supreme Court—June 12, 1920.

(107 Kan. 169, 190 Pac. 747.)

Public service commission — right of connection.

1. Because two telephone companies connect their systems of lines and exchanges on the switchboard of one of them, and give to each other telephone service under a contract, a third telephone company has no common-law right to connect its system of lines and exchanges with the same switchboard, on equal terms.

[See note on this question beginning on page 1204.]

— jurisdiction of court of industrial relations.

2. Chapter 29 of the Laws of the Special Session of 1920, abolishing the public utilities commission and creating the court of industrial relations, gives the court of industrial relations authority over two classes of subjects — regulation of public utilities, and regulation of industrial relations. On its public utilities side, the court of industrial relations is simply the successor of the public utilities commission, and orders made in the field of public utilities regulation are to be reviewed, as before, according to the Public Utilities Act.

— review of orders.

3. Section 12 of the Act of 1920 (Laws 1920, chap. 29) provides a method for the review of orders made in the field of industrial relations only.

— appeal.

4. There is no appeal from an order of the court of industrial relations direct to this court by notice of appeal given under the Civil Code.

— adjustment of controversies.

5. It is the public policy of this state, established by the legislature, that any controversy which falls within the scope of the jurisdiction of the court of industrial relations on its public utilities side shall be adjusted

there, subject to such review by the courts as the Public Utilities Act prescribes; and the section of the Civil Code, providing that the writ of mandamus may not be issued in any case where there is a plain and adequate remedy in the ordinary course of law, must be interpreted accordingly.

Telephone — connection with other company — remedy.

6. A telephone company, claiming the right to compel physical connection of its system of lines and exchanges with the switchboard of another telephone company, by virtue of provisions of the Public Utilities Act, has a plain and adequate remedy in the ordinary course of law, by application to the court of industrial relations.

Mandamus — when will not be issued.

7. A writ of mandamus will not be issued in any case where there is a plain and adequate remedy in the ordinary course of law.

[See 18 R. C. L. 131, 132.]

Telegraph and telephone — duty of telephone company.

8. Telephone companies are obliged to serve without discrimination all applicants for service within the field occupied.

[See 26 R. C. L. 541.]

APPEAL by complainant from an order of the Court of Industrial Relations denying its application to require switchboard connection between it and the respondent companies, and petition for a writ of mandamus to compel said court to enter a just, reasonable, and lawful order in the premises. *Appeal dismissed. Writ denied.*

The facts are stated in the opinion of the court.

Messrs. R. C. Miller and C. Vincent Jones for appellant and petitioner.

Messrs. J. W. Gleed, D. E. Palmer, John M. Kinkel, F. S. Jackson, and J. O. Wilson for appellees and respondents.

Burch, J., delivered the opinion of the court:

The proceeding is one induced by an order of the court of industrial relations denying an application to require switchboard connection between independent telephone systems.

The Co-operative Company has an exchange at Clay Center, with an installation of 117 business phones, 262 residence phones, and 275 rural phones. It has recently purchased an exchange at Idana, a small city in Clay county west of Clay Center, and has a connection with that exchange. The United Company has numerous exchanges and toll lines in Kansas, and toll-line connections with the lines of other companies serving Kansas and other states. It has an exchange at Clay Center, and has a toll-line connection with the Idana exchange, operated under contract. The Bell Company has an extensive telephone system, with a toll line from Kansas City, Missouri, through Topeka, Kansas, to Clay Center. It owns a portion of the stock of the United Company, and by agreement has its toll line connected with the switchboard of the United Company at Clay Center.

The Co-operative Company presented an application to the court of industrial relations for an order requiring switchboard connection at Clay Center between its lines and the lines of the United and Bell Companies. The ground of the application was that the public service and convenience of the patrons of the Co-operative Company would be promoted, and the court of industrial relations was asked to fix lia-

bility for cost of the connections, and to fix compensation for the transmission of messages arising with and delivered through the several exchanges. The United Company and the Bell Company responded with a denial of jurisdiction in the court of industrial relations to make the orders applied for. They further averred that the relief sought would deprive them of property without due process of law, and would deprive them of the equal protection of the law, contrary to provisions of the Constitution of the United States. Reserving these questions, the respondents then stated facts to show that from economic, operative, and other standpoints the orders prayed for should not be granted. The action of the court of industrial relations was expressed in the following order:

"Now on this 1st day of April, 1920, the above-entitled matter comes on for order by the court upon the complaint filed herein on the 5th day of November, 1919, and the evidence introduced in support of said complaint on the 19th day of February, 1920; and the court, being fully advised in the premises, finds that under the evidence and circumstances of this case it would be unreasonable for the court to order a connection between the lines of the complainant and the respondents, in the city of Clay Center, prayed for herein.

"It is therefore by the court ordered: That the complaint of the Clay County Co-operative Telephone Association, Complainant v. Southwestern Bell Telephone Company and United Telephone Company, Respondents, be, and the same is, hereby dismissed."

The petition to this court prays that the court of industrial relations be required to enter a just, reasonable, and lawful order in the prem-

ises, and so takes the form of a petition in mandamus, under § 12 of the act creating the court of industrial relations, which reads as follows: "In case either party to said controversy should feel aggrieved at any order made and entered by said court of industrial relations, such party is hereby authorized and empowered within ten days after service of such order upon it to bring proper proceedings in the supreme court of the state of Kansas to compel said court of industrial relations to make and enter a just, reasonable and lawful order in the premises." Laws Sp. Sess. 1920, chap. 29, § 12.

Accepting this theory of the petition, the court is without jurisdiction. The statute creating the court of industrial relations bears on its face marks of the craftsmanship which framed it. Leaving out of account § 2, the statute is a complete act, covering an entirely new field of legislation, which for convenience may be called the field of industrial relations, cognizance of which is committed to a tribunal having an authority unique in American jurisprudence, exercisable according to an outlined procedure. Action of

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the new court in
that field is review-
able according to
the method pre-

scribed in § 12. Thus considered, the statute has nothing to do with general regulation of public utilities, which was committed to the public utilities commission by the Public Utilities Act (Laws 1911, chap. 238; Gen. Stat. 1915, chap. 977) and supplementary and amendatory acts. Had the new statute been enacted in this form, there would have been two tribunals, each having jurisdiction over a distinct and separate field. Section 2 and a tying-in sentence in § 4 were simply injected into this scheme of legislation. The result is that, while the public utilities commission was abolished, its jurisdiction was committed, in whole and intact, together with appropri-

ate methods of procedure and review, to the court of industrial relations. While the court of industrial relations, under the molding power conferred by both the Public Utilities Act and the new law, will doubtless have but one procedure for itself, orders made in the public utilities field are to be reviewed as before, according to the method prescribed by the Public Utilities Act, and orders made in the field of industrial relations are to be reviewed according to the method specifically prescribed by the new law.

—Jurisdiction of
court of
industrial
relations.

That the foregoing interpretation is necessarily true in respect to the remedy provided in § 12 of the Act of 1920 is proved by its phraseology. The language is "said controversy." The word "controversy" first appears in § 7, and there and elsewhere throughout the act means a controversy in the field of industrial relations. Section 13 is merely a special statute of limitation. Section 25, providing that the rights given and remedies afforded are cumulative, and providing that the act does not repeal other laws, is interpretative only, and does not contain creative legislation. Section 26 merely confers such incidental powers as may be necessary to make express grants effective.

In this instance the controversy has nothing to do with industrial relations falling within the scope of the body of the Act of 1920. It falls within the scope of public utilities regulation according to the Public Utilities Act, which is fully preserved, and the plaintiff should have followed the procedure there prescribed. Gen. Stat. 1915, § 8348.

The plaintiff filed an ordinary notice of appeal with the clerk of the court of industrial relations, and claims this court acquired jurisdiction of the cause by virtue of the notice, under the provisions of the Code of Civil Procedure. From what has just been said it is obvious —appeal.
the notice was nugatory. The court

of industrial relations, on its public utilities side, is just what the public utilities commission was.

The plaintiff argues that it is entitled to relief by writ of mandamus granted by this court, independently of the action of the court of industrial relations. The purpose of the writ of mandamus is to compel performance of a clear legal duty. It is said the defendants rest under the clear legal duty not to discriminate against the plaintiff by excluding its telephone system from physical connection with their telephone systems, because of certain provisions of the Public Utilities Act. Without expressing an opinion on the subject, it will be assumed, for the purpose of a decision, that this claim is correct. Nevertheless, an original action of mandamus is not the proper remedy.

The writ of mandamus may not be issued in any case where there is a plain and adequate remedy in the ordinary course of law. Gen. Stat. 1915, § 7647 (Code Civ. Proc. § 715). This statute is merely declaratory of the common law. The plaintiff has a plain and adequate remedy by application to the court of industrial relations, as

the legal successor to the public utilities commission. It is said, however, that such remedy is out of the ordinary course of law, and the case of *Larabee Flour Mills Co. v. Missouri P. R. Co.* 74 Kan. 808, 88 Pac. 72, is cited. That case was decided many years ago, when public utilities regulation in this state was confined to railroads. A tribunal with the jurisdiction and powers of the court of industrial relations was beyond the range of legislative vision, and all remedies were regarded as unusual and out of the ordinary course, which did not follow closely the ancient paths of law and equity. The case was one to compel resumption of a definite service under established conditions—switching cars from a mill—which had simply been

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discontinued. The court had nothing to do but to command restoration of the service. The case fell naturally within the ordinary jurisdiction of the courts in mandamus, and the court took jurisdiction at once. It is now clearly perceived that what is most needed in the field of business intercourse is expert administrative adjustment, and not court adjudication. Advancing step by step according to that principle, the legislature superseded the board of railroad commissioners with the public utilities commission, gave it authority to regulate public utilities generally, and then superseded the public utilities commission with the court of industrial relations, and gave it greatly amplified powers. The policy has become the settled policy of the state. It contemplates that

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controversies.**

any controversy which naturally falls within the scope of the jurisdiction of the court of industrial relations shall be adjusted there, subject to such review by the courts as the statute provides, and the Mandamus Statute must be interpreted accordingly. The present controversy is peculiarly one of the kind just referred to. The proposition is to compel partial amalgamation of independent competing telephone systems. The court might order formation of the relation, if that were all, but the writ of mandamus, if issued, must prescribe the terms of the relation. Those terms involve switchboard changes, installation of connections, apportionment of cost, regulation of operation, service, rates, division of tolls, accounting, and other matters with which none but a body like the court of industrial relations is competent to deal. At the oral argument it was suggested by counsel for plaintiff that, after ordering the connection, the court should send the case to the court of industrial relations for adjustment of those details—a confession that mandamus is not a fit remedy, and that the court of industrial relations is the proper place to go

for relief. Therefore the court holds the plaintiff had a remedy in what the legislature has established as the ordinary course of law for such cases.

The plaintiff claims that aside from the Public Utilities act, the rights which it recognizes, and the remedies which it affords for the protection of such rights, the plaintiff has a clear legal right, and the defendants rest under a correlative legal duty, respecting the subject in controversy, under the common law. The court is of a different opinion.

There is no dispute that telephone companies are analogous to common

carriers with respect to communication of intelligence, and are obliged to

serve without discrimination all applicants for service within the field occupied. Likewise, there is no dispute that, in the absence of statute, no telephone company is obliged to make an initial switchboard connection with any other. The question, however, is whether or not the United Company, which has voluntarily contracted service connection with the Bell Company, is compelled to permit general switchboard connection with any other telephone company which applies; and whether or not the Bell Company, which has voluntarily contracted service connection with the United Company, is compelled to establish the same relations with any other company which applies.

In the case of *State ex rel. Goodwine v. Cadwallader*, 172 Ind. 619, 87 N. E. 644, the supreme court of Indiana had before it for decision the question whether or not the owner of a telephone system, physically connected with another system under a working agreement, could discontinue service by means of the connection. It appeared that the owner admitted to his switchboard lines from other exchanges. From that fact the court deduced certain conclusions, which, however, were not made the basis for decision of the question. The court said:

"Such physical connection cannot be acquired as of right, but if such connection is voluntarily made by contract, as is here alleged to be the case, so that the public acquires an interest in its continuance, the act of the parties in making such connection is equivalent to a declaration of a purpose to waive the primary right of independence, and it imposes upon the property such a public status that it may not be disregarded. *Mahan v. Michigan Teleph. Co.* (1903) 132 Mich. 242, 93 N. W. 629.

"Appellee is furnishing to other exchanges in West Lebanon direct connection and communication with their patrons to other exchanges, and the same service requested by relator. Appellee has thus fixed a classification of those similarly situated and affected. *Delaware & A. Teleg. & Teleph. Co. v. Delaware*, (1892) 2 C. C. A. 1, 3 U. S. App. 30, 50 Fed. 677.

"... The act of admitting the connection alleged is equivalent to a declaration that all will be admitted to the connection, on the terms and conditions imposed as to one or more." 172 Ind. pp. 636, 641.

This pronouncement has been restated as law by some text-writers, has been favored by some case annotators, and has been approved by some courts in disposing of controversies which did not require decision of the question. The ruling has been condemned by some courts in disposing of controversies which did not require decision of the question, and a contrary view has been indicated by other courts under like circumstances.

The first observation to be made respecting the declaration of the *Cadwallader* Case is that it was dictum. The rights of third persons who were not parties to the working agreement, and who were not seeking independent admission to the owner's switchboard, were not involved. *Pacific Teleph. & Teleg. Co. v. Anderson* (D. C.) 196 Fed. 699. Besides this, the court said: "We have given the cause this much at-

tention because of its public interest and character, but the judgment must be affirmed upon other grounds." 172 Ind. 642.

In the next place, the authorities cited to sustain the doctrine announced require consideration. In the Michigan case cited, one telephone company bought the franchises and exchange of another, connected the two systems, and for a time gave service to the subscribers to both. It then undertook to discontinue service by means of the purchased system. A subscriber having a term contract enforced his right. In the Federal cases cited, the Postal Telegraph Company wanted a telephone in its office. The Western Union Telegraph Company, like other subscribers, had a telephone, and the equal right of the Postal Company to an office telephone was enforced by mandamus. Further on in the opinion in the Cadwallader Case, several decisions are cited in support of the proposition that all who are similarly situated must be served alike, but each decision is identical in principle with the one rendered in the Postal Telegraph Company's case. With great respect for the Indiana supreme court, it is submitted that none of the cases cited sustains its declaration of principles. They all deal with the rights of individual persons or corporations to residence or business telephones, and not with the rights of one telephone company to use the telephone system of another. The result is, the declaration is not authoritative evidence of the common law.

The declaration contained in the Cadwallader Case was expressly disapproved in the case of *Home Teleph. Co. v. People's Teleph. & Telegr. Co.* 125 Tenn. 270, 43 L.R.A. (N.S.) 550, 141 S. W. 845. In the opinion it was said: "The case just referred to correctly holds, as we understand the law, that each telephone company, under the common law, is independent of all other telephone companies save for the duty to receive and forward to any point

on its line messages received from such other company or companies, and hence that it is not bound to accord to any such outside organization or its patrons connection with its switchboard on an equality with its own patrons; that such connection is a privilege to be accorded only as the result of contract, or in obedience to a statute. We concur in the reasoning that an opposite rule would soon result in the practical confiscation of the larger plants having long-distance lines, since the motive would be insistent and irresistible in small companies organized for the purpose, or depleted and run-down companies, to demand such connection; the maintenance of the long lines being without expense to them. But we are unable to agree with the supreme court of Indiana that, if a contract for such connection be once made without the specification of any time for it to run, this connection cannot thereafter be severed without the joint concurrence of the companies so in combination; nor are we able to see how the exercise of the right of contract to effect such a joint traffic arrangement between two companies can confer any right upon other companies, not parties to the contract, to a participation in its benefits. Such a rule, while in terms asserting the independent right of contract, denies its existence in fact." 125 Tenn. 283.

In the case of *Home Teleph. Co. v. Granby & N. Teleph. Co.* 147 Mo. App. 216, 126 S. W. 773, the court followed the decision in the Cadwallader Case. The presiding judge filed a dissenting opinion, in which he made the discriminations indicated by the following quotations:

"Fairness and equality to all, favors or special privileges in the conduct of the business as a public business to none, is the life of the law. This is very far from letting another in the same line of business into a participation in that business, even if the owner, by his voluntary act, has chosen to let in some other. It is the public who is under the pro-

tection of the law and the courts. Neither is concerned in promoting the interests of one corporation as against another. . . .

"The trouble with the opinion of my learned brother, in my judgment, is that two ideas are confused: One, the right of all the public to enjoy equal privileges with everyone else of the public in the use of telephone service over defendant's line; the other, the right of the defendant, notwithstanding its contract with plaintiff, to allow another company, engaged in the same business, the same rights granted plaintiff; in short, the right to become a part of its system." 147 Mo. App. 248, 249.

The supreme court of the state of Missouri, in an identical case, overruled the court of appeals, and held that the dissenting opinion stated the law. *Home Teleph. Co. v. Sarcoxie Light & Teleph. Co.* 236 Mo. 114, 36 L.R.A. (N.S.) 124, 139 S. W. 108. The substance of the decision may be indicated as follows: In the absence of statute or contract, the relation of telephone company A to telephone company B in respect to service is simply that of an individual of the general public. Telephone company B may extend its field of operations by making a contract with telephone company C, whereby their systems are connected. This having been done, the relation of telephone company A to the connected systems is that of an individual of the general public. The public service has been extended, but the private right of the individual has not been enlarged, and company A has no more right to appropriate the joint facilities of companies B and C to the extension of its own system than it had to connect with company B's system before the contract was made. After citing the statute of the state of Missouri regarding sufficient facilities for the despatch of public business, and prompt and impartial service on demand or tender of usual charges, the court said:

"This section does not require

physical connection between telephone lines. It does require such company to receive all messages from other telephone or telegraph lines, and transmit them, as it likewise requires it to receive all messages from individuals. This does not mean that such corporation must yield to a physical connection with its lines by a competitive company, and permit the use thereof in that way. In such case, and under this statute, the telephone corporation or the telegraph corporation has no greater right than the individual. If the individual goes to the office of the telephone company and tenders payment for a message, the company must accommodate him. So, too, if a telegraph company or other telephone company goes in the capacity of an individual or corporate entity and demands a similar service, it must be rendered. But this does not mean that the telephone company must put up a switchboard for all such individuals or corporations desiring to do business with the telephone company. . . .

"The theory of the case at bar is that under the law the Sarcoxie Company was compelled to grant physical connection to the Bell Company, because it had arranged for such connection with a competitor of the Bell Company. Under the railway cases cited supra, this contention is not well founded." 236 Mo. 133, 138.

In the case of *Pacific Teleph. & Teleg. Co. v. Anderson*, 196 Fed. 699, Rudkin, Dist. J., after referring to the *Cadwallader Case*, said:

"Where a public service corporation enters into private contracts with others in furtherance of its business, I find no warrant for holding that its public duties are in all cases extended to the full scope of the private contract. . . .

"It is a common practice among railroads to permit other companies to operate trains over their lines on terms agreed upon between them; but it has never been held or intimated that by such an act a com-

pany loses all control over its property, or obligates itself to grant similar privileges to every other company that may apply therefor. Any such rule would wrest from the proper officers of the corporation the power to manage and control its affairs, and would be destructive of private property rights.

"The defendant companies had, therefore, no right to demand a physical connection with the Anderson line simply because that right had been accorded to another, and they certainly have no such rights under the statute of this state, for that statute vests the power and discretion to direct physical connection in the public service commission." Pages 703, 705.

In the case of *Union Trust & Sav. Bank v. Kinloch Long Distance Teleph. Co.* 258 Ill. 202, 45 L.R.A. (N.S.) 465, 101 N. E. 535, Ann. Cas. 1914B, 258, the court had under consideration a contract for exclusive telephone connection. In the opinion it was said: "Without the contract the telephone company would be at liberty to contract with both the Kinloch and Bell systems for long-distance connections. . . . Such service, however desirable, is now impossible. It will continue to be impossible unless contracts can be made with both long-distance companies. These contracts cannot be compelled, but none of the corporations can by any contract deprive themselves of the power to make them. It may be that the telephone company cannot be compelled to give long-distance service, or to connect its exchange with any other system, or, having connected with one system, to permit a connection with another. It may decline to undertake any service which cannot be begun and completed over its own lines. If it does undertake such service, it may select its own lines, and it may confine itself to one agent, but it may not bind itself to do so and contract away its right and power to use more than one agency." 258 Ill. 209.

This case is erroneously cited in

Jones on Telegraph & Telephone Companies, page 364, note 113, as sustaining the particular doctrine of the *Cadwallader Case* under discussion.

In the case of *People ex rel. Cairo Teleph. Co. v. Western U. Teleg Co.* 166 Ill. 15, 36 L.R.A. 637, 46 N. E. 731, the syllabus reads: "The fact that a telegraph company has an arrangement with one telephone company whereby verbal messages are transmitted and received over the telephone line does not operate as a waiver of its right to refuse verbal messages over the line of another telephone company." 166 Ill. 15.

In the opinion it was said: "The only serious question is whether the fact that the defendant has waived its rights in that respect as to the other telephone company requires a like waiver on its part as to the relator, and we do not think that it does. It may be willing to assume risks with another telephone company of whose responsibility it may be satisfied, which it would not be willing to assume with the relator for proper and sufficient reasons. Such arrangements are founded entirely upon the agreements of parties, and defendant is not bound to admit every other corporation into a like arrangement. This has been the rule as to carriers." 166 Ill. 21.

These cases are sufficient to show substantial grounds of opposition to the views expressed in the *Cadwallader Case*. It may be conceded they are not, in strictness, authoritative upon the precise question under consideration, but they are quite as much so as the decision in the *Cadwallader Case*, to the force of which nothing has been contributed by any of the courts which have approved it.

Some of the courts which favor the doctrine of the *Cadwallader Case* deny the analogy between physical connection of telephone systems and physical connection of railroad systems, in order to defeat the argument against connection, founded on the railroad cases so frequently referred to. It is said that railroad

connection involves much more complicated relations, the things transported are essentially different—electric undulations in one case, and physical objects in the other—and in the case of telephone systems the communicants at each end of the telephone wire do the transmitting. In the case of *United States Teleph. Co. v. Central U. Teleph. Co.* (C. C.) 171 Fed. 130, it was said: "When it is said that a long-distance telephone company has no right to compel a connection with a local telephone exchange belonging to another company (which, of course, must be done, if at all, on reasonable and fair terms to the local company), for the same reason that one railroad company cannot be permitted to run its engines and cars loaded with its freight on the lines of another railroad company, no account is taken of the fact that the law as applied to railroad companies is a law arising out of convenience and necessity; for it would be physically impossible and unsafe for one railroad company to be permitted to run its cars and engines, except with the consent of the other company, over another company's lines. This is an obvious fact." Page 143.

If joint operation be in fact physically possible and safe and for the public benefit, it does not make much difference how the arrangement comes into existence. The Rock Island Railroad Company has no track between Topeka, Kansas, and Kansas City, Missouri. It operates trains over the tracks of the Union Pacific Railroad Company, under a contract, just as the United Company forwards its messages from Clay Center, Kansas, to Kansas City, Missouri, over the line of the Bell Company, under contract. If the officials of the two railroads were able to make a contract which renders this operation of trains possible and safe; it is conceivable a court or industrial commission, with the aid of experts, might frame an order in the terms of the contract. In the case of telephone companies, as in the case of railroad companies, there

are physical connection and use of physical property, maintenance of structures and way, operation, and accounting; and equality of right may not be denied on the ground of mere inconvenience arising from bigness and complexity of the business. The rural subscriber at his telephone on a fence post and iron-wire line, talking to his mail-order house over long distance, obstructs traffic as one freight train obstructs passage of another. Under the proposed theory, as fast as new telephone companies multiply and demand admission, the United Company must add to its switchboard, and the Bell Company must enlarge and improve its facilities. The Union Pacific Company can do the same thing. Every element on which right depends is as fully present in one kind of case as in the other; and if, as a matter of law, a telephone company, by admitting another to its switchboard under contract, dedicates that switchboard to general use by all who may apply, there is good reason to say the Union Pacific—simply another public utility for purposes of communication—dedicated its track to general use by its contract with the Rock Island Company. On the other hand, if it be the law that the Union Pacific Company waived nothing but its right to exclude the Rock Island Company from use of its tracks and other facilities, the same rule should govern the relation of the parties to this suit.

It will be observed the court has not quoted from the decisions in the railroad cases, and the subject may be considered on principle, independently of those decisions.

Telephone companies which engage in the business of furnishing telephones or facilities for telephone communication must serve the general public, within the field occupied, without discrimination. Individuals, whether persons or corporations, who desire telephones in their residences or places of business, or who desire to use telephone facilities, are members of the general public in

that respect, and on the same footing.

Let it be assumed, for the purpose of analysis, that the United Company established an exchange at Clay Center. Anyone who desires a telephone is entitled to have one. Let it be assumed that the Co-operative Company then established an exchange in Clay Center. Anyone who desires a telephone of this company is entitled to have one; and each company is entitled to a telephone of the other, should it so desire. That service satisfies the public duty of each company. Patrons of the United Company have no right as individuals, or in the name of the public interest, to demand that the United Company furnish them with means of communication with patrons of the Co-operative group who do not patronize the United Company. Patrons of the Co-operative Company are in the same situation. Without a statute, facilities for communications between the two groups of patrons cannot be compelled.

Let it be assumed that neither company has toll-line communication with Kansas City, Missouri. Patrons of neither company can demand, as individuals or in the name of the public interest, that facilities for such communication be supplied. Afterwards the United Company builds a toll line to Kansas City. Patrons of the Co-operative Company have no right to that service, except as they take a United Company telephone or go to one of its booths, and have no right to demand that the Co-operative Company build a line to Kansas City. Local relations between the two groups of patrons remain as they were before the toll line was constructed.

Instead of building a toll line to Kansas City, the United Company buys one already built by the Bell Company. The situation is the same as if the United Company had built it. Instead of buying the line, the United Company enters into a con-

tract with the Bell Company whereby both companies use it, and divide tolls on a satisfactory basis. The relation of the group of the public served by the Co-operative Company, to the United Company and its toll-line connection, is the same as if the United Company owned the toll line. Patrons of the Co-operative Company can subscribe for a United Company telephone, or go to its booths. Members of the public in Topeka and Kansas City who desire to communicate with Clay Center have a toll line to that place, and have at their disposal a local exchange serving the public—the exchange of the United Company.

The Co-operative Company extends lines into the country, and establishes a system of rural telephones. The rural patrons of the Co-operative Company stand on the same footing as the city patrons of that company, so far as right of access to the United Company's facilities is concerned. Besides that, those patrons have no right to call on the United Company for a class of service which it does not profess to give. It has dedicated its capital and facilities to no service beyond the Clay Center city exchange and the toll-line connection with Kansas City.

The Co-operative Company buys the Idana exchange, and connects it with the Clay Center exchange. The relation of patrons of the Idana exchange to the United Company's exchange and toll line is precisely the same as that of the Co-operative Company's rural patrons.

The United Company extends its line northward to connect with exchanges at Morganville, Clyde, and Concordia. Nobody can complain because it did not choose to make southerly connections with Broughton, Wakefield, and Junction City.

These illustrations are sufficient to develop the subject. The result is that by building or buying a line to Kansas City, or by contracting for a line to Kansas City, the United

Company has made no classification of telephone users, and has discriminated against no group of telephone users whatever; and no telephone user, or group of telephone users, has any lawful ground for complaint. The patrons of one telephone system must go to the legislature to obtain authority to compel another telephone system to serve them.

The Bell Company might have stopped its toll line at Topeka. If it had done so, Clay Center could not have complained of unjust classification or discrimination. No community beyond Clay Center can complain because the toll line stopped there. At Clay Center the Bell Company furnishes toll service to Kansas City to all telephone users who may apply, and, by virtue of its connection with the United Company, furnishes exchange service to all telephone users who may apply. It has made no classification of telephone users, and has not discriminated against any telephone users.

So much for those individuals and groups of individuals for whose benefit telephone service is instituted and maintained. What about the relations of telephone companies organized to institute and maintain such service, among themselves?

No amount of refinement on the nature of telephone communication and telephone service can disguise the fact that what the plaintiff seeks, and what any third company seeks, is use of the property, organization, and fruits of enterprise of the parties to the contract. The court is perfectly willing to say that by their contract the United Company and the Bell Company waived the independence they possessed before the contract was made. They cannot refuse to each other the service secured by the contract. The court is not able, however, to add to the ex-

tent of the waiver disclosed by the contract. To do so is to go beyond the intention of the parties and the factual results of the contract. To declare that the contract operates as a general waiver for the benefit of companies not parties to it is not to declare a fact, or inference of fact, at all. It is to attach a legal consequence. This legal consequence is not attached by way of applying well-understood principles of law to a novel state of facts. The state of facts is of a common kind, and the legal consequence is attached by application of a new rule of law of tremendous importance, special in its nature, and made out of whole cloth, which is legislation, and not adjudication.

Public service
commission—
right of con-
nection.

There is no rule or presumption of common law that any third company ought to participate in the joinder of two others. No doubt there are telephone lines, and exchanges which ought to be united. No doubt there are instances in which exchanges are formed for the sole purpose of pirating upon other systems. Each case of proposed physical connection must be considered on its merits, and the subject of compelling involuntary physical connection between different telephone systems cannot be dealt with except by some agency acting under special legislative authority.

The decision is, the plaintiff has no remedy by virtue of § 12 of the Act of 1920, no remedy by appeal according to the Code of Civil Procedure, and whatever right it may have by virtue of the Public Utilities Act should be vindicated by invoking the remedies there provided. The plaintiff has no common-law right on which to predicate the proceeding. Therefore the appeal is dismissed, and the writ of mandamus is denied.

ANNOTATION.

Right and duty of telephone companies to make physical connection of exchanges or lines.

I. At common law, 1204.

II. By contract:

- a. Validity of contract, 1205.
- b. Effect of contract as waiver of common-law right to refuse connection, 1208.
- c. Right to terminate contract, 1209.
- d. Enforcement of contract, 1210.

I. At common law.

The courts are agreed that at common law telephone companies, although public utilities and exercising public functions which render them amenable to regulation and control, are not subject to control and regulation to the extent of being under the duty of making physical connection with another company, in the absence of any statute requiring such physical connection. *Pacific Teleph. & Teleg. Co. v. Anderson* (1912) 196 Fed. 699; *Union Trust & Sav. Bank v. Kinloch Long Distance Teleph. Co.* (1913) 258 Ill. 202, 45 L.R.A.(N.S.) 465, 101 N. E. 535, Ann. Cas. 1914B, 258; *State ex rel. Goodwine v. Cadwallader* (1909) 172 Ind. 619, 87 N. E. 644, 89 N. E. 319; *CLAY COUNTY CO-OP. TELEPH. ASSO. v. SOUTHWESTERN BELL TELEPH. Co.* (reported herewith) ante, 1193; *Home Teleph. Co. v. People's Teleph. & Teleg. Co.* (1911) 125 Tenn. 270, 48 L.R.A.(N.S.) 550, 141 S. W. 845. This rule is also, in effect, recognized in the majority of the cases referred to in this note.

In *Pacific Teleph. & Teleg. Co. v. Anderson* (Fed.) supra, the court said that at common law each telephone company is independent of all other telephone companies, save for the duty to receive and forward to any point on its lines messages received from such other company or companies; and hence it is not bound to afford to any outside organization, or patron, connections with its switchboard on an equality with its own patrons; such connection is a privilege to be accorded only as a result of private contract, or in obedience to some constitutional or statutory provision.

III. Statute:

a. Constitutionality of:

1. In general, 1212.
2. As an exercise of the power of eminent domain, 1213.
3. Enforcement under statute, 1217.

And in *Union Trust & Sav. Bank v. Kinloch Long Distance Teleph. Co.* (1913) 258 Ill. 202, 45 L.R.A.(N.S.) 465, 101 N. E. 535, Ann. Cas. 1914B, 258, the court said that, while a general interchange of business among different telephone companies covering the same territory would be beneficial to the public, yet this cannot be compelled.

So, in *State ex rel. Goodwine v. Cadwallader* (1909) 172 Ind. 619, 87 N. E. 644, 89 N. E. 319, supra, the court pointed out that the duty of a telephone company, upon compliance with its reasonable rules and regulations and the payment of the compensation charged therefor, to transmit messages submitted to it for transmission, is a very different thing, in the absence of contract, from the demand that a physical connection shall be maintained, involuntarily and as of right, when, from the character of the business, the control of the plant and system of the company would be in a measure wrested from it, and subjected to the administration of another, or many others; and it is said that the private right of property and of contract may not be thus interfered with. The court remarked, however, that it was treating now only of the relation of these quasi public utilities, where there was no statutory regulation, and no contractual relation, express or implied.

In *Home Teleph. Co. v. People's Teleph. & Teleg. Co.* (Tenn.) supra, the court on this point said that telephone and telegraph companies are common carriers of intelligence, and must give the same service at the same terms to all who apply therefor, with-

out partiality or unreasonable discrimination; but this rule does not require a telephone company to permit another telephone company to make a physical connection with its lines for the purpose of using them as its own subscribers use them. "There is a wide difference between a telephone company's transmitting to any point on its line, equally and indiscriminately, the messages of all companies that offer them and are willing to pay the same fare for the same service, and admitting such outside companies or their patrons to the same use of its lines as its own patrons are entitled to."

II. *By contract.*

a. Validity of contract.

By the weight of authority telephone companies may lawfully contract with each other for the physical connection of their lines, and these contracts are not rendered invalid by the fact that they provide for exclusive physical connection. *Gravel Switch & L. S. Teleph. Co. v. Lebanon, L. & L. Teleph. Co.* (1910) 139 Ky. 151, 129 S. W. 559, modified in (1910) 139 Ky. 827, 132 S. W. 424; *Cumberland Teleph. & Teleg. Co. v. State* (1911) 100 Miss. 102, 39 L.R.A.(N.S.) 277, 54 So. 670; *Home Teleph. Co. v. Sarcoxie Light & Teleph. Co.* (1911) 236 Mo. 114, 36 L.R.A.(N.S.) 124, 139 S. W. 108; *Wayne-Monroe Teleph. Co. v. Ontario Teleph. Co.* (1908) 60 Misc. 435, 112 N. Y. Supp. 424; *United States Teleph. Co. v. Middlepoint Home Teleph. Co.* (1908) 7 Ohio N. P. N. S. 425, 19 Ohio S. & C. P. Dec. 202.

The validity of contracts for physical connection between telephone companies is also recognized in the following cases, which, however, passed upon some point with reference to the termination of the contract, or the enforcement thereof:

United States. — *Pacific Teleph. & Teleg. Co. v. Anderson* (1912) 196 Fed. 699; *Memphis Teleph. Co. v. Cumberland Teleph. & Teleg. Co.* (1916) 146 C. C. A. 31, 231 Fed. 835.

Indiana.—*State ex rel. Goodwine v.*

Cadwallader (1909) 172 Ind. 619, 87 N. E. 644, 89 N. E. 319.

Iowa.—*Dumont v. Peet* (1911) 152 Iowa, 524, 132 N. W. 955.

Kentucky.—*Campbellsville Teleph. Co. v. Lebanon, L. & L. Teleph. Co.* (1904) 118 Ky. 277, 80 S. W. 1114, 84 S. W. 518.

Michigan.—*Oceana Farmers' Mut. Teleph. Co. v. United Home Teleph. Co.* (1919) 205 Mich. 662, P.U.R.1919E, 40, 172 N. W. 553.

Missouri. — *Home Teleph. Co. v. Sarcoxie Light & Teleph. Co.* (1911) 236 Mo. 114, 36 L.R.A.(N.S.) 124, 139 S. W. 108.

North Carolina. — *Clinton-Dunn Teleph. Co. v. Carolina Teleph. & Teleg. Co.* (1912) 159 N. C. 9, 74 S. E. 636.

Tennessee. — *Home Teleph. Co. v. People's Teleph. & Teleg. Co.* (1911) 125 Tenn. 270, 43 L.R.A.(N.S.) 550, 141 S. W. 845.

Washington.—*State ex rel. Public Serv. Commission v. Skagit River Teleph. & Teleg. Co.* (1915) 85 Wash. 29, P.U.R.1915C, 902, 147 Pac. 885.

Thus, in *Gravel Switch & L. S. Teleph. Co. v. Lebanon, L. & L. Teleph. Co.* (1910) 139 Ky. 151, 129 S. W. 559, modified in (1910) 139 Ky. 827, 132 S. W. 424, a contract between a long-distance telephone company and a telephone company having a local exchange, for the physical connection of their lines, was sustained and damages were awarded for breach of the contract by the local exchange in terminating it.

And in *Cumberland Teleph. & Teleg. Co. v. State* (1911) 100 Miss. 102, 39 L.R.A.(N.S.) 277, 54 So. 670, it was held that a contract between two telephone companies, one doing a long-distance business and the other a local exchange business, for exclusive physical connection of their systems at the place where the local exchange is conducted, was not violative of the Anti-monopoly or Anti-trust Laws of Mississippi.

So, in *Wayne-Monroe Teleph. Co. v. Ontario Teleph. Co.* (1908) 60 Misc. 435, 112 N. Y. Supp. 424, a contract was held not invalid as an unlawful restraint of trade, where it provided

for the physical connection by two noncompeting telephone companies which occupied different territories, but desired to secure in this manner connection in each other's territory. The facts that they agreed to connect their lines by building an extension to a certain point, and then operate their lines over such territory in unison, and that they further provided that neither company should compete with the other in the telephone business, or take subscribers in the territory of companies with which the other had contractual relations, or contract with any other company so as to impair the privileges secured by the contract, were held not sufficient to render it invalid as in restraint of trade, since this provision was only incident to the main purpose, which was to extend the lines of the company.

In *United States Teleph. Co. v. Middlepoint Home Teleph. Co.* (1908) 7 Ohio N. P. N. S. 425, 19 Ohio S. & C. P. Dec. 202, holding that a contract for physical connection and exclusive service between a long-distance telephone company and a company having a local exchange system is not in restraint of trade and invalid, the court said that whether the contract was one which tends to create a monopoly, and for such reason is void, depends upon the facts. "An agreement," said the court, "may be void because of its tendency to create monopoly, when applied to certain classes of business, and be quite the contrary when applied to the telephone enterprise. Some combination of telephone exchanges and of telephone lines is absolutely necessary to a proper enjoyment thereof by the public. . . . The Middlepoint Company was organized for a purpose quite different from that of the plaintiff. The defendant was organized for the purpose of acquiring, constructing, owning, and operating a telephone exchange in the village of Middlepoint, Ohio, and to supply telephone service to people in Middlepoint and vicinity. The plaintiff and defendant were not competitors; the nature of their business made them natural and necessary co-operators—the one providing local service

to its subscribers, while the other provided toll and long-distance service for said exchange, which otherwise would have been isolated, and thus brought all the subscribers into communication with the subscribers of all other independent exchanges. The merger or combination, if such it may be termed, was natural, for it was a matter of necessity to both companies, and of unquestioned benefit to the public. When the defendant by said contract procured the benefits and advantages of toll service for its subscribers, it went further than it was required to go to discharge its full duty under the terms of its charter. There was no legal obligation resting upon the defendant to do more than conduct a local exchange. It is also clear that the defendant could not be compelled to make such connections with the plaintiff or with any other company, nor could the defendant require any toll company to connect with its switchboard and furnish its subscribers long-distance service. The defendant was not required to transmit messages beyond its own lines, but it may do so and by such lines as it chooses, and when an exclusive contract is made with such company, it cannot be correctly stated that such contract is in the restraint of trade. The evidence is convincing that such contracts have not stifled competition, nor is that their tendency."

Upon this point in *Home Teleph. Co. v. Sarcoxie Light & Teleph. Co.* (1911) 236 Mo. 114, 36 L.R.A. (N.S.) 124, 139 S. W. 108, the court said that the joining of two telephone lines operating in different fields does not create a monopoly, or stifle competition; such action only broadens the use of both lines; if the two contracting lines occupied the same field, and were therefore competitive lines, a very different question might be presented. "To our mind the purpose of this contract was to make one continuous system of the lines owned, controlled, and connected with the two contracting corporations. This continuous system to be by physical connection of the several lines through switchboards. The contract contemplates lines operating or being

operated in different fields. If this be so, then there is no monopoly, either at common law or under the statute. If this be so, then such combined line constituted one competitive line for long-distance business, and in that line of business could not be said to be a monopoly. Other competitive lines could be formed or built. And in this case, under the allegations of the petition, which on demurrer are taken to be true, there was a competitive line in the Bell Company. In local business there could be no monopoly, because, prior to the contract, the corporations operated in different fields, . . . and the contract simply increased the usefulness of each, so far as the general public was concerned. So, therefore, upon that part of the contract which provides for the joining of these lines and those connected and controlled by them, we feel constrained to hold the contract valid."

But in *United States Teleph. Co. v. Central U. Teleph. Co.* (1913) 122 C. C. A. 86, 202 Fed. 66, writ of certiorari denied in (1913) 229 U. S. 620, 57 L. ed. 1354, 33 Sup. Ct. Rep. 1049, it is held that a contract between a telephone company having a local exchange and another company having a long-distance system, by which the former gives to the latter the exclusive long-distance business within the territory covered by the former company, is violative of public policy and invalid. The court said that "the prima facie restrictive character and monopolistic tendency of the contracts in question can hardly be denied. The local company has tied up its long-distance business. It cannot take general advantage of competition from time to time arising, no matter how advantageous to it or its patrons, and it cannot expand its own business and extend its own lines beyond its then-existing limits into competition with the long-distance company, no matter how advisable such extension and competition might prove to be. This is from the standpoint of the local exchange, but similar results are apparent from the other standpoint. The long-distance company not only forestalls competition likely to arise

through the extension of the local company's lines, but by its system of these contracts there is a direct plan and effort to monopolize in the long-distance business so much of the field as it could cover. A general system of contracts may be obnoxious to an Anti-trust Law, though the individual contract would not be."

To similar effect is *Union Trust & Sav. Bank v. Kinloch Long-Distance Teleph. Co.* (1913) 258 Ill. 202, 45 L.R.A.(N.S.) 465, 101 N. E. 535, Ann. Cas. 1914B, 258, wherein the court said: "The object of telephone systems is to enable individuals to talk to one another at distances too great for ordinary conversation. A line connecting two cities with a single instrument at each end would be of comparatively little use. It is the possibility of connection with a large number of instruments that gives usefulness to the system. The use of the telephone has come to be quite generally regarded, not as a luxury or convenience, but a necessity, and it is essential to the greatest public convenience that all users of telephones should be able to secure, as nearly as possible, direct connection with all other users. This perfection of service is not now possible, but a telephone company is avoiding the performance of its duty to the public when it contracts to restrict its field of operations to communications to and from the patrons of one long-distance line. Any contract thus to deprive itself of the power to render to the public that service which it was incorporated to give, is violative of the public rights. . . . If neither of the long-distance companies at Vandalia would contract with a telephone company for long-distance service without an exclusive clause in the contract, the latter had still the right to construct its own long-distance lines, and the long-distance companies the right to establish local exchanges. The general interchange of business among all the companies would be more beneficial to the public. While this cannot be compelled, it cannot be said that competition would be increased by the combination of two of

the systems, through an exclusive contract for the interchange of business "

So, in *Home Teleph. Co. v. Granby & N. Teleph. Co.* (1910) 147 Mo. App. 216, 126 S. W. 773, it is held that a contract between two telephone companies for exclusive physical connection of their lines at points where they have respectively established exchanges, which contains a provision that each company shall use the lines of the other exclusively to reach the point where such exchanges are established, and shall not make physical connection with any other company having competing exchanges at such places, is invalid to the extent that, where one of the contracting companies permits the physical connection of its lines with the lines of a third company having competing exchanges with the other party to the contract, the latter company is not entitled to restrain a breach of the contract. The decision is based in part upon the language of a statute of Missouri, which provides in effect that if any two or more corporations, engaged in buying or selling any commodity, convenience, or any article or thing whatsoever, shall enter into any agreement or understanding to limit competition in such trade by refusing to buy from or sell to any other person or corporation any such article or thing aforesaid, for the reason that such other person or corporation was not a member of or a party to such combination, confederation, association, or understanding, it shall be in violation of this article. As to the validity of such contracts, in view of this statute, the court said that "in performing this duty in respect to a message not routed by the sender, by delivering to and forwarding a message over a connecting line, the initial carrier assumes the attitude of a purchaser of the convenience or commodity of telephone service from the connecting carrier to transmit the message to destination. And identically as the initial carrier of the message becomes the purchaser of the service of the connecting company to complete the transmission, so the connecting company becomes the seller of its service to the end of

transmitting the message over its own lines. Thus viewed, it is obvious that the two telephone companies are engaged to some extent in buying and selling telephone service from and to each other. At any rate, the contract contemplates a situation where such should be the case. The contract provides, in other portions, how the connecting carrier is to be paid for such services by accepting from the initial carrier such percentage of the compensation collected as accords with the relative number of miles the message is transmitted over its lines, as compared with those of the other company. . . . In this view, it is certainly proper to treat telephone service as a convenience or commodity being bought and sold between those companies." Compare with *Home Teleph. Co. v. Sarcoxie Light & Teleph. Co.* (1911) 236 Mo. 114, 36 L.R.A. (N.S.) 124, 139 S. W. 108, *supra*.

b. Effect of contract as waiver of common-law right to refuse connection.

It is pointed out in *State ex rel. Goodwine v. Cadwallader* (1909) 172 Ind. 619, 87 N. E. 644, 89 N. E. 319, *supra*, that where there is a contract between two telephone companies for physical connection, and the connection is made, the public acquires an interest in its continuance, and hence the act of the parties in making the connection is equivalent to the declaration of a purpose to waive the primary right of independence, and imposes upon the property a public status. The court said: "Having elected to furnish direct physical connection between, and immediate communication with and for, other exchanges and their patrons through his exchange in West Lebanon, appellee cannot exclude a like service to an exchange in the same town, for the reason that he is compelled to treat all of the same class alike, and there can . . . be no rational ground for excluding one exchange when others are admitted. The act of admitting the connection alleged is equivalent to a declaration that all will be admitted to the connection, on the terms and conditions imposed as to

one or more. . . . Not only the patrons of relator, but those of appellee and the public at large, have an interest in the matter. Appellee could have refused to connect his plant and to furnish direct or immediate service to relator's patrons and to other exchanges and their patrons, but did not so refuse, but he and they opened their exchanges to all applicants."

And in *State ex rel. Public Serv. Commission v. Skagit River Teleph. & Teleg. Co.* (1915) 85 Wash. 29, P.U.R. 1915C, 902, 147 Pac. 885, the court on the same subject said: "When one telephone company has opened its lines to physical connection and services for another telephone company upon certain terms, it can be required, as a state regulation within the police power, to afford the same facilities, conveniences, and uses to another or other telephone companies upon equal terms. It is not open to the Skagit Company to allege that the independent company is a competitive company, for, as to it, the independent company is only a connecting or extending company. It is not open to the Pacific Company to object on the ground that the Independent Company is a competitor, for the connection between the Independent and the Skagit companies is not a connection between competing lines. Furthermore, the Pacific Company itself, having no right under its contract to a monopolistic use of the Skagit Company's line, has no other or different right than the Independent Company has to connect with the Skagit Company's line." And see *Jamp Rincon Resort Co. v. Eshleman* (Cal.) *infra*, III. a, 2.

But it has been held that the mere fact that one telephone company contracts with another telephone company for a physical connection does not obligate it, by the common law, to grant the same privilege to any other individual or company on the same terms and conditions. *Pacific Teleph. & Teleg. Co. v. Anderson* (1912) 196 Fed. 699.

In *Home Teleph. Co. v. People's Teleph. & Teleg. Co.* (1911) 125 Tenn. 70, 43 L.R.A.(N.S.) 550, 141 S. W. 845, it is held that a statute requiring tele-

phone companies to supply all applicants for a telephone connection with facilities without discrimination, including those engaged in the same business, does not require one telephone company to permit a physical connection of its switchboard with the lines of another company for through business, although it permits such connection to some companies.

In *Home Teleph. Co. v. Sarcoux Light & Teleph. Co.* (1911) 236 Mo. 114, 36 L.R.A.(N.S.) 124, 139 S. W. 108, reversing a judgment sustaining a demurrer to a complaint in an action to enjoin a telephone company from violating its contract with another company for exclusive connection of their lines at a certain point, the court assumed that the vital question presented was whether, where a local telephone company, desiring to extend its usefulness toward the public, makes a contract for exclusive connection for a long-distance service, every other telephone line can compel physical connection with such local company. In answering this question in the negative, it is held that the question was not affected by a statute requiring telephone companies to receive messages from and for other lines, and, upon payment or tender of the usual charges, to transmit the same. But see decision of appellate court in *Home Teleph. Co. v. Granby & N. Teleph. Co.* (1910) 147 Mo. App. 216, 126 S. W. 773, *supra*.

In the reported case (*CLAY COUNTY CO-OP. TELEPH. ASSO. v. SOUTHWESTERN BELL TELEPH. Co. ante*, 1193) it is held that the fact that telephone companies connect their systems, and give each other telephone service over their lines, gives no common-law right to another company, not a party to the contract, also to connect or have connected its system of lines and exchanges with the same switchboard, on equal terms.

c. Right to terminate contract.

In *Clinton-Dunn Teleph. Co. v. Carolina Teleph. & Teleg. Co.* (1912) 159 N. C. 9, 74 S. E. 636, it is held that where physical connection is made between the systems of two telephone

companies by virtue of a contract which has no provision for its termination, except under certain circumstances, a successor of one of the companies is not privileged to terminate the contract, although carrying out the same has become burdensome owing to the increased territory covered by this company. It is, however, held that, under these circumstances, that part of the contract relative to rates to be charged may be abrogated, and the court may, after inquiry into the matter, fix new rates which shall be reasonable under the circumstances.

The doctrine is asserted in the case just cited that when such physical connection has been voluntarily made under fair and reasonable arrangement, and the continuous line is patronized and established as a great public convenience, such connection should not, in breach of the agreement, be severed by one of the parties. As to the question of rates to be charged, the court said that if, under conditions developed in the reasonable and ordinary exercise and performance of the defendant's duties under its charter, the rates agreed upon between these contracting parties are of a character that discriminates among defendant's patrons receiving like service under like conditions, or they are so unreasonable and burdensome as to render defendant's company unable properly to perform the duties incumbent under its charter, the agreement, to that extent, must be annulled and the parties allowed to continue the service under such reasonable rates as they may further agree upon, or which may be sanctioned and approved by the supervising agency established by law for the purpose. See also *Camp Rincon Resort Co. v. Eshleman* (1916) 172 Cal. 561, P.U.R.1916E, 418, 158 Pac. 186, *infra*, III. a, 2,

But in *Memphis Teleph. Co. v. Cumberland Teleph. & Teleg. Co.* (1916) 146 C. C. A. 31, 231 Fed. 835, it is held that where no state statute requires a physical connection between telephone companies, and the contract for connection is indefinite as to time, either company may sever physical connection at any time without rendering it-

self liable in tort to the other company for so doing.

In *Dumont v. Peet* (1911) 152 Iowa, 524, 132 N. W. 955, it appeared that two telephone associations agreed to connect their lines temporarily with the understanding that the agreement might be revoked at any time by either party; subsequently one of the parties revoked the agreement and disconnected its lines, whereupon the connection was again made by the other party. Upon appeal to equity for an injunction to restrain the continuance of such connection, the court issued the injunction as prayed.

In *Campbellsville Teleph. Co. v. Lebanon, L. & L. Teleph. Co.* (1904) 118 Ky. 277, 80 S. W. 1114, 84 S. W. 518, two telephone companies, having exchanges at two points some distance apart, agreed to construct a line between the two points and to make a physical connection of the lines at an intermediate point; no time was agreed upon for the duration of the contract. Under these circumstances it was held that the contract was to endure so long as the two companies or their successors should continue to maintain an exchange or public station at the places from which the extension line was constructed, or at the intermediate point where the connection was made.

d. Enforcement of contract.

Where a board or commission has been created by statute to determine questions relative to the physical connection of telephone companies and the service required of such companies, it would seem that such board is properly given exclusive jurisdiction to determine the question of the termination of physical connection under a contract between two companies for connection. This is the holding in *Oceana Farmers' Mut. Teleph. Co. v. United Home Teleph. Co.* (1919) 205 Mich. 662, P.U.R.1919E, 40, 172 N. W. 553. In that case it appeared that one telephone company gave notice to another company, with which it had made physical connection under a contract allowing either company to terminate the same for failure of the other

party to carry out any of the provisions of the contract, that it would terminate the contract under this clause at a specified date in the future; after some correspondence between the two companies in regard to the matter, the company seeking to terminate the contract filed a petition with the railroad commission to have the entire matter of physical connection, and the duties of the company in regard thereto, determined by that board according to the statute in such case made and provided; this petition was filed before the date set for the termination of the contract; after the filing of this petition, and before the expiration of the time set for the termination of the contract, the company objecting to the termination thereof filed a bill in equity to restrain the threatened act of the other company. Under these circumstances, it was held that equity was without jurisdiction in the matter, but that the matter was one properly to be determined by the railroad commission. The court said: "It must be borne in mind that these two telephone companies, parties to this litigation, are public utility corporations; that their properties are charged with a public interest; that the question of quality of service is one in which the public is vitally interested. One of the prime purposes served by the enactment of legislation creating boards and commissions to supervise the activities of these and similar companies was that such public interest might be safeguarded by these public boards. Upon the hearing of defendant's petition the railroad commission may make such order as the rights of the parties and the public interest require. If the plaintiff is furnishing adequate facilities to comply with the contract and to discharge its duty to the public, defendant's petition will undoubtedly be denied. If it is not, the commission may require it to furnish such facilities as will not only require it to perform the terms of its contract, but also perform its duty to the public. On the other hand, should this case run its

course, it will ultimately be determined whether defendant had ground for a forfeiture of the contract, whether plaintiff is performing its part of the contract, and is furnishing adequate facilities. If plaintiff maintains its case, a decree for specific performance will be entered. If it fails, its bill will be dismissed, defendant's forfeiture will become effective, it will be relieved of its contract obligation to perform switching service, and the public served by the two companies will be deprived of the benefit of physical connection of the properties by proceedings in which it is not a party. This situation was sought to be avoided by the creation of a railroad commission and a bestowal of broad powers upon it. I think it sufficient that we hold in the instant case, and that we should hold, that where the question involved is one of adequate service growing out of physical connection between two telephone companies, and the railroad commission had acquired jurisdiction before the institution of any proceedings in court, such jurisdiction is to exclusion of that of the courts."

And see the reported case (*CLAY COUNTY CO-OP. TELEPH. ASSO. v. SOUTHWESTERN BELL TELEPH. CO.* ante, 1193), which holds that the Public Utilities Act of Kansas gives to the court of industrial relations complete and exclusive jurisdiction over proceedings by one telephone company to require another company to make or permit a physical connection of their lines, and that mandamus to review the decision, in that regard, of a court of industrial relations, cannot be resorted to by the company whose petition for physical connection has been denied on the ground that the same is unreasonable.

In *Clinton-Dunn Teleph. Co. v. Carolina Teleph. & Teleg. Co.* (1912) 159 N. C. 9, 74 S. E. 636, it is held that either mandamus or injunction should be resorted to, to prevent one company from disconnecting its systems from that of another, where the two have been physically connected under contract.

III. Statute.

a. Constitutionality of.

1. In general.

With the exception of *Pacific Teleph. & Teleg. Co. v. Eshleman* (1913) 166 Cal. 640, 50 L.R.A.(N.S.) 652, 137 Pac. 1119, Ann. Cas. 1915C, 822, hereinafter referred to (*infra*, III. a, 2), the cases are in harmony in holding that telephone companies, by accepting a franchise for conducting their business of transmitting oral messages, render themselves amenable to control and regulation by the state, similar to that applicable to other public utility corporations; and that within the scope of such regulations and control there is vested in the state the power to compel telephone companies physically to connect their lines, where such regulation is reasonable in view of the benefit thereby accruing to the public, although some loss or inconvenience may result therefrom to the telephone companies, provision, however, being made for compensation for the use by the patrons of the one company of the line of the other company, and proper adjustment being made as to the expense of connection.

United States. — *Billings Mut. Teleph. Co. v. Rocky Mountain Bell Teleph. Co.* (1907) 155 Fed. 207; *Pacific Teleph. & Teleg. Co. v. Wright-Dickinson Hotel Co.* (1914) 214 Fed. 666.

Kansas. — *CLAY COUNTY CO-OP. TELEPH. ASSO. v. SOUTHWESTERN BELL TELEPH. CO.* (reported herewith) ante, 1193.

Michigan. — *Michigan State Teleph. Co. v. Michigan R. Commission* (1916) 193 Mich. 515, P.U.R.1917C, 355, 161 N. W. 240.

Nebraska. — *Hooper Teleph. Co. v. Nebraska Teleph. Co.* (1914) 96 Neb. 245, 147 N. W. 674.

Oklahoma. — *Pioneer Teleph. & Teleg. Co. v. State* (1913) 38 Okla. 554, 134 Pac. 398; *Pioneer Teleph. & Teleg. Co. v. State* (1914) 45 Okla. 31, 144 Pac. 1060.

South Dakota. — *Milbank v. Dakota Cent. Teleph. Co.* (1916) 37 S. D. 504, P.U.R.1916F, 562, 159 N. W. 99.

Texas. — *Southwestern Teleg. & Teleph. Co. v. State* (1912) — Tex. Civ. App. —, 150 S. W. 604, affirmed in (1918) — Tex. —, P.U.R.1919C, 56, 207 S. W. 308.

Washington. — *State ex rel. Public Serv. Commission v. Skagit River Teleph. & Teleg. Co.* (1915) 85 Wash. 29, P.U.R.1915C, 902, 147 Pac. 885 (opinion modified on another point in (1915) — Wash. —, 151 Pac. 1122).

Wisconsin. — *Wisconsin Teleph. Co. v. Railroad Commission* (1916) 162 Wis. 383, L.R.A.1916E, 748, P.U.R.1916D, 212, 156 N. W. 614.

In *Billings Mut. Teleph. Co. v. Rocky Mountain Bell Teleph. Co.* (Fed.) *supra*, in holding that it is within the power of the state to require physical connection to be made between telephone companies, the court said that the use that may be required by one company is such as is practicable by a connection like that had in the everyday service with the defendant's own connections. "This is feasible by a plan of trunking between the exchanges where the respective switch or toll boards are maintained. The defendant company would then receive the business of the plaintiff, as it now receives business coming from one of its own subscribers. Electricians of experience say that it is neither against scientific rules nor uncommon, in practical telephoning, to find one telephone plant connected with toll lines of other systems; that the matter of current is practically the same in talking on all systems; and that, if the established circuits cannot do the business, the method of taking care of increased business, or an overload, is by stringing more circuits. The operators of defendant company would have to be made use of to make such service practical; the additional service that the defendant's operators would have to perform being that of 'plugging in,' answering, and getting the connection. But, in effect, the same process is required to be used for a patron of the defendant company's exchange, so that the question is really resolved into one of detail, and is not one of practicability. It may even be that, owing to possible

differences in the switchboards of the two companies, an auxiliary apparatus will be necessary; but that is also a matter of mechanical adjustment, not unusual or at all difficult of arrangement. The right to use is the thing the law has said may be acquired. Therefore, where appropriate proceedings are instituted, as in this case, it is this right of use that is to be acquired; and the reasonable practical method by which the right may be enjoyed is use by a connection made so that the one company, by its operators, may call the operators of the other company, which must receive the long-distance business of the subscribers of the plaintiff company and care for the same very much as it would like business of its own patrons."

In *Pioneer Teleph. & Teleg. Co. v. State* (1913) 38 Okla. 554, 134 Pac. 398, the court, in sustaining the power of the state to require a long-distance telephone company to make physical connections with a local exchange system, said that a statutory requirement of this kind became a part of the charter of all corporations organized in the state. To the same effect is *Pioneer Teleph. & Teleg. Co. v. State* (1914) 45 Okla. 31, 144 Pac. 1060.

In *State ex rel. Public Serv. Commission v. Skagit River Teleph. & Teleg. Co.* (Wash.) *supra*, it is held that the state has power to require physical connection between telephone companies, under regulations which are fair, reasonable, and appropriate. The court said: "Under the settled law of the country, telephone companies are common carriers and public service corporations, and as such, when they procure their charter or license to engage in such business, they engage in a public service and do so with full knowledge that they thereby become agencies of the state, subject to its control and regulation, and under the exercise of its police power, for the comfort and convenience of the state, . . . subject to the condition that their property shall not be taken except by due process of law. When a fair and just compensation is afforded or such conveniences, facilities, and

service, the constitutional requirement is satisfied."

2. As an exercise of the power of eminent domain.

It is apparent that while the cases cited in the preceding subdivision recognize the right of the telephone company to service charges or tolls, and in some instances the right to be reimbursed for expense of making and maintaining this connection, the power of the state to compel the connection is upheld as an exercise of the power of regulation over public utilities, not as an exercise of the power of eminent domain, involving the necessity of compensating the company for the loss suffered in consequence of the connection, as distinguished from the actual cost of making or maintaining, and from its right to tolls.

On the other hand, *Pacific Teleph. & Teleg. Co. v. Eshleman* (1913) 166 Cal. 640, 50 L.R.A. (N.S.) 652, 137 Pac. 1119, Ann. Cas. 1915C, 822, *supra*, holding the statute unconstitutional, is based upon the ground that the requirement of physical connection by the two telephone companies constituted the taking of property of the companies without the exercise of the power of eminent domain, including the compensation recoverable in an action exercising such power. In this case, for the purpose of considering the constitutionality of the statute, the court assumed the reasonableness of the order, if the power existed in the commission to make it at all, the question of its reasonableness not being within the purview of the court. The statute was attacked on the ground that to compel a physical connection involved the exercise of the power of eminent domain, subject to the conditions which attach to the exercise of that power, including the right to compensation, which the statute in question did not satisfy. The commission, arguing for the possession of the power, contended that its order was referable solely to the police power of the state, and not at all to the power of eminent domain, and that this order amounted to no more than a reason-

able regulation touching the use of property held in private ownership, but devoted to public use. In denying this contention, and holding that the commission was attempting unlawfully to exercise the power of eminent domain, the court, after alluding to limitations on the police power, said: "This principle, it is to be noted, is not that the legislature, acting directly or through its authorized mandatories, may not subject property devoted by its owners to a public use, to another public use, or to the same public use by its rivals, but that the doing of this is an act referable to the power of eminent domain, and not to the police power, and that compensation must be made accordingly. Herein lies the vital distinction between the legitimate exercise of the police power, and the exercise of the power of eminent domain. In the former, uncompensated obedience to the order is imperative. In the latter, the order may not be enforced without compensation first made. And, finally, it may not be amiss to point out that the devotion to a public use by a person or a corporation, of property held by them in ownership, does not destroy their ownership, and does not vest title to the property in the public, so as to justify, under the exercise of the police power, the taking away of the management and control of the property from its owners without compensation, upon the ground that public convenience would better be served thereby, or that the owners themselves have proven false or derelict in the performance of their public duty. Any law or order seeking to do this passes beyond the ultimate limits of the police power, however vague and undefined those limits may be."

See also *Home Teleph. Co. v. People's Teleph. & Teleg. Co.* (1911) 125 Tenn. 270, 43 L.R.A.(N.S.) 550, 141 S. W. 845, holding that a statute compelling telephone companies to supply applicants for connection with equal facilities, including those engaged in the same business, does not obligate one telephone company to give to another company physical connection with its lines, although this privilege

is given to a third company. The court said that such a statute would enable one telephone company to take the property of another for public use, without compensation, and hence to deprive the latter company of its property without due process of law.

The *Eshleman Case* is distinguished in *Camp Rincon Resort Co. v. Eshleman* (1916) 172 Cal. 561, P.U.R.1916E, 418, 158 Pac. 186, which holds that a telephone line is a public utility, and where it voluntarily permits a connection to be made with another company, and it subsequently terminates the connection, the railroad commission has power and authority to order a reconnection to be made and to require a continuation of the service. The court, in referring to the *Eshleman Case*, said that it was there held that an order requiring the company to connect its lines with those of a competing company, where there had been no such connection theretofore, and the first company had not held itself out as willing to make such connection, could not be sustained. "The questions involved were so fully discussed in that case that there is no occasion here to repeat our views. It will suffice to say that the present proceeding is not within the rule of the *Pacific Teleph. & Teleg. Co. Case*, for the reason that the connection here directed to be made was merely a continuation of a service which the petitioner had voluntarily assumed."

The *Eshleman Case* first referred to was disapproved of in *Pacific Teleph. & Teleg. Co. v. Wright-Dickinson Hotel Co.* (1914) 214 Fed. 666, supra, wherein the court said it was unable to give assent to that decision. So, in *State ex rel. Public Serv. Commission v. Skagit River Teleph. & Teleg. Co.* (1915) 85 Wash. 48, P.U.R.1915C, 902, 147 Pac. 885, supra, the court said: "From a careful review of most of the decisions, we are satisfied that the decision in the *Eshleman Case* is not supported even by the decisions in the Federal jurisdictions, and is against the weight of authority." And in *Michigan State Teleph. Co. v. Michigan R. Commission* (1916) 193 Mich. 515, P.U.R.1917C, 355, 161 N. W. 240,

the court said: "With all due respect for that court [the California court], however, we find ourselves unable to agree with this conclusion as to the effect of a connection between competing lines. The business of a telephone company is to transmit oral messages from one point to another, and for that purpose every patron, whether he is a subscriber or not, has the use of its lines for the time being. That is the public use to which they are dedicated. Without physical connection each subscriber to a citizens' telephone is entitled to the same use of complainant's lines as it would have with the physical connection; the difference being that with the lines connected he can talk from his own telephone, while without the connection he would be obliged to go to a public station of complainant company."

In the Michigan case, which held that, upon the showing made, the commission properly required physical connection, the court in considering the question as to whether or not a physical connection between telephone companies constituted such an appropriation of the property of one of the telephone companies that to require it constituted the taking of property, necessitating the exercise of the right of eminent domain, said: "Complainant also claims that an enforced physical connection between its lines and those of the Citizens' Company would not be an exercise of the right of regulation, but would amount to such a taking of its property as could be justified only under the power of eminent domain and upon the payment of compensation. As the basis of this contention, it is obvious that the Citizens' Company would be given the use and control of complainant's line every time one of its subscribers talked over them by means of a connection. . . . The relations of a telephone company in this state are not simply with its own subscribers, but with the public generally, and it is forbidden by law to make any discrimination between persons. . . . Complainant would have the same control over its own lines if the Citizens' subscriber should talk from his house or office that it would

have if he should talk from one of complainant's public stations; and complainant, not the Citizens' Company, would receive compensation for the use of the lines. It would amount simply, so far as this phase of the matter is concerned, to a difference in the way messages were got to and from the Citizens' subscribers, and would be not a taking of property by eminent domain, but a regulation in the interest of the public. . . . In one sense there may be, and often is, the taking of property through the legitimate exercise of the power of regulation, and as necessarily incident thereto. In such case the company whose business is subjected to the regulation is not deprived of the title to or possession of its property, but it may be required to forego profits which it might otherwise receive; to apply its property, within the dedicated use, to some purpose contrary to its wishes; to expend its money as it would not otherwise expend it; to perform service it would not perform except for the regulation; and to submit to losses which it would prefer to avoid."

So, in *Hooper Teleph. Co. v. Nebraska Teleph. Co.* (1914) 96 Neb. 245, 147 N. W. 674, supra, in denying the contention that the act of the commission, in ordering two telephone companies to make physical connection, constituted the taking of property of one of the companies without resort to eminent domain proceedings, the court said: "It is conceded that the appellant is engaged in the carrying on of a general telephone business, and operates telephone exchanges located in various towns in the states of Nebraska, Iowa, and South Dakota; it owns and operates toll lines which connect the telephone exchanges owned by it in those states, which lines connect with toll and long-distance lines, and with telephone exchanges owned and operated by other persons and companies. It is also conceded that its toll lines can be physically connected with the lines of the Hooper Company, but its contention is that the 'result of such a connection is to at once pass to the Hooper Com-

pany as much dominion and control over the toll lines as the Nebraska Company itself possesses, and when service is given over such a connection the Hooper Company is in control, not only of the toll line, but likewise of its operation. . . . Telephone lines are operated by an electric current, and wherever the line terminates there lies the control of the entire line. But one conversation can pass over a circuit at the same time, and the minute the telephone circuit is connected with the switchboard of the Hooper Company, the switchboard becomes the end of the circuit, and it lies within the power of the Hooper Company to interfere with and control the traffic of the entire circuit all the way between Omaha and Norfolk.'” As to this latter contention the court said: “Perhaps we do not fully understand the argument and reasoning upon this point. It appears that physical connection of different telephone lines has been made in many instances without any such direful results. When an individual asks for connection of his private telephone with the toll lines of the company, and such connection is made for him, he has the exclusive use of the toll line of the company for a certain time. There is no doubt that if he complies with the reasonable regulations of the company he is entitled to such use of the line, and that the company could be compelled to furnish such use upon reasonable terms and upon complying with reasonable regulations, without any greater use of the company's property or any greater danger of injury thereto than in case such service is furnished to a patron of the company itself. If there are inherent reasons for making the distinction which the appellant seeks to make, that fact does not appear from the evidence in this record.”

In *Milbank v. Dakota Cent. Teleph. Co.* (1916) 37 S. D. 504, P.U.R.1916F, 562, 159 N. W. 99, *supra*, sustaining the power of the state to require telephone companies to make physical connection, the court said: “We are satisfied that the connecting of telephone exchanges in order to facilitate

the transmission of messages, and therefore advance the purpose for which the public service franchises are granted, is not an exercise of the power of eminent domain, but is entirely analogous to the power exercised by a railroad commission in ordering connecting switches between competing lines of railway; that, instead of being an exercise of power of eminent domain, it is a mere regulation of the public service corporation, if not under an implied power resulting from the nature of the franchise enjoyed by the corporation, then under the police powers of the state.”

And in *Southwestern Teleg. & Teleph. Co. v. State* (1918) — Tex. —, P.U.R.1919C, 56, 207 S. W. 308, it is also held that a statute requiring telephone companies to make a physical connection under the circumstances there presented was not unconstitutional, and did not constitute the taking of property without the exercise of the power of eminent domain. Upon this point the court said that compliance with an order for physical connection made by a municipal corporation, based upon authority of the act, “will not result in any ‘taking’ of the company's property in any constitutional sense. Its effect is only to require that, by means of the connection upon its switchboard, it afford, for compensation, the service of its toll lines to the public at certain points upon the Paducah Company's line. In all such cases those patrons will be as fully its patrons as those of the Paducah Company. In extending the service it will remain in undisputed control of all of its property, including the switchboard. The operation of its lines for the purpose of the service will be entirely in its hands. No different use or burden will be imposed upon its property. The company is merely made to provide a facility whereby patrons of another line may, by means of that line and for a charge paid the company for the service, have access to its toll lines. If this be a ‘taking’ of the company's property, the property of such a company is likewise taken every time the company is made to connect its line

with the storehouse or residence of a local subscriber as a means of affording him similar service. It is not a taking of property. It is merely a reasonable regulation of the company's service for the public convenience, which the state may prescribe in the exercise of its police power, and to which the company, as a common carrier, is properly subject."

And in *Wisconsin Teleph. Co. v. Railroad Commission* (1916) 162 Wis. 383, L.R.A.1916E, 748, P.U.R.1916D, 212, 156 N. W. 614, supra, in sustaining the power of the state to require telephone companies doing business in the state physically to connect their lines, the court said: "It is true that a connection must be established between the wires of the local company and the switchboard of the plaintiff. To say that this is a taking of property is far-fetched. There may be a technical appropriation, but there is no taking in the constitutional sense. Neither would the fact that there was some expense incurred alter the situation, because it is the right of the state, within reasonable limitations, to require public service corporations to increase their facilities where the public interest requires the increase. Instead of damage resulting from the connection ordered, it would be more reasonable to suppose that both profit and convenience should result therefrom. We do not see how the switchboard connection required can entail any substantial loss upon the plaintiff. If it should be conceded that there was a taking of plaintiff's property by either of the requirements referred to, it is a technical taking that results in no loss, and it is entirely within the legitimate scope of the police power. The legislature has seen fit to exercise such power, provided no substantial loss would result."

So, in *Pacific Teleph. & Teleg. Co. v. Wright-Dickinson Hotel Co.* (1914) 214 Fed. 666, supra, it is held that the requirement that one telephone company shall accept and transmit messages from certain hotels, which originate on the wires of another telephone company, is reasonable and properly referable to the police powers of the

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state. The court said that it did not constitute the taking of the property of the telephone company without due process of law. That the requirement did not impose a new or different use or burden, nor permit a different person, corporation, or entity to occupy or utilize the lines or system of the complaining company.

3. *Enforcement under statute.*

It has been held that the constitutional delegation of power to require physical connection between two telephone systems does not confer the right to compel business intercourse between two competing companies to the detriment of either, nor does it give the right to specify the routing of messages to the detriment of one company. *Pioneer Teleph. & Teleg. Co. v. State* (1918) — Okla. —, P.U.R. 1919C, 544, 177 Pac. 580; *Pioneer Teleph. & Teleg. Co. v. State* (1920) 77 Okla. 216, P.U.R.1920C, 557, 186 Pac. 934. And see also, to the same effect, *Pioneer Teleph. & Teleg. Co. v. State* (1920) 78 Okla. 38, 188 Pac. 107.

In *Pioneer Teleph. & Teleg. Co. v. State* (1918) — Okla. —, P.U.R.1919C, 544, 177 Pac. 580, supra, while the power of the state to compel competing telephone companies physically to connect their systems, is sustained, yet the power is held to be limited to the extent that the regulation shall be reasonable and not impose any burdensome obligations upon either company. Upon this point the court said: "The right of one telephone company to connect its lines with that of another company implies no more than a mechanical union of the lines, so as to admit of the convenient passage of messages from one to the other, and does not include the right to compel business intercourse between two competing companies, to the detriment of either company. The lines are to be connected, not the companies, and the purpose is to establish and maintain means for a continuous transmission of messages for the benefit and convenience of the public. It was never intended by this section to compel two companies, competing for the same business, to make such physical con-

nection between their lines and exchanges as would permit one company to have the benefit and use of the equipment and system of the other, to its detriment and the discrimination of its subscribers. On the contrary, it was meant to require such a mechanical union of the lines as would constitute a continuous transmission of the messages for the public convenience, and without destroying the property rights of either company. A connection under rules and regulations that amount to the destruction of property, or that work a discrimination against the subscribers of either exchange would amount to the taking of property without due process of law. The state, of course, has the power to take private property for public use under its right of eminent domain, but this can only be done for a fair consideration."

It has been held that where the members of a mutual telephone company own their instruments and maintain their lines to the central station, and maintain their station by contributing quarterly for that purpose, the company cannot require connection with an incorporated telephone company doing a long-distance business, and the public service commission is not authorized to require such physical connection under a statute which includes a provision for physical connection, but defines the corporations within the jurisdiction of the commission as any company maintaining telephone communication for hire. The mutual company was held not to maintain telephone communication for hire, although it permitted a few non-stockholders to use the line for hire. *State ex rel. Buffum Teleph. Co. v. Public Service Commission* (1917) 272 Mo. 627, L.R.A.1918C, 820, P.U.R. 1918C, 158, 199 S. W. 962.

A case of some interest upon this point, although not strictly within the scope of the note, is *People ex rel. Oneida Teleph. Co. v. Central New York Teleph. & Teleg. Co.* (1899) 41 App. Div. 17, 58 N. Y. Supp. 221, which involved the right of one telephone company to compel another telephone company to place one of its telephones

in the office of the former company, in order that this company might thereby gain the benefit of the use of the line of the rival company. Upon this point it is held that a statutory provision that telephone companies shall receive despatches from and for other telegraph and telephone lines or corporations, and from and for any individual, on payment of the usual charges by individuals for transmitting despatches as established by the rules and regulations of such corporation, and transmit the same with impartiality, good faith, etc., did not require this service upon the part of a rival telephone company. The court said: "Suppose, as the relator's petition will permit us to do, that the relator has 5 miles of wire in the village of Oneida, and not elsewhere, and that the defendant company not only has the like amount in the same village, but 5,000 miles of wire extending over the whole state; that the defendant company charges an individual \$15 per quarter a year for installing a telephone in his office, and allows him to use it to send messages to any place where said defendant's lines extend. The individual might send not more than one message a day. If the relator can, for the same price, procure unlimited service for its patrons, it might daily send a thousand messages, and thus compel the said defendant to do the relator's work, not only for inadequate compensation, but also deprive it of the patrons upon which it depends. The relator could thus make its profits at the said defendant's expense. Does the statute contemplate this? It does not, in terms, direct one company to install its telephone in its rival's office. It must receive and transmit its rival's messages upon payment of the usual charges; but if that means that it must also furnish its rival with an instrument in the latter's office, such meaning must be implied, because such is the usual course of business."

It has been held that a subscriber to one telephone company cannot invoke the power of the state to compel a physical connection between telephone lines. *Ivanhoe Furnace Co. v.*

Virginia & T. Teleph. Co. (1909) 109 Va. 130, 63 S. E. 426. In this case a stockholder and subscriber of a mutual telephone company presented his petition to the circuit court of one of the counties of Virginia, praying for a peremptory writ of mandamus, directed to another telephone company, commanding and compelling it, among other things, to connect its lines and exchange with the mutual company of which the petitioner was a subscriber and stockholder. The court said that the petitioner had no right to interplead the defendant in error upon the issues sought to be litigated by its petition. Its status was merely that of a subscriber and patron of the mutual company, and in those relations it was entitled to demand of that company the same service that it rendered to other patrons in the same class, and no other. The petitioner was in no sense the representative of

the mutual company, and possessed no authority whatever to dictate to that company or to the defendant in error what physical connections they should make, or what regulations they should adopt in an interchange of business. These are matters of business policy, to be determined by the companies for themselves, subject only to the visitatorial authority of the state.

However, upon this point, in *Milbank v. Dakota Cent. Teleph. Co.* (1916) 37 S. D. 504, P.U.R.1916F, 562, 159 N. W. 99, the court said that, under the statutes of that state, the board of railroad commissioners have a right to act upon the complaint of any person or corporation having an interest in the relief sought, and that therefore a proceeding was properly initiated by a city and an individual, and that to hold otherwise would destroy the efficiency of the statute.

A. G. S.

IRA WHITE
v.
HOWARD LEVARN.

Vermont Supreme Court—February 12, 1918.

(— Vt. —, 108 Atl. 564.)

Sunday — hunting — injury to bystander — liability.

1. One hunting on Sunday in violation of statute is answerable for injuries accidentally inflicted upon a bystander by the voluntary discharge of his gun.

[See note on this question beginning on page 1220.]

Assault — gunshot wound — contributory negligence.

2. Contributory negligence of one who accompanies another into the woods to hunt on Sunday is no de-

fense to the latter's liability for accidentally inflicting injury upon him by the voluntary discharge of a gun.

[See 2 R. C. L. 563.]

(Powers, J., dissents.)

EXCEPTIONS by plaintiff to rulings of the Addison County Court (Miles, J.) made during the trial of an action brought to recover damages for alleged unlawful shooting of plaintiff by defendant, which resulted in a judgment for defendant. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Joel W. Page and Guy M. Page for plaintiff.

Watson, Ch. J., delivered the opinion of the court:

The declaration contains two counts, one in trespass and one in case. On October 5, 1913, which was Sunday, the plaintiff and the defendant together went hunting partridges and gray squirrels, each being armed with a shotgun. Late in the afternoon, separating from each other, the defendant started through the woods, following along a short distance from, and nearly parallel with, a stone wall which separated the woods from a small clearing. The plaintiff, at the same time, started along in the same direction on the other side of the wall, following it along for a distance of 25 to 35 rods, when he sat down on the wall, and while sitting there was shot in the face and chest by the defendant, receiving the injuries complained of. When injured, the plaintiff was wearing a cap of the color of a gray squirrel, and the defendant mistook it for such a squirrel, doing the shooting without intending to hit the plaintiff. They were 128 feet apart. On the facts found, a majority of the court rendered judgment for the defendant, the presiding judge dissenting. The case is here on plaintiff's exceptions to the reception of certain evidence and to the judgment.

Hunting and shooting wild game or other birds or animals, or discharging firearms, on Sunday (with some exceptions not material here), are unlawful by statute. Pub. Stat. § 5957; *Duran v. Standard Life & Acci. Ins. Co.* 63 Vt. 437, 13 L.R.A. 637, 25 Am. St. Rep. 773, 22 Atl. 530. The shooting which injured the plaintiff was, therefore, an unlawful act voluntarily done by the defendant, and he is answerable, in

an action of trespass, for the injury which happened to the plaintiff, either by carelessness or accident. Vincent

*Sunday—hunting—
injury to by-
stander—
liability.*

v. Stinehour, 7 Vt. 62, 29 Am. Dec. 145; *Wright v. Clark*, 50 Vt. 130, 28 Am. Rep. 496; *Bradley v. Andrews*, 51 Vt. 530; *Judd v. Ballard*, 66 Vt. 668, 30 Atl. 96; *Isham v. Dow*, 70 Vt. 588, 45 L.R.A. 87, 67 Am. St. Rep. 691, 41 Atl. 585, 5 Am. Neg. Rep. 106.

Against objection and exception, the defendant was permitted to introduce evidence for the purpose of showing contributory negligence by the plaintiff, and facts are found thereon. Without noticing the question of admissibility of such evidence under the count in case, we dispose of the case according to the rights of the parties under the count in trespass. In *Willey v. Carpenter*, 64 Vt. 212, 15 L.R.A. 853, 23 Atl. 630, an action of trespass for assault and battery, it was held to be clear and unquestionable that consent to an assault is no justification, for, since the state is wronged by it, the law forbids it on public grounds. The same doctrine was applied in *State v. Roby*, 83 Vt. 121, 74 Atl. 638. From this it must logically follow that contributory negligence is no defense in an action of trespass for a similar offense in law.

*Assault—
gunshot wound
—contributory
negligence.*

Judgment reversed, and judgment for the plaintiff. Cause remanded for the assessment of damages.

Powers, J., regards the violation of the statute referred to as the condition, and not the cause, of the plaintiff's injury, and, on the strength of *Dervin v. Frenier*, 91 Vt. 398, 100 Atl. 760, dissents.

ANNOTATION.

Violation of Sunday law as ground for civil action for damages.

There are numerous cases and considerable diversity of opinion as to effect of violation of Sunday law by

plaintiff to prevent recovery for an injury due to negligence or other wrong on the part of the defendant (see 25

R. C. L. § 51), but an extended search has disclosed but three cases, in addition to the reported case (*WHITE v. LEVARN*, ante, 1219), on the violation of Sunday law as ground of civil action for damages. It will be observed that while the majority opinion in the reported case does not discuss the question whether the violation of the Sunday law by the defendant could properly be regarded as the proximate cause of the injury to the plaintiff, the dissent is upon the ground that such violation was a condition, and not a proximate cause, of the injury. The case (*Dervin v. Frenier* (1917) 91 Vt. 398, 100 Atl. 760) upon which the dissenter relies in support of his position held that the operation of an automobile without the license required by law was a condition, and not a cause, of the injury to a person struck by the automobile. That specific question, of course, is beyond the scope of this annotation. It may be observed, however, that while there is some conflict in the ultimate decisions, the courts have, for the most part at least, proceeded upon the assumption that the element of proximate cause was the controlling factor in the determination of the question. And this is true generally of cases involving other classes of statutes. Returning to cases involving a violation of the Sunday law, it will be noted that in *Hyde Park v. Gay* (1876) 120 Mass. 589, an action in tort by a town against a railroad company for running over and destroying a fire hose, the court, in overruling an exception to an instruction that the running of the train on the Lord's Day was an unlawful act on the part of defendant, and, if such unlawful act or the negligence of the defendant was the cause of the injuries, the plaintiff might recover, recognized the importance of the element of proximate, or at least of direct, cause, observing that the instructions given plainly required the jury to find that the act of running the train on the Lord's Day was the "distinctive and direct cause of the injury complained of." The court further said: "The fact that the defendant, by his servants and agents, was run-

ning a train of cars in violation of the statute regulating the observance of the Lord's Day, has an important and material bearing on the relative rights and duties of the parties at the time of the accident. It affects the question of the care required of both. The persons in charge of the hose, in the absence of positive information, had a right to expect that no train would be run on that day contrary to law. And those in charge of the train were, for that reason, required to exercise greater caution towards them. The jury could not have been properly told, as requested by the defendant, that the rights of the parties were no different from what they would have been on any other day. . . . To the defendants objection that the jury was permitted to find for the plaintiff, although the managers of the train were free from any fault except that of running a train on Sunday, it is sufficient to say that the instructions given plainly required the jury to find that the act of running the train on the Lord's Day was the distinctive and direct cause of the injury complained of; and this is enough to support the action."

But in *Tingle v. Chicago, B. & Q. R. Co.* (1882) 60 Iowa, 333, 14 N. W. 320, in holding that a railroad company could not be held liable for the killing of an animal by a train run on Sunday, on the ground that such running of the train was in violation of a statute imposing a penalty for unnecessary labor, etc., on Sunday, the court said: "The question which we have now to determine is whether the simple operation of a train, in violation of the provisions of this statute, renders a railroad company liable for all damages accidentally occurring, without fault or negligence on its part other than the mere operating of the train. . . . If the mere fact that a party is engaged in employment upon the Sabbath day, in violation of statute, will not defeat recovery for an injury sustained whilst so employed, it follows, we think, that the mere fact that a person is so employed will not render him liable for injuries inflicted without other fault or negligence than

the being so employed. It is true that, if the defendant's train had not been operated on Sunday, the injury complained of would not have occurred. . . . Whilst the injury could not have been inflicted if the defendant's train had not been operated, still, as it is not claimed that the train was operated in a negligent manner, the proximate cause of the injury was not the operation of the train, but it resulted from an accident for which the defendant is not responsible. The cases in this court in which a party has been held liable in damages for the violation of a statute have all been cases in which the unlawful act contributed to the injury. In our opinion, no other liability is incurred by the operation of a railway train in violation of the provisions of § 4072 of the Code, than that which the statute itself imposes."

And in *Storm v. Cleveland, C. C. & St. L. R. Co.* (1910) 156 Ill. App. 88,

where certain counts in an action for death at a railroad crossing were predicated upon an alleged violation of Illinois Criminal Code, chap. 38, § 261, relative to the observance of Sunday, the court dismissed such counts with the mere statement that "there was no connection shown between the alleged violation of the Sunday law" and the death of plaintiff's intestate.

In *Gross v. Miller* (1894) 93 Iowa, 72, 26 L.R.A. 605, 61 N. W. 385, which, in its facts, was quite similar to the reported case, plaintiff having been shot by the defendant while they were hunting on Sunday in violation of the law, the liability of the defendant was predicated on negligence, and not on violation of the Sunday law. The court, in sustaining a judgment for plaintiff, merely held that the violation of the Sunday law did not prevent a recovery, since it was not a proximate or efficient cause of the accident.

G. J. C.

RE APPLICATION OF LEE H. HINKELMAN.

California Supreme Court (In Banc)—July 27, 1920.

(— Cal. —, 191 Pac. 682.)

Automobile — headlight — violation of statute.

1. That a headlight used on an automobile did not produce a dangerous glare does not make its use lawful where it has not been tested and sanctioned as required by statute.

[See note on this question beginning on page 1226.]

Evidence — judicial notice — diffusing type of lens.

2. The court does not take judicial notice of the phrase "diffusing type of lens" in a statute regulating the lights to be carried by automobiles.

[See 15 R. C. L. 1094.]

Indictment — charging use of diffusing type of lens.

3. A complaint charging the violation of the statute defining the lights to be carried on automobiles is sufficient which states that the automo-

bile was equipped with the diffusing type of lens, since the meaning of the term may be proved at the trial.

Statute — delegation of authority — automobile headlight testing agency.

4. The legislature may, in prescribing the quality of headlights which may be used on automobiles, establish a testing agency to determine whether or not the lights in use comply with the law.

[See 6 R. C. L. 175.]

APPLICATION for a writ of habeas corpus to secure petitioner's release from custody of the Chief of Police of the City and County of San Fran-

cisco to which he had been committed for violation of the Motor Vehicle Act. *Petitioner remanded.*

The facts are stated in the opinion of the court.

Messrs. James M. Oliver and Raymond Benjamin, for petitioner:

For the legislature to require that the user of a head lamp must abide by the "sample" test dictum of an unofficial and irresponsible testing agency, as to when thereafter and at all future times he is or is not complying with the law, is an arbitrary, unwarranted, and unenforceable extreme, and a denial of trial upon merits.

Gaylord v. Pasadena, 175 Cal. 433, 166 Pac. 348; Baltimore & O. R. Co. v. Railroad Commission, 196 Fed. 690; Schaezlein v. Cabaniss, 135 Cal. 466, 56 L.R.A. 733, 87 Am. St. Rep. 122, 67 Pac. 755.

The legislature cannot delegate its power to make laws.

Ex parte Cox, 63 Cal. 21; Arms v. Ayer, 192 Ill. 601, 58 L.R.A. 277, 85 Am. St. Rep. 357, 61 N. E. 851; Holley v. Orange County, 106 Cal. 420, 39 Pac. 790; Houghton v. Austin, 47 Cal. 646; Savings & L. Soc. v. Austin, 46 Cal. 416; McCabe v. Carpenter, 102 Cal. 469, 36 Pac. 836; People ex rel. Pixley v. Lodi High School Dist. 124 Cal. 694, 57 Pac. 660; Board of Education v. Trustees, 129 Cal. 599, 62 Pac. 173.

Admitting that the subject to which the statute relates is within the scope of the legislative power, the test of validity within the police power is whether or not the regulations prescribed are unreasonable.

Re Wilshire, 103 Fed. 620; Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; Re Junqua, 10 Cal. App. 602, 103 Pac. 159; Lassen County v. Cone, 72 Cal. 387, 14 Pac. 100; Plumas County v. Wheeler, 149 Cal. 766, 87 Pac. 909; McGehee, Due Process of Law, 341; Ex parte Knapp, 127 Cal. 101, 59 Pac. 315.

To permit any one person to define or decide what constitutes "dangerous glare," prescribe a light bulb that, if used, will not in such person's opinion create a "dangerous glare," and impose a penalty on the individual who declines to abide by that decision, is an unauthorized delegation of power by the legislature.

Ex parte McNulty, 77 Cal. 164, 11 Am. St. Rep. 257, 19 Pac. 137; Hewitt v. State Medical Examiners, 148 Cal. 590, 3 L.R.A. (N.S.) 896, 113 Am. St. Rep. 315, 84 Pac. 39, 7 Ann. Cas. 750; Re Wisner, 32 Cal. App. 637, 163 Pac.

868; Hayes v. State, 11 Ga. App. 371, 75 S. E. 523; Sogdell v. State, 81 Tex. Crim. Rep. 66, 193 S. W. 675; Railroad Commission v. Grand Trunk Western R. Co. 179 Ind. 255, 100 N. E. 852; Cook v. State, 26 Ind. App. 278, 59 N. E. 489; Park City v. Daniels, 46 Utah, 554, 149 Pac. 1094, Ann. Cas. 1918E, 107.

Mr. U. S. Webb for respondent.

Shaw, J., delivered the opinion of the court:

Hinkelman was imprisoned on a warrant of arrest issued out of the police court of the city and county of San Francisco on a complaint charging him with violating §§ 13 and 32 of the Motor Vehicle Act (Stat. 1915, pp. 405, 413, as amended by Stat. 1919, pp. 206, 225, §§ 10, 16). He applied for a writ of habeas corpus, claiming that the complaint does not charge a public offense, and that §§ 13 and 32 of said act, so far as they relate to the offense charged, are unconstitutional.

Section 32 declares it to be a misdemeanor for any person to violate any provisions of the act. The particular violation here charged is the driving of an automobile on a public street equipped with a headlight more brilliant and set at a different angle than is permitted by the provisions of § 13. This section makes elaborate and complex regulations relating to headlights. The portions thereof applying to the present case may be summarized as follows:

Subdivision (a) provides that, "all times during the period from a half hour after sunset to a half hour before sunrise, every automobile while on the public highway shall carry at the front at least two lighted lamps." Subdivision (f) provides that during the time above stated "the headlights of all automobiles upon the highways shall give a light of sufficient power and so distributed as provided herein." The material provisions of subdivision (g) are as follows: "The headlights of motor vehicles shall

be so arranged, adjusted, and constructed when the car is fully loaded, that any pair of headlights under the conditions of use must produce a light which:" (1) Is not less than 1,200 apparent candle power at a point 200 feet directly in front of the lens, when measured on a level surface on which the car stands and at some point between such surface and a horizontal line passing through the top of the lens; (2) does not exceed 2,400 apparent candle power at a point 100 feet directly in front and 5 feet above such level surface and which has no greater power at a height above 5 feet at that distance; and (3) does not exceed 800 apparent candle power at a distance of 100 feet ahead of the car, and 7 feet or more to the left of the axis of the same, and 5 feet above the level surface on which the vehicle stands.

Subdivision (h) provides that no headlight referred to in subdivision (f) shall be used upon the highways until it shall have been tested as provided in subdivision (h). This subdivision makes elaborate provisions for the making of such tests by a testing agency to be appointed by the superintendent of the motor vehicle department. Subdivision (i) requires the superintendent of the motor vehicle department to make a written report of the result of the test and file a copy thereof with each county clerk in the state and with the official of each city, town, or county whose duty it is to enforce the law. Subdivision (j) provides: "It shall be unlawful for any manufactured device that is sold commercially to be used in connection with the headlight upon a motor vehicle to enable the same to comply with the provisions of subdivision (f) hereof unless such device shall have been first tested as provided in subdivision (h) hereof," and shall have been reported favorably by the testing agency, as complying with the requirements of the section, and such report incorporated into the report of the superintendent of the department, and a

copy thereof filed in the office of the county clerk of the county in which the device is used, and sent to the city, county, or town police or traffic officers. Subdivision (k) contains the clause which has caused the difficulty in the present case. It reads as follows: "Diffusing type of lens may be used with a candle power not sufficiently great to produce a dangerous glare. The maximum of such candle power shall be established by the testing agency selected by the superintendent of the motor vehicle department, based upon tests as hereinabove provided. Any device so certified shall be equipped with light bulbs labeled with the true candle power thereof, not exceeding that prescribed."

The complaint on which Hinkelman was arrested charged that he did unlawfully drive along and upon a public highway, at half past 8 o'clock P. M., an automobile occupied by himself alone, carrying at the front thereof two lighted head lamps,—“each equipped with a device that is sold commercially to be used in connection with head lamps on motor vehicles to enable them to comply with the provisions of § 13, subdivision (f), of the Motor Vehicle Act, which said device was purchased by the defendant in 1918, and attached to said head lamps by defendant, to wit, a diffusing type of lens, known as a ‘Warner lens,’ which said type of device was, during the month of July, 1919, tested by the testing agency appointed by the superintendent of the motor vehicle department of the state of California and reported to said superintendent by said testing agency as substantially complying with the requirements of § 13 of the California Motor Vehicle Act, when used with light bulbs of a specific candle power prescribed by said testing agency, and adjusted at a specific angle designated by said testing agency; that said defendant did then and there drive said automobile with said head lamps adjusted at an angle other than designated by said testing agency, and

equipped with said device, and did then and there use said device with light bulbs exceeding in amount the candle power prescribed by said testing agency, though not sufficiently great as to produce a dangerous glare."

The two main purposes of the section are to compel the driver of an automobile to use thereon headlights which (a) shall cast in front of the automobile a light of sufficient power to enable him, when driving in the dark, to see objects in the road at a distance of 200 feet ahead, and which (b) shall not unduly dazzle the eyes of persons in front who may be looking toward him. The requirement of subdivision (g) that, at an elevation above the level surface equal to the elevation of the top of his lens and 200 feet ahead, the light shall not be less than 1,200 apparent candle power, is intended to meet the first-mentioned purpose. The requirements that at a point 100 feet directly in front of the car the light shall not exceed 2,400 apparent candle power, and that at a point 100 feet ahead, 7 feet to the left and 5 feet above the surface, it shall not exceed 800 apparent candle power, are intended to serve the last-mentioned purpose.

The meaning of the clause in subdivision (k) above quoted is not clear. The phrase "diffusing type of lens" is not defined in the act. To diffuse is to spread widely, to scatter, or disperse. Any lens not made of plain glass would to some extent diffuse the rays of light passing through it. The phrase is apparently a tradename of recent origin. Its use has not as yet become sufficiently general to enable a court to take judicial notice of its trade meaning. The charge is that the defendant's headlight was of that type. As a pleading this is sufficient, and the meaning of the term would be a matter of proof at the trial. The question whether such a law is sufficiently certain to

make the penalty valid is not here decided. But whatever this phrase may mean, it is clear that under the provisions of this clause all lenses of the "diffusing type" must be submitted to the testing agency for approval, and subjected to the same tests as to the maximum candle power that are required for other types of lenses. It declares that the maximum candle power of such lenses "shall be established by the testing agency . . . based upon tests as hereinabove provided," and that the device so tested shall have light bulbs "not exceeding that prescribed." This obviously refers to subdivisions (g), (h), and (j). It therefore means that such diffusing type of lens shall not throw a light which, at 100 feet ahead and at a height of 5 feet from the level surface, shall exceed 2,400 candle power, or which, at said height and said distance ahead and 7 feet to the left, shall exceed 800 candle power, as provided in subdivision (g), and also that such device, if sold commercially, cannot be used by any person, unless it has been tested to ascertain this maximum, as provided in subdivision (h), and approved and certified, as provided in subdivision (j). It also makes such lenses subject to another clause in subdivision (h), not above mentioned, which is as follows: "Provided, however, that if the test indicates that a device which is unacceptable with either of the test lamps will come within the specifications with lamps of another candle power or of the other type, the device may be passed with corresponding limitations as to the incandescent lamps to be used in connection with it."

The complaint shows a violation of the act. It charges that the Warner type of lens was sold commercially, was tested by the testing agency as provided in the act, and was by it reported as complying with § 13 "when used with light bulbs" of a stated candle power, but that the defendant used Warner lenses with light bulbs exceeding the

Evidence—
Judicial notice—
diffusing type of
lens.

Indictment—
charging use of
diffusing type
of lens.

candle power so limited. Warner lenses equipped with light bulbs of the candle power used by the defendant may have been tested, but the complaint shows that they had not been approved or reported as permissible. The defendant is therefore, in effect, charged with using in connection with his headlight a "manufactured device that is sold commercially," which had not been first approved by the testing agency, or reported by said agency to the superintendent of the motor vehicle department as substantially complying with § 13 of the act, contrary to the provisions of subdivisions (h) and (j) above set forth. The fact that the headlights used did not produce a dangerous

Automobile—
headlight—
violation of
statute.

glare did not make it lawful for Hinkelman to use a headlight sold commercially that had not been tested and sanctioned by the testing agency as provided in subdivision (j). The complaint is therefore sufficient to justify the warrant upon which Hinkelman is detained in custody.

We see no constitutional objection to the validity of these provisions. It may be true that the legislature has no power to delegate to the testing agency or to any other body the authority to make regulations in the nature of laws prescribing the quality of headlights which shall be used by persons driving automobiles. But

the act itself, in subdivision (g), prescribes the qualities of headlights. The office of the testing agency is to furnish a means for the convenient determination of the question whether or not a given light does comply with the regulations laid down in the act. The legislature has provided that no such light shall be used until the testing agency shall have ascertained and reported that it does comply with the law. Were it not for such provision for a testing agency no one could be reasonably certain that he is complying with the law, and no officer of the state could be reasonably certain that the user was not complying with the law, without an elaborate test of the particular light in use. This would entail great expense and inconvenience, both to the state in enforcing the law, and to persons charged with a violation of it in establishing the defense that they had not violated it. In such cases it is proper for the state to establish an agency for the ascertainment of the facts with respect to any particular kind of headlight that is sold commercially and for general use.

Statute—
delegation of
authority—
automobile
headlight
testing agency.

The petitioner is remanded to the custody of the officer.

We concur: Angellotti, Ch. J.; Wilbur, J.; Lawlor, J.; Olney, J.; Sloane, J.; Lennon, J.

ANNOTATION.

Validity and construction of regulations as to automobile lights.

The reported case (*RE HINKELMAN*, ante, 1222) deals with rather a novel attempt to solve the problem resulting from the use upon automobiles of headlights which, while making a journey after dark safe and easy for the one operating the automobile, impose great discomfort and peril upon those who are compelled to meet the car on its travels. Many of the legislatures have been content merely to name certain lenses which they approved, and

which might therefore be used on cars with the legislative sanction, but the California statute requires indorsement of any device to be used by a specially appointed testing agency, and, in addition, the device must be kept in the adjustment recommended by the agency. It would seem that that was making a requirement which would impose a liability on many innocent persons, because the difficulty of keeping lights properly adjusted

under the conditions of road travel is proverbial, and it seems that defendant in the reported case was in trouble, not because of failure to use an approved lens, but failure to meet the adjustment regulations.

Validity of regulations.

The courts have, in most instances, required the statute to be definite and reasonable to be upheld.

Thus, a statute making it unlawful to operate an automobile whose front lights project forward a light of such a glare and brilliancy as seriously to interfere with the sight of or temporarily blind the vision of a driver of a vehicle approaching from the opposite direction is obnoxious to the rule which requires some degree of certainty in informing one accused of crime of the nature of the accusation against him. The court says what degree of interference is serious is a matter not fixed by the legislature. The glare and brilliancy are not described by any standard that is certain, that may be known in advance by the citizen. *Griffin v. State* (1920) — Tex. Crim. Rep. —, 218 S. W. 494.

But the Kansas court held valid an ordinance imposing absolute liability for operating a motor car upon a city street without displaying a red rear light between certain hours, against an objection that it was invalid for failure to make intent an element of the offense. *Hays v. Schueler* (1920) 107 Kan. 635, post, 1433, 193 Pac. 311.

And a statute requiring a display of one or more white lights has been held not void for uncertainty on the ground that it does not designate the person who should be held liable for a violation thereof, it being held that the intention of the legislature was to prohibit during certain hours the use of motor vehicles not lighted in the manner designated, and that it by implication designated the person who should be liable for a violation, the prohibition being against the "use," and consequently the "user" being the one who was intended to be held responsible for a violation of the statute. *State v. Myette* (1910) 30 R. I. 556, 76 Atl. 664.

Where the legislative power of a

city is vested in the common council, and the commissioner of public safety is given supervision and control of the government, administration, and discipline of the police and fire departments, with power to adopt such reasonable rules, orders, and regulations not inconsistent with law as may be reasonably necessary to effect a prompt and efficient exercise of all powers conferred, such commissioner cannot prescribe regulations for automobile lights. *Harding v. Cavanaugh* (1915) 91 Misc. 511, 155 N. Y. Supp. 374, affirmed in (1917) 181 App. Div. 968, 167 N. Y. Supp. 1103.

Where the Constitution confers upon municipal corporations a reasonable control of their streets, the legislature cannot deprive the municipal authorities of power to prescribe the lights on automobiles which shall be used upon such streets. *People v. McGraw* (1915) 184 Mich. 233, 150 N. W. 836.

A provision of a jitney bus act requiring the maintenance of a light in the tonneau of cars during certain hours, if the top is up, which was designed to prevent crime, has been held not invalid on the ground that it was unreasonable and unnecessary. *Allen v. Bellingham* (1917) 95 Wash. 12, 163 Pac. 18.

And in *Huston v. Des Moines* (1916) 176 Iowa, 455, 156 N. W. 883, a provision of an ordinance regulating jitney busses, requiring an illumination of the body of the bus after dark, which was in the interest of public safety, was sustained where the city had been granted the power to regulate jitney busses and all motor vehicles.

Construction of regulations.

As has been seen above, the legislature may make the one in charge of an automobile absolutely liable for failure to maintain a rear light, although it may have gone out without his knowledge.

But in *Luckie v. Diamond Coal Co.* (1919) — Cal. App. —, 183 Pac. 178, where the provision of the statute is that no one shall allow a motor vehicle owned by him to be operated on the streets after dark without a rear

red light, knowledge, express or implied, is held to be essential to liability.

And the same case holds that a statute requiring the carrying by an automobile of a rear red light after dark, and providing that no person shall allow a motor vehicle owned by him or under his control to be operated in violation of the provisions of the act, does not impose liability on the owner during the time that the vehicle is under the control of another person. The court says the intention of the legislature was to impose the liability upon any person other than the owner, when such other person is operating the vehicle and it is under his control.

In *Com. v. Henry* (1917) 229 Mass. 19, L.R.A.1918B, 827, 118 N. E. 224, it was held that an automobile standing on the street after dark with its engine at rest is within a statute prohibiting the operation of automobiles on the streets, after dark, without lights. The court says it is obvious that an automobile standing upon a highway under such conditions may be fully as great a menace to the safety of travelers as if running on the way without lights. The word "operate" is not limited to a state of motion produced by the mechanism of the car, but includes at least ordinary stops upon the highway, and such stops are to be regarded as fairly incidental to its operation.

A similar conclusion was reached in *Jaquith v. Worden* (1913) 73 Wash. 349, 48 L.R.A.(N.S.) 827, 132 Pac. 33, where the court decided that an automobile, when stopped or left standing in the highway, did not cease to be "driven," within the meaning of a statute providing that "every automobile or motor vehicle, when driven on any public road" between certain hours, should have "at least one lighted lamp, showing white to the front and red to the rear." It was stated that it could not be said that the driver of such a vehicle must carry lights while it is moving, but that he may stop it during the hours of darkness in the roadway, turn off the lights, and leave it standing, without violating the law;

that the statute must be read with reference to its plain spirit and intent; that its spirit cannot be destroyed by narrowing it to the literal meaning of a single word; that the highways are designed for travel in all lawful ways, and that the driver of a vehicle does not cease to be a driver or traveler when he stops his machine in the street.

But it has been held that an automobile left standing on the street with its engine stopped is not within the contemplation of an ordinance providing that motor vehicles "operated or driven" upon the street shall, during certain hours, display two lighted lamps on the front and one on the rear, and that the rays of the latter shall shine upon the number plate in such a manner as to render the numerals thereon visible for a stated distance "in the direction from which the motor vehicle is proceeding," and that the front light shall be visible for a stated distance "in the direction in which the motor vehicle is proceeding." *Harlan v. Kraschel* (1914) 164 Iowa, 667, 146 N. W. 463.

So, in *State v. Bixby* (1917) 91 Vt. 287, 100 Atl. 42, a statute providing that "an automobile or a motor vehicle operated during the period of forty-five minutes after sunset to forty-five minutes before sunrise shall display at least two lighted lamps on the front and one on the rear," construed in connection with the context immediately following, specifying that the rays of the rear light should shine upon the rear-end number plate in such a manner as to render the numerals visible for a certain distance "in the direction from which such automobile or motor vehicle is proceeding," and that the light from the front lamps should be visible a certain distance "in the direction in which the automobile or motor vehicle is proceeding," was held to have reference to automobiles and motor vehicles which were moving, and not to be violated by one who left his automobile standing unlighted on a public street.

A regulation that every motor vehicle, while in use on a public high-

way, shall exhibit lights visible within a reasonable distance in the direction toward which the vehicle is going, and also a red light visible in the reverse direction, does not apply to two "dead cars" which were being towed through the streets by a "live car" bearing sufficient lights. The court stated that the statute applied to cars only "while in use on a public highway," and that it was manifest that it was the intention of the legislature to limit its provisions to such cars only as were actually being used on the highway; that is, such as were being driven by their own power. *Musgrave v. Studebaker Bros. Co.* (1916) 48 Utah, 410, 160 Pac. 117.

The words "on the front," as used in a statute requiring automobiles during certain hours to display at least two lighted lamps "on the front," which shall be visible at least 500 feet in the direction in which the machine is proceeding, do not necessarily mean the very foremost part of the vehicle, but mean such a point in front of the driver as will make the light visible in the direction in which the car is proceeding for at least 500 feet, and the requirement is satisfied where two lighted lamps are fastened to the top and to each side of the dashboard of an automobile, facing the front, and are visible to those approaching from the front at a distance of more than 500 feet. *State v. Read* (1918) 162 Iowa, 572, 144 N. W. 310.

But a light hung on the side of an inclosed milk wagon, which was visible only to those approaching the wagon with a view of such side, does not comply with a regulation that the light shall be so displayed as to be visible from the rear and front of such vehicle during certain hours of the night. *Yahnke v. Lange* (1919) 168 Wis. 512, 170 N. W. 722.

A statute providing that there shall be exhibited on automobiles operated at night, "one or more lamps showing white lights visible within a reasonable distance in the direction toward which the automobile is proceeding," does not require the lights for the guidance and benefit only of those approaching the automobile, but also

those in charge of the car. *Giles v. Ternes* (1914) 93 Kan. 140, 143 Pac. 491; *Ternes v. Giles* (1914) 93 Kan. 435, 144 Pac. 1014. And a similar conclusion was reached in *Lauson v. Fond du Lac* (1909) 141 Wis. 57, 25 L.R.A. (N.S.) 40, 135 Am. St. Rep. 30, 123 N. W. 629.

A statute requiring lights on an automobile traveling a public highway after dark has no application to a vehicle on a private way. *Stewart v. Smith* (1918) 16 Ala. App. 461, 78 So. 724.

In a case involving an ordinance making it unlawful for the driver of an automobile or other wheeled vehicle to use the streets of a city without displaying "until daybreak" one or more lights, "daybreak" was construed to mean the dawn, or first appearance of light in the morning. *Sullivan v. Chicago City R. Co.* (1912) 167 Ill. App. 152.

In England, a failure by one in charge of a motor car to have, as required by article 11 of the Motor Car Order 1904, lamps on the extreme sides of the car, so as to exhibit during certain hours a white light visible within a reasonable distance in the direction toward which the car is proceeding, has been held an offense "in connection with the driving of a motor car," within § 4 of the Motor Car Act 1903, so that a conviction for that offense might be required to be indorsed on the offender's license in accordance with the provisions of the latter act. *Ex parte Symes* [1910] W. N. (Eng.) 219, 27 Times L. R. 21, 103 L. T. N. S. 428.

And a similar conclusion has been reached where there has been a violation of the provision of the act just referred to, requiring a lighted lamp on the back of a car. *Brown v. Crossley* [1911] 1 K. B. (Eng.) 603, 80 L. J. K. B. N. S. 478, 104 L. T. N. S. 429, 75 J. P. 177, 27 Times L. R. 194, 9 L. G. R. 194.

So there is an offense "in connection with the driving of a motor car," which may be required to be indorsed on the offender's license, where there were powerful headlights on the offender's car, in contravention of an

order prohibiting such lights, at the time he was driving it on the highway. *White v. Jackson* (1915) 31 Times L. R. (Eng.) 505, [1915] W. N. 256, 84 L. J. K. B. N. S. 1900, 113 L. T. N. S. 783, 79 J. P. 447, 13 L. G. R. 1319.

There was held to be evidence in *Provincial Motor Cab Co. v. Dunning* [1909] 2 K. B. (Eng.) 599, 78 L. J. K. B. N. S. 822, 101 L. T. N. S. 231, 73 J. P. 387, 25 Times L. R. 646, 7 L. G. R. 765, upon which the defendant corporation could be found guilty of aiding and abetting the operator of a motor car in using it on the highway at night without having the back num-

ber illuminated, as required by the Motor Car Registration Order, there being testimony that the operator drove one of the defendant's cars at night with the back number plate not illuminated, on account of the back lamp being hung too low, although it appeared that there was a proper and permanent bracket provided on which to hang the lamp, and that it was the duty of the defendant's foreman to see to it that its cars left its premises in a condition which complied with the provisions of the Motor Car Act and the regulations thereunder.

H. P. F.

COMMONWEALTH OF MASSACHUSETTS

v.

SAM SOOKEY.

—
SAME.

v.

MICHAEL J. REAGEN.

Massachusetts Supreme Judicial Court—November 24, 1920.

(236 Mass. 448, 128 N. E. 788.)

Evidence — judicial notice — Jamaica ginger as intoxicating beverage.

1. The court will not take judicial notice of the facts that extract of Jamaica ginger is in fact an intoxicating beverage, and that it is generally sold and used as such.

[See note on this question beginning on page 1233.]

Intoxicating liquor — Jamaica ginger as.

2. It cannot be ruled as matter of law that the mere possession by a grocer of a quantity of Jamaica ginger containing 88 per cent of alcohol, and a sale of a single bottle of it, bring him within the law forbidding the sale of intoxicating liquor, which is defined by the statute to be, *inter alia*,

any beverage containing more than 1 per cent of alcohol.

[See 15 R. C. L. 377.]

Trial — question for jury — intoxicating beverage.

3. The question whether or not Jamaica ginger is an intoxicating beverage is one of fact to be submitted to the jury.

[See 15 R. C. L. 379.]

REPORT by the Superior Criminal Court for Berkshire County (Brown, J.) for the determination by the Supreme Judicial Court of complaints charging defendants with unlawfully selling intoxicating liquors, which resulted in their conviction. *Verdicts in each case ordered set aside.*

The facts are stated in the opinion of the court.

Mr. Charles H. Wright for the Commonwealth.

Messrs. Warner & Barker, for defendant Sookey:

If the article sold was a medicine or a recognized household remedy, so intended and put up in good faith, and so sold, though it may have contained some intoxicating liquor essential to the preparation, then the defendant is not guilty as alleged.

Com. v. Joslin, 158 Mass. 482, 21 L.R.A. 449, 33 N. E. 653.

The charge of making an illegal sale necessarily includes the charge that the vendor believed that the sale was for a purpose not authorized.

Ibid.

The distinction between belief or knowledge, and reasonable cause to know, becomes important.

Com. v. Gould, 158 Mass. 499, 33 N. E. 656.

Under the statutes of the commonwealth of Massachusetts Acts 1910, chap. 172, defendant had a legal right to make this sale.

Mr. Harold R. Goewey for defendant Reagan.

De Courcy, J., delivered the opinion of the court:

In each of these cases the complaint alleged an unlawful sale of "intoxicating liquor, to wit, Jamaica ginger," to one Harrington, at Pittsfield, on July 17, 1919. The cases were tried together. The only evidence offered was an agreed statement of facts. It appears therein that the defendant Sookey conducts a retail grocery store, in which he also sells soda water and ice cream. He had bought from the Berkshire Grocery Company, wholesale grocers, 12 dozen bottles of a standard brand of Jamaica ginger, containing alcohol as stated in the label on each bottle, which label reads as follows:

3 FL. OZ.
Harris's
Strictly Pure
EXTRACT
JAMAICA GINGER.
Alcohol 88%.
For Flavoring and
Medicinal Purposes.
Manufactured by
Frank E. Harris Co.,
Binghamton, N. Y.

On the day alleged Harrington "purchased a bottle from said defendant, being an original package of said Jamaica ginger," and said bottle was brought into court as evidence. The facts in the Reagan case are the same, except that he "conducted a store in which he sold ice cream, soda water, cigars, tobacco, and toilet articles, and also maintained in the rear of his store four billiard and pool tables for the use of the public." He had on hand about twenty-four bottles of Jamaica ginger.

The motion of each defendant for a directed verdict raises the question whether a verdict of guilty was warranted by the agreed facts. We put aside the discussion of the Prohibition Amendment to the Federal Constitution, and the Volstead Act (41 Stat. at L. 305, chap. 83), enacted by Congress to enforce the same, as they were not in effect at the time of the sales in question. Nor is it contended that the earlier War-time Prohibition Act has any application. See Jacob Ruppert v. Caffey, 251 U. S. 264, 64 L. ed. 260, 40 Sup. Ct. Rep. 141. The statute that the defendants were charged with violating is Rev. Laws, chap. 100, which prohibits the unauthorized sale of intoxicating liquor. It was held in the recent case of Com. v. Nickerson, 236 Mass. 281, 10 A.L.R. 1568, 128 N. E. 273 (September 17, 1920), that this statute "has not been abrogated by the 18th Amendment and the Volstead Act. The sections under which the complaint was framed against the defendant are still operative and efficacious." Section 2 provides as follows: "Ale, porter, strong beer, lager beer, cider, all wines, any beverage which contains more than one per cent of alcohol, by volume, at sixty degrees Fahrenheit, and distilled spirits, shall be deemed to be intoxicating liquor within the meaning of this chapter."

Jamaica ginger is not included in this definition, unless it is shown to be a "beverage;" that is to say, a liquor for drinking. The mere fact that it contains a large percentage

of alcohol does not make it "intoxicating liquor" within the meaning of the statute. There are numerous medical preparations manufactured in accordance with formulas prescribed by the United States Pharmacopœia (see Rev. Laws, chap. 75, § 18; chap. 100, § 17, cl. 3), and many patent and proprietary medicines, toilet and antiseptic solutions, which contain much more than "1 per cent of alcohol," but whose use as a beverage is rendered practically impossible by reason of other ingredients. *Com. v. Mandeville*, 142 Mass. 469, 8 N. E. 327; *State v. Costa*, 78 Vt. 198, 207, 62 Atl. 38; *Intoxicating-Liquor Cases*, 25 Kan. 751, 37 Am. Rep. 284.

In this meager record there appears no evidence that the article sold was fit for beverage purposes, much less that it was ordinarily so used. No testimony was introduced as to its nature, or as to its constituent elements other than the alcohol. So far as disclosed by the agreed facts, it was manufactured solely "for flavoring and medicinal purposes," as the label indicated, and sold by each of these defendants to Harrington in good faith for those purposes. It would be only conjecture to infer from a single sale of Jamaica ginger, without any evidence of the possibility or extent of the use of this preparation as a beverage, that the bottle was in fact sold, not as a medicine, but as intoxicating liquor. *Com. v. Ramsdell*, 130 Mass. 68; *Com. v. Joslin*, 158 Mass. 482, 21 L.R.A. 449, 33 N. E. 653. It could not be ruled as matter of law that the mere possession by a grocer or druggist of certain well-known articles ordinarily used for medical, culinary, toilet or antiseptic purposes, and containing alcohol, makes the dealer criminally liable for the illegal keeping of intoxicating liquor, under our statutes. See, in this connection, Rev. Laws, chap. 76, § 23, as amended by Stat. 1910, chap. 172. For the more stringent provisions of the Volstead Act, see title 2, §§ 1,

4, and Regulation 60, issued under said act by the Bureau of Internal Revenue; especially see Regulations of United States Treasury Department 3092, approved November 16, 1920, with reference to extract of ginger.

We cannot supply the lack of essential evidence in the present case by taking "judicial notice" that extract of Jamaica ginger is in fact an intoxicating beverage, and that it is generally sold and used as such. In this jurisdiction, where licenses for the sale of intoxicating liquors have been granted under a local option system, and there has been little occasion in many communities to resort to substitutes therefor, it has not become, as yet at least, a matter of common and general knowledge that ordinarily this well-known preparation is sold, not for medicinal purposes, but as a disguised substitute for liquor. In other words, that alleged fact is not so notorious that we can assume without proof that Jamaica ginger has the distinctive character, use, and effect of an intoxicating liquor. As was said in *State v. Barr*, 84 Vt. 38, 41, 48 L.R.A. (N.S.) 302, 77 Atl. 914: "In some states the courts now take judicial notice of the properties of persimmon beer, rice beer, and potato beer; while in this state there is no such common knowledge of these things as to warrant judicial notice of them."

See *Com. v. Pease*, 110 Mass. 412; Ann. Cas. 1914C, 874, note; 48 L.R.A. (N.S.) 302, 308, note; 4 Wigmore, Ev. § 2582.

Confining ourselves to the present record, we are of opinion that, on the scanty facts appearing in the agreed statement, the commonwealth did not go far enough to warrant a verdict of guilty, and the motion of each defendant to that effect should not have been denied.

In view of the judge's direction of verdicts of guilty, it should be added that, even if the agreed facts had warranted a finding that this Jamai-

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ca ginger was an intoxicating beverage within the meaning of our statute, that issue, being one of fact, should have been submitted to the jury. *Com. v. Hallett*, 103 Mass. 452; *Compton v. State*, 95 Ala. 25, 11 So. 69; *Cooper v. State*, 19 Ariz. 486, 172 Pac. 276; *State v. Miller*, 92 Kan. 994, 1004, L.R.A.1917F, 238, 142 Pac. 979, Ann. Cas. 1916B, 365; *Bertrand v. State*, 73 Miss. 51, 18 So. 545; *Arbuthnot v. State*, 56 Tex. Crim. Rep. 517, 120 S. W. 478. In *Mitchell v. Com.* 106 Ky. 602, 51 S. W. 17, relied on by the common-

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beverage.

wealth, the issue was so submitted; and in *State v. Intoxicating Liquors & Vessels*, 118 Me. 198, 4 A.L.R. 1128, 106 Atl. 711, it was stated in the opinion: "The evidence shows that the Jamaica ginger could be and was used by ordinary persons as a beverage, and in such quantities as to produce intoxication, and did in fact produce intoxication."

Accordingly it was held to be intoxicating liquor, within the meaning of Me. Rev. Stat. chap. 127, §§ 21, 22.

It follows that in each case the verdict must be set aside; and it is so ordered.

ANNOTATION.

Test of intoxicating character of liquor.

- I. Introductory, 1233.
- II. Liquors in general, 1233.
- III. Medicinal compounds, 1236.

I. Introductory.

This note is supplementary to that appended to the case of *Estes v. State*, 4 A.L.R. 1135, and collates the recent cases discussing the test of the intoxicating character of liquor.

II. Liquors in general.

(Supplementing annotation in 4 A.L.R. 1137.)

Where a statute prohibits the sale of liquor containing more than a specified percentage of alcohol, the statutory test is conclusive, and the question whether the liquor is in point of fact intoxicating is immaterial. *United States v. Standard Brewery* (1920) 251 U. S. 210, 64 L. ed. 229, 40 Sup. Ct. Rep. 139; *Jacob Ruppert v. Caffey* (1920) 251 U. S. 264, 64 L. ed. 260, 40 Sup. Ct. Rep. 141; *Com. v. Nickerson* (1920) 236 Mass. 281, 10 A.L.R. 1568, 128 N. E. 273.

It is not necessary to allege that the beer was intoxicating, in an information charging its manufacture and sale in violation of the Act of Congress of November 21, 1918, commonly known as the War-time Prohibition Act (40 Stat. at L. 1047, chap. 212), making it unlawful to manufacture 11 A.L.R.—78.

ture or sell any beer, wine, or other intoxicating malt or vinous liquor, for beverage purposes. *United States v. Pittsburgh Brewing Co.* (1919) 260 Fed. 762.

Sweet cider, to which 1/2 of 1 per cent of benzoate of soda had been added, which does not prevent fermentation and consequent development of alcohol, but merely retards such action, is not "preserved sweet cider" within the meaning of § 4 of title 2 of the Volstead Act, which excepts from the operation of such act, such cider. *United States v. Dodson* (1920) 268 Fed. 397. The court, in this case, said that the degree of alcoholic content specified in the statute is determinative of whether or not it is, within the terms of the law, intoxicating.

Whisky is, as a matter of law, an intoxicant, and this fact need not be proved in a prosecution for selling intoxicating liquors. *Gordon v. State* (1920) — Ga. App. —, 103 S. E. 38.

The label "Cascade Whisky" was held in *Hawkins v. State* (1920) 142 Tenn. 238, 218 S. W. 397, to make a prima facie case that the contents of the bottles were whisky, on the prosecution of the one in whose possession they were found for transporting intoxicating liquor in violation of the Tennessee Act of 1917.

In *Jones v. State* (1919) — Tex. Crim. Rep. —, 216 S. W. 183, a prosecution for violation of a local option law, the evidence was held sufficient to show that the liquor in question was intoxicating, where the purchaser testified that he bought a bottle of whisky, or what he believed to be whisky, from the defendant, and that he became intoxicated from the use of the contents of the bottle.

"Whisky," "moonshine whisky," or "corn whisky," are within the expression "prohibited liquors and beverages," as defined in § 1 of the Alabama Act of 1919, which reads as follows: "All liquors, liquids, drinks or beverages, made in imitation of or intended as a substitute for, beer, ale, rum, gin, whisky or for any other alcoholic, spirituous, vinous or malt liquor; and further, that any liquor, drink or liquid made or used for beverage purposes containing any alcohol, shall be deemed an alcoholic liquor, within the meaning of the term 'prohibited liquors and beverages' as defined in this act in connection with the existing prohibition laws of Alabama." *State v. Merrill* (1920) 203 Ala. 686, 85 So. 28.

A prohibition of the sale of specified liquors, such as "whisky" and "wine," has been held to include any liquor falling within the designation, without regard to its intoxicating properties. *State v. Dennison* (1919) — W. Va. —, 101 S. E. 458. But the fact that a beverage contains "whisky" is not conclusive. "Alcohol is the intoxicating element in intoxicating liquor, so that, in order to make a sale of liquor an offense in this state, it must contain more than $\frac{1}{2}$ of 1 per cent of alcohol by volume. The offense charged was the sale of intoxicating liquor particularly distinguished as whisky. The courts of this state will take judicial notice that whisky is intoxicating liquor. *Schlicht v. State* (1877) 56 Ind. 173; *Eagan v. State* (1876) 53 Ind. 162; *State v. Barr*, 48 L.R.A.(N.S.) 302, note. Consequently proof of a sale of whisky, or proof that the liquid sold was intoxicating, or that it contained

more than $\frac{1}{2}$ of 1 per cent of alcohol, would be sufficient to sustain the charge. Courts will not take judicial notice, from the fact alone that whisky in some amount is in a certain compound, that such compound or liquid is necessarily intoxicating, or that it contains more than $\frac{1}{2}$ of 1 per cent of alcohol by volume. Our statute does not entirely forbid the sale of the intoxicating element, which, with water and other elements, composes whisky. So, in this case, the fact as to whether or not the liquid in question was intoxicating was a question for the jury, to be determined from the evidence, as any other essential fact in the case." *Hiatt v. State* (1920) — Ind. —, 127 N. E. 277.

So the Montana act, which prohibits the sale of all "spirituous liquors" and "malt liquors," has been held to prohibit irrespective of alcoholic content. *State v. Centennial Brewing Co.* (1918) 55 Mont. 500, 179 Pac. 296. In that case the court construed the following act: "The phrase 'intoxicating liquors' shall be held and construed to include whisky, brandy, gin, rum, wine, ale and any spirituous, vinous, fermented or malt liquors and liquor or liquid of any kind or description, whether medicated or not, and whether proprietary [proprietary], patented or not, which contains as much as 2 per centum of alcohol measured by volume, and which is capable of being used as a beverage." It was held that the provision as to 2 per cent of alcohol applied only to liquors not previously mentioned. But in *People v. Bickerstaff* (1920) — Cal. App. —, 190 Pac. 656, it was held that the California act did not make unlawful the sale of "beer" containing less than 1 per cent of alcohol. And in *United States v. Baumgartner* (1919) 259 Fed. 722, the court, holding that the "War Prohibition Act" (Fed Stat. Anno. Supp. 1919, 202) applied to intoxicating beer only, said that the test was whether, when used in such quantities as it is practically possible for a man to drink, it will produce intoxication.

Where the prohibition is of "intoxicating" liquor, the test is actual ca-

capacity to intoxicate. Thus, cider shown to produce actual intoxication is within a statute prohibiting the sale of intoxicating liquor. *State v. Meyer* (1920) — Mo. App. —, 221 S. W. 775, wherein it was intimated that fermented cider was also an "alcoholic" liquor.

In *Shaw v. State* (1920) — Ga. App. —, 103 S. E. 470, involving the possession of a liquid called "buck," made from corn, syrup, and water, and claimed by the accused to be kept for hog feed, the court said in an official syllabus: "It makes no difference by what name an intoxicant may be known; the question is whether the liquid is an intoxicant."

A charge in an indictment that the defendant manufactured alcoholic and intoxicating liquors in a county where the sale of liquors had been prohibited by law is not supported by evidence that the defendant had in his possession 4 gallons of "buck," without any evidence that the liquid was either alcoholic or intoxicating, the court holding that the intoxicating character of the liquor was not proved by the testimony of a witness that it was intoxicating, where his cross-examination showed that this statement of fact was a mere impression, gained from tasting the liquor, and he did not inform the court or jury what sensations were produced through his sense of taste, to convince his judgment as to the alcoholic or intoxicating properties of the liquor. *Norwood v. State* (1920) — Fla. —, 86 So. 506.

The Oklahoma act, set out in the original annotation (see 4 A.L.R., at page 1162), has been held to forbid the sale of pure alcohol. *State v. Kollar* (1920) — Okla. Crim. Rep. —, 186 Pac. 968, wherein it was said: "Courts take judicial notice that alcohol is an intoxicating liquor. It forms the basic principle, the intoxicating principle, of all spirituous, vinous, fermented, and malt liquors. It is a constituent element in each of said liquors. Pure alcohol may be easily diluted so as to be capable of being used freely as a beverage. To hold that the people in adopting the prohibition ordinance, and the legisla-

tures in enacting statutes to make prohibition effective within this state, intended only to prohibit the sale of such intoxicating liquors containing alcohol which were capable of being used as a beverage in the form in which sold, and did not intend to prohibit the sale of pure alcohol for beverage purposes, would open the way for persistent unlawful sales of alcohol in its original state, and would absolutely render nugatory those provisions of the Constitution and the subsequent statutes, providing specifically the manner in which pure alcohol should be sold, distributed, and used within this state, to wit, denaturized alcohol for industrial purposes, and grain alcohol for scientific purposes, to scientific institutions, universities, and colleges, and also to apothecaries for the purpose of compounding prescriptions and other medicines, etc."

The evidence was held sufficient, in *Cunningham v. State* (1920) — Okla. Crim. Rep. —, 192 Pac. 1104, to show the intoxicating character of the liquor, to justify a conviction of unlawfully having in one's possession intoxicating liquor in violation of the Oklahoma Prohibitory Liquor Laws, where the sheriff, who discovered a keg of "choc" beer in the defendant's possession, testified that he tasted it, that it was fermented and very strong, and that it was intoxicating, that he had drunk other kinds of beer, and that the "choc" beer was about three times as strong, and the testimony of three or four other witnesses was, in substance, the same.

And in *Patterson v. State* (1919) 140 Ark. 236, 215 S. W. 629, a prosecution for manufacturing intoxicating liquors, or a compound or preparation thereof commonly called "choc" beer, contrary to the statute, the evidence was likewise held sufficient to show that such beer was intoxicating, where a chemist, after an examination of the liquid, testified that it smelled like fermented liquor, and after an examination of mashed grain used in its manufacture testified that such grain seemed to have passed through a state of fermentation, or, at least, seemed to

have been cooked, and would, when placed with yeast in water, ferment and produce alcohol, and other witnesses testified that such beer was intoxicating.

III. Medicinal compounds.

(Supplementing annotation in 4 A.L.R. 1154.)

With respect to medicinal compounds containing a considerable proportion of alcohol, the question whether such a compound is an intoxicating liquor depends on whether it is sold as a beverage, which is a question of fact. See the reported case (*COM. v. SOOKEY*, ante, 1230), wherein the rule is applied to a sale of Jamaica ginger. And see to the same effect, *Rex v. Vroom* (1919) 46 N. B. 470, 31 Can. Crim. Cas. 304, 47 D. L. R. 578.

In *Schemmer v. State* (1920) — Neb. —, 180 N. W. 581, involving a sale of Jamaica ginger, the court held that under the Nebraska act excepting medicinal preparations not sold as beverages, and unfit for use as such, it is essential that the sale should be for use as a beverage, saying: "There is no proof in this case that this article is manufactured, bought, sold, or dealt in for use as a beverage or intoxicant, or that the defendant had kept or sold the article for that purpose. The testimony of expert witnesses is that Jamaica ginger is harsh and irritating to the stomach, unpleasant to take, and unfit for use as a beverage, although occasionally individuals with abnormal appetites use it for that purpose. The intention of the legislature was evidently not to prohibit the use of all alcoholic compounds, remedies, essences, culinary, mechanical, or toilet preparations, but to include within the prohibition of the act all such articles manufactured, bought, sold, or dealt in for use as a beverage or intoxicant. It is a difficult matter to draw the line, because the question is one of degree, and the circumstances of each case must determine the intent. The legislature did not mean to punish those who in good faith manufacture, sell, deal in, or keep the articles enumerated in § 27, for their proper purpose,

if they 'are unfit for use as a beverage.' The charge was not intoxication, but possession of a liquor described in § 27 of the act. It was incumbent upon the state to prove that the article was manufactured, bought, sold, or dealt in for use as a beverage or intoxicant, and the jury should have been so instructed."

So, in *State v. Johnson* (1920) 113 S. C. 350, 101 S. E. 851, a conviction was sustained on proof that Jamaica ginger was knowingly sold for use as a beverage.

In *State v. Agalos* (1919) — N. H. —, 107 Atl. 314, the court sustained a conviction for the sale of Jamaica ginger as a beverage, holding the sale to be a violation of a general prohibition of the sale of intoxicating liquor. As to a further section of the statute, it was said: "But the respondent claims that the prosecution cannot be sustained under § 19, because § 21 provides that 'the sale of Jamaica ginger, or other compounds of alcohol, in such quantity, or with such frequency, as to indicate that it is intended for beverage use, shall be deemed unlawful selling of intoxicating liquor, within the provisions of this act; and the punishment shall be the same as in the case of selling or keeping for sale intoxicating liquor.' The argument is that, as the sale of Jamaica ginger, under certain conditions, is prohibited by § 21, the sale or the keeping of it for sale is not an offense under § 19. It must be admitted that the intention of the legislature in regard to the question thus presented is not clear, when both statutes are considered together. As above pointed out, the language of § 19 is broad enough to cover the keeping for sale as a beverage of the compound in question, and it is clear, when both sections are read together, that the purpose of § 21 was to make certain facts—the quantity and frequency of the sale—evidence upon the purpose with which the compound was kept. As the Jamaica ginger was kept for sale to be used as a beverage, the respondent's motion was properly denied."

And in *Hobbs v. Pawhuska* (1920) — Okla. Crim. Rep. —, 187 Pac. 258,

a prosecution for the violation of an ordinance prohibiting the keeping of a . tipping house, which was defined in the ordinance to be "a room, building, tent, street, cab, vehicle, automobile, or any place where intoxicating liquors of any kind, character, or description, are manufactured, sold, bartered, or given away," and intoxicating liquors were defined to include "any spirituous, malt, vinous, fermented, or other intoxicating liquors, including what is known as ginger, hard cider, bitters, patent medicines, containing more than 2 per cent alcohol, or any other liquid or solid that will produce or cause intoxication," the evidence was held sufficient to justify the conviction of the defendant, where he testified that he was engaged in the grocery business, and purchased and had in his place of business one half gross of bottles of Jamaica ginger, that he took much of the Jamaica ginger as a medicine, sold about a dozen bottles of it, and gave away other bottles, and some of the bottles of the Jamaica ginger taken from the store of the defendant by the officers, which the labels thereon stated contained 90 per cent of alcohol, were put in evidence by the state.

In *State ex rel. Zipse v. Klein* (1919) — Iowa, —, 174 N. W. 481, a sale of lemon and vanilla extracts was held to be unlawful, if the extracts were potable and contained a high percentage of alcohol, though they were not made or intended for use as a beverage, and though they could not be used in such quantity as to produce intoxication. The court said: "One witness does say that he does not see how a person could imbibe enough vanilla extract to become intoxicated, because its tendency would be to make him sick before he drank enough to become drunk. But surely this is not the test. Alcohol is none the less alcohol because it is disguised by a foreign flavoring, and its sale is none the less unlawful because it is in quantities less than are required to produce drunkenness in the buyer."

In *Collins v. State* (1920) — Ark. —, 221 S. W. 455, involving a "bitter wine" said to be a medicine, and containing about 15 per cent of alcohol, it was held that an instruction that the test was whether it was habitually sold as a beverage was correct, and that it was not necessary that alcohol should be the predominating element.

In *State v. Andrews* (1920) — Iowa, —, 176 N. W. 637, a cathartic stomach bitters containing about 25 per cent of alcohol was held to be an intoxicating liquor, and a drug store which sold it was enjoined from maintaining a liquor nuisance.

In *Rex v. Campbell's Pharmacy* (1918) 11 Sask. L. R. 231, a medicated wine, containing over 2½ per cent of alcohol and capable of being used as a beverage, was held to be an intoxicating liquor. But in *Rex v. Dojacek* (1919) 31 Can. Crim. Cas. 224, 49 D. L. R. 36, a contrary result was reached as to a similar preparation, the court saying: "The word 'drinkable' may mean capable of being drunk. In that case 'drinkable liquids' would include all liquids, because a liquid, no matter how nauseous or deadly it may be, is capable of being drunk. The word 'drinkable' would, if taken in that sense, be unnecessary, as 'liquid' standing alone would be sufficient. But 'drinkable' may also mean suitable for drinking, and be synonymous with potable, using the word in the sense in which we speak of water as being drinkable or undrinkable; that is, fit or unfit for drinking."

In *United States v. Kinsel* (1918) 263 Fed. 141, the court sustained an information under § 12 of the Selective Service Act (9 Fed. Stat. Anno. 2d ed. p. 1162), charging the sale near a military camp of "Newbro's Herpicide," saying that whether it was an "alcoholic liquor," or merely a compound containing alcohol wherein the distinctive character and effect of alcoholic liquor were absent, was a matter of proof. W. A. S.

LOUIS HIRSH, Appt.,

v.

JULIUS BLOCK.

District of Columbia Court of Appeals—June 2, 1920.

(— App. D. C. —, 267 Fed. 614.)

Constitutional law — due process — permitting tenant to hold over.

1. A landlord is deprived of his property without due process of law by a statute giving the tenant the privilege of holding over at pleasure at expiration of his lease.

[See note on this question beginning on page 1252.]

Estoppel — to question constitutionality of statute.

2. A landlord proceeding before the statutory commission for relief from a tenancy estops himself from subsequently questioning the constitutionality of the statute under which he proceeds.

[See 6 R. C. L. 94, 95.]

Landlord and tenant — expiration of time lease — notice to quit.

3. No notice to quit is required to entitle the landlord to possession at the expiration of a time lease.

[See 16 R. C. L. 1172, 1173.]

Constitutional law — Federal Constitution — where operative.

4. The provisions of the Federal Constitution are operative in the District of Columbia.

[See 26 R. C. L. 673.]

Landlord and tenant — nature of rental business — public interests.

5. The renting of private property is a private business, not affected with a public interest so as to be subject to legislative control as such.

Eminent domain — taking private property for private use.

6. Congress has no power to take private property for private use.

[See 10 R. C. L. 16, 28.]

(Smyth, Ch. J., dissents.)

APPEAL by plaintiff from a judgment of the Supreme Court, at Law, affirming a judgment of the Municipal Court in favor of defendant in a proceeding brought to recover possession of certain premises held by him under a three-year lease. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Myer Cohen, Richard D. Daniels, and William G. Johnson, for appellant:

The act of Congress known as the Ball Act is unconstitutional and void.

Missouri P. R. Co. v. Nebraska, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130; Willson v. McDonnell, — App. D. C. —, 265 Fed. 432; Heitmuller v. Stokes, 49 App. D. C. 391, 266 Fed. 1011; Calder v. Bull, 3 Dall. 386, 1 L. ed. 648; Wilkinson v. Leland, 2 Pet. 627, 7 L. ed. 542; Sinking Fund Cases, 99 U. S. 700, 25 L. ed. 496; Ochoa v. Hernandez y Morales, 230 U. S. 139, 57 L. ed. 1427, 33 Sup. Ct. Rep. 1003; Monongahela Nav. Co. v. United States, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622; Kohl v. United States, 91

U. S. 367, 23 L. ed. 449; Pritchard v. Norton, 106 U. S. 124, 27 L. ed. 104, 1 Sup. Ct. Rep. 102; Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 23 Sup. Ct. Rep. 277, 13 Ann. Cas. 764.

The existence of a state of war gives no validity to the statute.

Hamilton v. Kentucky Distilleries & Warehouse Co. 251 U. S. 146, 64 L. ed. 194, 40 Sup. Ct. Rep. 106; Mitchell v. Harmony, 13 How. 115, 14 L. ed. 75.

The legislative declaration that particular property is affected with a public interest is itself invalid.

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Weems S. B. Co. v. People's S. B. Co. 214 U. S. 345, 53 L. ed. 1024, 29 Sup. Ct. Rep. 661, 16 Ann. Cas. 1222; Producers' Transp. Co. v. Rail-

road Commission, 251 U. S. 228, 64 L. ed. 239, P.U.R.1920C, 574, 40 Sup. Ct. Rep. 131.

Messrs. Julius I. Peyser, George E. Edelin, and Theodore D. Peyser, for appellee:

The plaintiff is not prejudiced by the enforcement of the Ball Rent Act so as to raise a constitutional question.

Arkadelphia Mill. Co. v. St. Louis Southwestern R. Co. 249 U. S. 134, 63 L. ed. 517, P.U.R.1919C, 710, 39 Sup. Ct. Rep. 237; Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, 59 L. ed. 364, 35 Sup. Ct. Rep. 167, 7 N. C. C. A. 570; Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 58 L. ed. 713, 34 Sup. Ct. Rep. 359; Standard Stock Food Co. v. Wright, 225 U. S. 540, 56 L. ed. 1197, 32 Sup. Ct. Rep. 784; Southern R. Co. v. King, 217 U. S. 524, 54 L. ed. 868, 30 Sup. Ct. Rep. 594; Turpin v. Lemon, 187 U. S. 51, 47 L. ed. 70, 23 Sup. Ct. Rep. 20; Tyler v. Judges of Court of Registration, 179 U. S. 405, 45 L. ed. 252, 21 Sup. Ct. Rep. 206; New York ex rel. Hatch v. Reardon, 204 U. S. 152, 51 L. ed. 415, 27 Sup. Ct. Rep. 188, 9 Ann. Cas. 736; Collins v. Texas, 223 U. S. 288, 56 L. ed. 439, 32 Sup. Ct. Rep. 286; Jaehne v. New York, 128 U. S. 189, 32 L. ed. 398, 9 Sup. Ct. Rep. 70; Albany County v. Stanley, 105 U. S. 305, 26 L. ed. 1044; Chapman v. United States, 5 App. D. C. 122.

The act does not impair plaintiff's vested rights.

New York C. R. Co. v. White, 243 U. S. 188, 61 L. ed. 667, L.R.A.1917D, 1, 37 Sup. Ct. Rep. 247, Ann. Cas. 1917D, 629, 13 N. C. C. A. 943; Chicago & A. R. Co. v. Tranbarger, 238 U. S. 67, 59 L. ed. 1204, 35 Sup. Ct. Rep. 678; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A. (N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Bank of Columbia v. Okeley, 4 Wheat. 235, 4 L. ed. 559; League v. Texas, 184 U. S. 156, 46 L. ed. 478, 22 Sup. Ct. Rep. 475; Red River Valley Nat. Bank v. Craig, 181 U. S. 548, 45 L. ed. 994, 21 Sup. Ct. Rep. 703.

The act is not an unreasonable and unnecessary invasion of private property, but is a lawful exercise of the war and police powers of Congress.

Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Noble State Bank v. Haskell, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A. (N.S.) 1062, 31 Sup.

Ct. Rep. 186, Ann. Cas. 1912A, 487; Clark v. Nash, 198 U. S. 361, 49 L. ed. 1085, 25 Sup. Ct. Rep. 676, 4 Ann. Cas. 1171; Hamilton v. Kentucky Distilleries & Warehouse Co. 253 U. S. 146, 64 L. ed. 194, 40 Sup. Ct. Rep. 106; German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 58 L. ed. 1011, L.R.A.1915C, 1189, 34 Sup. Ct. Rep. 612.

Mr. J. C. Adkins also for appellee.

Van Orsdel, J., delivered the opinion of the court:

This is a landlord and tenant proceeding brought by appellant Hirsh, plaintiff below, in the municipal court of the District of Columbia, to recover possession of certain premises held by defendant Block under a three-year lease, which terminated on the 31st day of December, 1919.

It appears that, on November 12, 1919, the owners of the reversion, Mary A. Cushing and Isabella Varney, conveyed the property in question by deed to one Sylvan J. Luchs, who, on the same day, conveyed it in fee simple to plaintiff Hirsh. The lease was duly assigned to plaintiff. Plaintiff authorized his agents to collect from the defendant the rent accruing to the termination of the lease,—the 31st day of December, 1919,—which rent was paid.

On December 15, 1919, plaintiff notified defendant that he had purchased the property and would require possession at the expiration of the lease. Defendant refused to vacate; hence, this proceeding.

From a judgment in favor of defendant in the municipal court, plaintiff appealed to the supreme court of the District of Columbia, where he filed an affidavit of merit under Rule 19, in which he set forth, among other things, "that he is a bona fide purchaser of the said real property for his own occupancy, and requires and intends to occupy and to use the same himself for the conduct therein of the business of retail selling of men's furnishings and similar merchandise." An affidavit of defense was filed by defendant, in which he denied plaintiff's right to possession of the premises by reason of the termination of the lease, claiming that under the Ball

Rent Law the lease is continued in force, and he is entitled to remain in possession of the premises notwithstanding the expiration of the term fixed by the lease, and alleged that plaintiff purchased the premises and took conveyance thereof subject to the rights of the defendant under the act. It is further averred that plaintiff is required by the act to give a thirty-day notice in writing, served in the manner provided by § 1223 of the District Code, which notice has not been served, though it is made mandatory under the provisions of the act.

On hearing, the court denied the motion of plaintiff for judgment, and entered judgment in favor of defendant, from which this appeal is prosecuted.

This case involves the constitutionality of the Act of Congress of October 22, 1919 (41 Stat. at L. 298, chap. 80), known as the "Ball Rent Law." The act provides for the appointment of a rent commission consisting of three persons, who are vested with absolute jurisdiction over landlords and tenants, the fixing of rents, and the continuing and making of leases within the District of Columbia for a period of two years, unless the act is sooner repealed by Congress. The only check upon the power of the commission is a restricted right of appeal to the court of appeals of the District of Columbia, in which "the commission's determination shall not be modified or set aside by the court, except for error of law." The act provides that the appeal shall in no manner operate as a supersedeas or stay to postpone the enforcement of the determination of the commission appealed from, and, if any finding of the commission is modified as the result of the appeal or set aside, the difference between the amount of rent paid pending appeal, and the amount which should have been paid under the final judgment in the case, may be recovered by suit in the municipal court of the District of Columbia.

The act declares rental property,

hotels, and apartments "affected with a public interest, and that all rents . . . shall be fair and reasonable; and any unreasonable or unfair provision of a lease . . . is hereby declared to be contrary to public policy." The commission, on complaint of either the landlord or tenant, or on its own motion, is empowered to inquire into and determine whether the terms and conditions of any lease are fair and reasonable, provided, however, that the landlord cannot make complaint when the tenant is in possession under an unexpired lease. On hearing, if the commission finds that the rent or terms of the lease are unreasonable or unfair, it shall determine and fix a "fair and reasonable rent or charges therefor, and fair and reasonable service, terms, and conditions of use or occupancy. In any suit in any court of the United States or the District of Columbia, involving any question arising out of the relation of landlord and tenant with respect to any rental property, apartment, or hotel, except on appeal from the commission's determination as provided in this title, such court shall determine the rights and duties of the parties in accordance with the determination and regulations of the commission relevant thereto."

The act also provides that "the rights of a tenant to the use or occupancy of any rental property, hotel or apartment, existing at the time this act takes effect, or thereafter acquired, under any lease or other contract for such use or occupancy or under any extension thereof by operation of law, shall, notwithstanding the expiration of the term fixed by such lease or contract, continue at the option of the tenant, subject, however, to any determination or regulation of the commission relevant thereto; and such tenant shall not be evicted or dispossessed so long as he pays the rent and performs the other terms and conditions of the tenancy as fixed by such lease or contract, or in case such lease or contract is modified by any

determination or regulation of the commission, then as fixed by such modified lease or contract. All remedies of the owner at law or equity, based on any provision of any such lease or contract to the effect that such lease or contract shall be determined or forfeited if the premises are sold, are hereby suspended so long as this title is in force. Every purchaser shall take conveyance of any rental property, hotel, or apartment subject to the rights of tenants as provided in this title."

The act then provides that the bona fide owner of rental property shall have the right of possession for his own use and occupancy upon giving thirty days' notice, as provided in § 1223 of the District Code, which notice shall contain a statement of the facts upon which it is based. In case there is a dispute between the landlord and tenant as to the accuracy or sufficiency of the statement, the matters in dispute shall, upon complaint, be determined by the commission.

The act vests the commission with power to subpoena and compel the attendance of witnesses and the production of records, to fix rental rates retroactively, to take effect from the date of filing the complaint, to prescribe the procedure to be followed in all proceedings under its jurisdiction, and to prescribe standard forms of leases and contracts to be used in renting property, with the provision that any lease or contract made after the form has been prescribed, regardless of its provisions, shall be interpreted, applied, and enforced by the commission or any court of the United States or the District of Columbia, "in the same manner as if it were in the form and contained the stipulations of such standard form."

Heavy penalties are prescribed for the collection of rent in excess of the amount fixed by the commission, or for the collection of any bonus or other consideration in addition to the fixed rental; and the assignment of leases or subletting of leased

premises at a greater rental than that paid under the lease is forbidden, except by permission of the commission.

The right of plaintiff to question the constitutionality of the act in this proceeding is assailed. It is urged that he should have pursued the remedy prescribed in the act, and, if unsuccessful, appeal. But plaintiff would be in poor position to question the jurisdiction which he had himself invoked merely because of an adverse decision. If he should invoke the aid of the statute and suffer defeat before the commission, he would estop himself to seek further relief on the ground of the unconstitutionality of the act. He would not be permitted to thus experiment with the law. *Electric Co. v. Dow*, 166 U. S. 489, 41 L. ed. 1088, 17 Sup. Ct. Rep. 645; *Wight v. Davidson*, 181 U. S. 371, 45 L. ed. 900, 21 Sup. Ct. Rep. 616; *Shepard v. Barron*, 194 U. S. 553, 48 L. ed. 1115, 24 Sup. Ct. Rep. 737; *Daniels v. Tearney*, 102 U. S. 415, 26 L. ed. 187; *Grand Rapids & I. R. Co. v. Osborn*, 193 U. S. 17, 48 L. ed. 598, 24 Sup. Ct. Rep. 310. The sole defense interposed is the present act. If it is valid, the defense is complete, since the thirty-day notice required by the act was not given, and the proceedings could only be had before the commission. If the act is void, it furnished no defense; since, under existing law, at the expiration of a time lease no notice is required, and the proceedings to acquire possession must be brought; as in this case, in the municipal court of the District. "An unconstitutional act is not a law; it confers no rights, it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." *Norton v. Shelby County*, 118 U. S. 425, 442, 30 L. ed. 178, 186, 6 Sup. Ct. Rep. 1121.

Estoppel—to question constitutionality of statute.

Landlord and tenant—expiration of time lease—notice to quit.

Coming to the validity of the act, we have held in the recent case of *Willson v. McDonnell*, — App. D. C. —, 265 Fed. 432, considering an act of Congress similar to the one before us, that the provisions of the Constitution which protect persons and property are uniform in their operation throughout the United States. In this respect, there

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where operative.

is no distinction between the District of Columbia and the states of the Union. "There is nothing in the history of the Constitution or of the original amendments to justify the assertion that the people of this District may be lawfully deprived of the benefit of any of the constitutional guaranties of life, liberty, and property." *Callan v. Wilson*, 127 U. S. 540, 550, 32 L. ed. 223, 226, 8 Sup. Ct. Rep. 1301.

But what are the rights of which plaintiff has been divested, if the present act is held to constitute a valid defense to his action for possession? Plaintiff had a vested estate and reversion in fee in the property in question, to come into possession on January 1, 1920. Defendant's right of possession terminated on December 31, 1919, by the express terms of his lease, a contract valid and existing when this act was passed. This right of reversion is a property right, of which plaintiff cannot be divested except by due process of law. The act gives defendant the option of retaining possession of the property at the rental fixed in the lease, which is continued in force; or, if dissatisfied, he may apply to the commission for a reduction of the rent. If reduced by the commission, plaintiff is powerless to have a review of the facts upon which the action of the commission is based. Not only is plaintiff denied any remedy for this continued detention of his property, but he is forbidden to sell his property except subject to and burdened by the option of the tenant. It would seem, therefore, that,

if the property clauses of the Constitution are longer to have any restraining power over Congress, the case here presented is one within the inhibition of the 5th Amendment.

—due process—
permitting
tenant to hold
over.

Nor does this amount to the taking of private property for public use. Plaintiff and defendant are private citizens engaged in private business. If the government needed the use of this property for the better conduct of the war, it had a remedy, plain and adequate, by the exercise of the power of eminent domain. But, as was said by Mr. Justice Story, speaking for the court in *Wilkinson v. Leland*, 2 Pet. 627, 658, 7 L. ed. 542, 553: "We know of no case in which a legislative act to transfer the property of A to B, without his consent, has ever been held a constitutional exercise of legislative power, in any state in the Union. On the contrary, it has been constantly resisted, as inconsistent with just principles, by every judicial tribunal in which it has been attempted to be enforced."

The power to fix rental rates between private individuals is not analogous to nor controlled by the decisions which have upheld the power of the legislature to fix rates for service where the owner has devoted the business affected to a public use. In *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77, the owner of a grain elevator had for years devoted it to a public use in handling grain for the public generally. The court, upholding the power of the legislature of Illinois to fix rates for the services thus rendered the public, announced the rule authorizing this exercise of legislative power, as follows: "To limit the rate of charge for services rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle in the law, but only give a new effect to an old one."

The same principle runs through

the Railroad Rate Cases; the Insurance Case (German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 58 L. ed. 1011, L.R.A.1915C, 1189, 34 Sup. Ct. Rep. 612); the Bank Guaranty Decision (Noble State Bank v. Haskell, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487); the Irrigation Cases (Clark v. Nash, 198 U. S. 361, 49 L. ed. 1085, 25 Sup. Ct. Rep. 676, 4 Ann. Cas. 1171, and Strickley v. Highland Boy Min. Co. 200 U. S. 527, 50 L. ed. 581, 26 Sup. Ct. Rep. 301, 4 Ann. Cas. 1174); the Wharf Case (Weems S. B. Co. v. People's S. B. Co. 214 U. S. 345, 53 L. ed. 1024, 29 Sup. Ct. Rep. 661, 16 Ann. Cas. 1222), and the Pipe Line Case (Producers' Transp. Co. v. Railroad Commission, 251 U. S. 228, 64 L. ed. 239, P.U.R.1920C, 574, 40 Sup. Ct. Rep. 131).

In no case where the legislative power to regulate and fix rates has been upheld, has the power to continue existing contracts in force after the time fixed by the parties for their termination, or to require the owner of the property to continue the business, been sustained. In the Noble Bank Case, supra, the court held, on petition for rehearing, 219 U. S. 575, 55 L. ed. 341, 32 L.R.A.(N.S.) 1065, 31 Sup. Ct. Rep. 299, that, if the law was obnoxious to anyone engaged in the banking business, "the payment can be avoided by going out of the banking business, and is required only as a condition of keeping on, from corporations created by the state." But in the present case, the landlord is not only prevented from going out of the renting business, but is required to continue it upon the terms fixed by the act.

The renting of property in the District of Columbia is a private business, whether the tenant be an employee of the government or not.

A private business cannot be made public or impressed with a public interest merely by leg-

islative fiat. A public interest cannot be thus created, or property rights be divested, by an arbitrary exercise of the police power. In both instances, the power resides in the judiciary to restrain the law-making power within constitutional limitations. In the Producers' Transportation Case, Mr. Justice Van Devanter, speaking for the court, said: "It is, of course, true that if the pipe line was constructed solely to carry oil for particular producers under strictly private contracts, and never was devoted by its owner to public use, that is, to carrying for the public, the state could not by mere legislative fiat, or by any regulating order of a commission, convert it into a public utility or make its owner a common carrier; for that would be taking private property for public use without just compensation, which no state can do consistently with the due process of law clause of the 14th Amendment."

More potent still, as affecting the constitutionality of the present act, is the fact that landlords and tenants in the District of Columbia are, by its express terms, deprived of the right of trial by jury in cases involving the right to possession of real estate. Though a writ undoubtedly may be obtained in the municipal court upon the determination of the rent commission that the owner is entitled to possession, the finding of fact by the commission is binding and conclusive upon the court and the parties, which, of course, forecloses the intervention of a jury. In Whitehead v. Shattuck, 138 U. S. 146, 151, 34 L. ed. 873, 874, 11 Sup. Ct. Rep. 276, the court, holding that the action for the recovery of possession of real estate is at law, and not by suit in equity, said: "The 7th Amendment of the Constitution of the United States declares that 'in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.' . . . The right which in this case the plaintiff

Landlord and tenant—nature of rental business—public interests.

wishes to assert is his title to certain real property; the remedy which he wishes to obtain is its possession and enjoyment; and in a contest over the title both parties have a constitutional right to call for a jury."

Section 122 of the act provides as follows: "It is hereby declared that the provisions of this title are made necessary by emergencies growing out of the war with the Imperial German Government, resulting in rental conditions in the District of Columbia dangerous to the public health and burdensome to public officers and employees whose duties require them to reside within the District, and other persons whose activities are essential to the maintenance and comfort of such officers and employees, and thereby embarrassing the Federal government in the transaction of public business. It is also declared that this title shall be considered temporary legislation, and that it shall terminate on the expiration of two years from the date of the passage of this act, unless sooner repealed."

A similar statement was contained in the Saulsbury Resolution (40 Stat. at L. 593, chap. 90). In the Willson Case, holding the resolution void, we said: "The Constitution is not superseded by a declaration of war, and experience has demonstrated that ample provision may be made for 'the national security and defense,' without overstepping its limitations." And Mr. Justice Brandeis, in the recent case of *Hamilton v. Kentucky Distilleries & Warehouse Co.* 251 U. S. 146, 64 L. ed. 194, 40 Sup. Ct. Rep. 106, said: "The war power of the United States, like its other powers and like the police power of the states, is subject to applicable constitutional limitations."

The declaration here amounts merely to a statement of the inducement or reason for the enactment of the statute. It effects no change in the method of acquiring private property for public use. It adds nothing to the constitutional power

of Congress. The only exception to the rule that, in the case of "war emergency," private property must be taken under the power of eminent domain, is where private property may be impressed into the public service, or seized for a public use, by a military officer in the field, either to prevent it from falling into the hands of the public enemy, or for the use of the Army, to meet an immediate and pressing necessity. But this is taking for public use, and not for private use. Such action, however, is only justified where the emergency is too great to admit of delay to await the sanction of the civil authorities. In all such cases, the government is bound to make full compensation. *Mitchell v. Harmony*, 13 How. 115, 14 L. ed. 75.

Nor can Congress, by a mere legislative declaration, convert a private use into a public use; nor, by such a declaration, create an arbitrary exercise of the police power, or make an act constitutional which otherwise would be unconstitutional. Undoubtedly, in the exercise of the power of eminent domain, Congress has the power to designate the public use for which private property may be taken, and, if found by the courts to be, in fact, a public use, the courts are then powerless to question the wisdom of the legislative decision. "The adjudicated cases likewise establish the proposition that, while the courts have power to determine whether the use for which private property is authorized by the legislature to be taken, is in fact a public use, yet, if this question is decided in the affirmative, the judicial function is exhausted; that the extent to which such property shall be taken for such use rests wholly in the legislative discretion, subject only to the restraint that just compensation must be made." *Shoemaker v. United States*, 147 U. S. 282, 298, 37 L. ed. 170, 184, 13 Sup. Ct. Rep. 361.

And the courts are not estopped by any legislative declaration from inquiring into the nature of the use, to determine whether it is, in fact,

public or private. "The nature of the use for which land is to be taken necessarily appears on the face of the proceedings; and, if it is not a public one, the condemnation cannot be sustained, no matter what the legislature may have declared." *Coe v. Aiken*, 61 Fed. 24, 32.

In *Palairot's Appeal*, 67 Pa. 479, 5 Am. Rep. 450, the court considered an act of the legislature of Pennsylvania, in which it was attempted to extinguish irredeemable rents. The act provided for just compensation to be fixed by a jury, and, as here, contained a declaration of public use as a matter of public policy. Mr. Justice Sharswood, in an able opinion declaring the act unconstitutional, said: "No doubt the right of *eminent domain*, being for the safety and advantage of the public, overrides all rights of private property. But for what public use has this estate of the appellants been taken and applied? It has been contended, as the preamble of the act declares, that 'the policy of this commonwealth has always been to encourage the free transmission of real estate, and to remove restrictions on alienation, so that it is, and is hereby declared to be, necessary for the public use to provide a method of extinguishing such irredeemable rents, having a due regard for private rights.' But if this is the kind of public use for which a man's property can be taken, there is practically no limit to the legislative power. It would result that, whenever the legislature deem it expedient to transfer one man's property to another upon a valuation, they can effect their object."

In other words, whatever power Congress may possess to take private property for a public use upon just compensation, it has no power, under any circumstances, to take private property for a private use,

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property for
private use.**

as is attempted under the present act. Here, however, the individual litigant invokes the aid of the statute, not for the public use, but for his own

private benefit. Though Congress may have had power, in the exercise of the right of eminent domain as a war emergency, to take over rental property in the District of Columbia to devote it to the public use of accommodating its employees and officials, it has not power to take the private property of one individual and turn it over to the use of another private individual. As we said in the *Willson Case*, — App. D. C. —, 265 Fed. 435: "In the present case, for example, by the exercise of the power of eminent domain, the government might have checked and thwarted any tendency on the part of landlords toward extortion, and, at the same time, have satisfied the due process clause of the Constitution."

The judgment is reversed with costs, and the cause remanded for further proceedings not inconsistent with this opinion.

Chief Justice Smyth dissenting:

Being unable to unite with my associates in the conclusion which they have reached in this case, I think it proper to state as briefly as may be the reasons for my position.

First. Block's lease of the property expired December 31, 1919. Hirsh became the owner of the property November 12, 1919; therefore in ample time to give Block thirty days' notice, as prescribed by the Ball Act, before his term expired. Hirsh brought his action for possession in the municipal court, saying, in the words of the record, "that he is a bona fide purchaser of the said real property for his own occupancy, and requires and intends to occupy and to use the same himself." Judgment went against him. He appealed to the supreme court of the District, and in his affidavit of merit repeated the allegation just quoted. Under Rule 19 of that court he filed a motion for judgment on the ground that the affidavit of defense filed by Block was insufficient. The motion was overruled and judgment given for the defendant.

The Ball Act provides: "The

rights of the tenant under this title shall be subject to the limitation that the bona fide owner of any rental property, apartment, or hotel shall have the right to possession thereof for actual and bona fide occupancy by himself, or his wife, children, or dependents, . . . upon giving thirty days' notice in writing, served in the manner provided by § 1223 of the act entitled 'An Act to Establish a Code of Laws for the District of Columbia,' approved May 3, 1901, as amended, which notice shall contain a full and correct statement of the facts and circumstances upon which the same is based," etc. Therefore, if Hirsh's allegation with respect to being a bona fide purchaser of the property for his own use is true, he would be awarded possession under the act by the commission, for we must assume that it would correctly decide the case. *Shreveport v. Cole*, 129 U. S. 36, 42, 32 L. ed. 589, 591, 9 Sup. Ct. Rep. 210; *Strother v. Lucas*, 12 Pet. 410, 9 L. ed. 1137; *Boley v. Griswold*, 20 Wall. 486, 488, 22 L. ed. 375, 376; *Butler v. Maples*, 9 Wall. 766, 19 L. ed. 822. Should the tenant refuse to yield possession, Hirsh could apply to the municipal court for the proper writ, and the commission's determination under § 106 of the act would be conclusive of the "rights and duties" of the tenant, and a writ for possession would necessarily follow. Therefore, if he had pursued the course outlined in the act, he would have received complete relief, provided he gave the required thirty days' notice. According to the law existing prior to the approval of the act, he would not have been required to give such notice. Does this render the act unconstitutional?

The requirement with respect to the notice affects the remedy only. It does not touch the contractual rights of the parties. There is a wide difference between the obligation of a contract and the remedy for its enforcement. This has been the law, at least since *Sturges v. Crowninshield*, 4 Wheat. 122, 4 L.

ed. 529. In that case Chief Justice Marshall said: "The distinction between the obligation of a contract, and the remedy given by the legislature to enforce that obligation, has been taken at the bar, and exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct." In a later case, the same court said: "But it is equally well settled that changes in the forms of action and modes of proceeding do not amount to an impairment of the obligations of a contract if an adequate and efficacious remedy is left." *Antoni v. Greenhow*, 107 U. S. 769, 774, 27 L. ed. 468, 471, 2 Sup. Ct. Rep. 91. To the same effect are *Tennessee v. Sneed*, 96 U. S. 69, 74, 24 L. ed. 610, 612; *Wilson v. Standefer*, 184 U. S. 399, 416, 46 L. ed. 612, 619, 22 Sup. Ct. Rep. 384; *Waggoner v. Flack*, 188 U. S. 595, 604, 47 L. ed. 609, 613, 23 Sup. Ct. Rep. 345; and *Aikens v. Kingsbury*, 247 U. S. 484, 488, 62 L. ed. 1226, 1229, 38 Sup. Ct. Rep. 558. According to the judgment of Congress, the remedy in the case before us was modified, but that was legitimate and did not make the act invalid.

It is asserted by Hirsh, and in effect repeated in the majority opinion, that the law insured him the unrestricted right of alienation of his property, the right to confer upon his alienee the right of possession without any claim or charge upon it, the right to relet the property to another tenant upon such terms as may be agreeable to him, without let or hindrance from Block, and that the act deprives him of these rights. The ready answer to these contentions is that he does not seek by his pleading the right to sell or relet his property. He asks only that he be given possession of it for his own occupancy, and, as I have just pointed out, the act furnishes him a direct and effective means by which to get it. It will be time enough to adjudicate the other rights when they properly arise.

Of a situation quite similar to the one we are considering, the Supreme Court of the United States said: "This is an effort to test the constitutionality of the law without showing that the plaintiff had been injured by its application, and in this particular the case falls within our ruling in *Tyler v. Judges of Court of Registration*, 179 U. S. 405, 45 L. ed. 252, 21 Sup. Ct. Rep. 206, wherein we held that the plaintiff was bound to show he had personally suffered an injury, before he could institute a bill for relief. In short, the case made by the plaintiff is purely academic." *Turpin v. Lemon*, 187 U. S. 51, 60, 47 L. ed. 70, 75, 23 Sup. Ct. Rep. 20. In a more recent case, *New York ex rel. Hatch v. Reardon*, 204 U. S. 152, 160, 51 L. ed. 415, 422, 27 Sup. Ct. Rep. 188, 9 Ann. Cas. 736, the same court said: "But there is a point beyond which this court does not consider arguments of this sort for the purpose of invalidating the tax laws of a state on constitutional grounds. This limit has been fixed in many cases. It is that unless the party setting up the unconstitutionality of the state law belongs to the class for whose sake the constitutional protection is given, or the class primarily protected, this court does not listen to his objections, and will not go into imaginary cases, notwithstanding the seeming logic of the position that it must do so, because if for any reason, or as against any class embraced, the law is unconstitutional, it is void as to all."

In another case one Collins, an osteopath, was arrested for violating a law of Texas prohibiting a person from practising medicine for money, without having first procured a license under the statute. He sued out a writ of habeas corpus. It appeared he made no application to the state medical board for permission to register, assuming that he would be denied the right, and on this assumption attacked the constitutionality of the law. The supreme court, after pointing out his failure

to seek the license, and the probability that he might have obtained it if he had applied, said: "On these facts we are of opinion that the plaintiff in error fails to show that the statute inflicts any wrong upon him contrary to the 14th Amendment of the Constitution of the United States. If he has not suffered, we are not called upon to speculate upon other cases, or to decide whether the followers of Christian Science . . . might . . . have cause to complain." *Collins v. Texas*, 223 U. S. 288, 295, 56 L. ed. 439, 443, 32 Sup. Ct. Rep. 286. So I may say here, we are not called upon to decide whether, if Hirsh desired to sell or relet his property, the act would interfere with his doing so.

My associates say that the act deprives Hirsh of his right to a trial by jury, in disregard of the 7th Amendment to the Constitution. But he did not ask for a jury trial. On the contrary, he moved the court under Rule 19, as I have shown, for a judgment without the intervention of a jury. Why should they raise a question not presented by the record in order that they may assail an act of Congress, especially in view of the rule, universally held, that it is the duty of all courts to sustain a statute if it can be done. "Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without injury. The safety of our institutions depends in no small degree on a strict observance of this salutary rule." *Sinking Fund Cases*, 99 U. S. 700, 718, 25 L. ed. 496, 501; *Hooper v. California*, 155 U. S. 648, 657, 39 L. ed. 297, 301, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; *Presser v. Illinois*, 116 U. S. 252, 269, 29 L. ed. 615, 620, 6 Sup. Ct. Rep. 580; *Grenada County v. Brogden* (*Grenada County v. Brown*) 112 U. S. 261, 266, 28 L. ed. 704, 706, 5 Sup. Ct. Rep. 125.

The doctrine of the foregoing

cases, which is binding on us, when applied to Hirsh's contentions, demonstrates that the latter have no basis in the law. Outside the matter of notice, which I have disposed of, the wrongs of which he complains are imaginary. The questions he raises are purely academic, and not properly before the court for adjudication.

Second. It is urged by Hirsh that the regulation of the use of rental property and of the charges to be made therefor in the District is not within the scope of the police power of Congress, and therefore the act is void. For reasons already given, appellant has no right to raise this question. So far as the act applies to him in the present action, it is valid.

Suppose, however, it is open to him to assail the act. Will it stand the test? Congress possesses all the police power within this District that a state legislature has within its state. *Washington Terminal Co. v. District of Columbia*, 36 App. D. C. 186, 191; *District of Columbia v. Brooke*, 214 U. S. 147, 149, 53 L. ed. 944, 945, 29 Sup. Ct. Rep. 560. This is not denied. The police power is a development of the law. It comprehends much more now than it did sixty years ago. Albeit a part of the common law, it was not known to it under that name. The 13th edition of *Bouvier's Law Dictionary*, published in 1867, did not have it. Chief Justice Marshall seems to be the first to introduce it into the nomenclature of our law, when he used it in *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678. Under this power, Congress has the right "to enact laws for the promotion of the health, safety, morals and welfare of those subject to its jurisdiction." *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 567, 55 L. ed. 328, 338, 31 Sup. Ct. Rep. 259. "There is," says Mr. Justice Hughes in the same case, "no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide de-

partment of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community. A like doctrine is set forth in *Crowley v. Christensen*, 137 U. S. 86, 89, 34 L. ed. 620, 621, 11 Sup. Ct. Rep. 13; *Jacobson v. Massachusetts*, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358, and *Frisbie v. United States*, 157 U. S. 160, 165, 39 L. ed. 657, 658, 15 Sup. Ct. Rep. 586.

Congress, however, may not exercise this power except with respect to business or property clothed with a public interest. But who is to decide when property is so clothed? Manifestly, this must be done in the first instance by Congress. "The legislature," said the Supreme Court of the United States, in *McLean v. Arkansas*, 211 U. S. 547, 548, 58 L. ed. 319, 320, 29 Sup. Ct. Rep. 206, "being familiar with local conditions, is primarily the judge of the necessity of such enactments." In *Clark v. Nash*, 198 U. S. 361, 369, 49 L. ed. 1085, 1088, 25 Sup. Ct. Rep. 676, 4 Ann. Cas. 1171, it was ruled "that what is a public use may frequently and largely depend upon the facts surrounding the subject." After examining many cases, both Federal and state, the Supreme Court said: "They demonstrate that a business, by circumstances and its nature, may rise from private to be of public concern, and be subject, in consequence, to governmental regulation." *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389, 411, 58 L. ed. 1011, 1021, L.R.A. 1915C, 1189, 34 Sup. Ct. Rep. 612; see also *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 569, 55 L. ed. 328, 339, 31 Sup. Ct. Rep. 259; *Erie R. Co. v. Williams*, 233 U. S. 699, 58 L. ed. 1160, 51 L.R.A. (N.S.) 1097, 34 Sup. Ct. Rep. 761. Congress, in § 122 of the act before us, found that it was "made necessary by emergencies growing out of the war with the Imperial German Gov-

ernment, resulting in rental conditions in the District of Columbia dangerous to the public health and burdensome to public officers and employees whose duties require them to reside within the District, and other persons whose activities are essential to the maintenance and comfort of such officers and employees, and thereby embarrassing the Federal government in the transaction of the public business." We must assume that this declaration was made in good faith, and represents the deliberate judgment of the Congress. The Supreme Court has asserted "many times that each act of legislation has the support of the presumption that it is an exercise in the interests of the public." *Erie R. Co. v. Williams*, supra.

The determination, therefore, by the Congress, presumably after a careful survey of all the pertinent facts,—for we must assume that Congress discharged its full duty (*Shreveport v. Cole*, 129 U. S. 36, 42, 32 L. ed. 589, 591, 9 Sup. Ct. Rep. 210; *Strother v. Lucas*, 12 Pet. 410, 9 L. ed. 1137; *Boley v. Griswold*, 20 Wall. 486, 488, 22 L. ed. 375, 376; *Butler v. Maples*, 9 Wall. 766, 19 L. ed. 822),—that rental property in this District, for the reasons set forth in § 122, was clothed with a public interest when the Ball Act was passed, is entitled to great respect by the courts, and should not be brushed aside except upon very conclusive proof that it has no basis on which to rest. But we were told at the bar that it had no effect and should be treated by the court as negligible. Counsel frankly admitted that he did not have any authority for this assertion, and my studies have not revealed any.

In *Antoni v. Greenhow*, 107 U. S. 769, 775, 27 L. ed. 468, 471, 2 Sup. Ct. Rep. 91, the Supreme Court declared: "We ought never to overrule the decision of the legislative department of the government, unless a palpable error has been committed."

What, then, is the test by which

the court is to ascertain whether this determination by Congress is sound? The Supreme Court furnishes it. In *Munn v. Illinois*, 94 U. S. 113, 132, 24 L. ed. 77, 86, it said: "For our purposes we must assume that, if a state of facts *could* exist that would justify such legislation, it *actually did* exist when the statute now under consideration was passed. For us the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the state. *But if it could, we must presume it did.*" Could there be anything plainer or more direct? In oral argument it was urged that this statement was merely obiter. In *Antoni v. Greenhow*, supra, after the *Munn* Case had been under the searching scrutiny of the bench and bar for more than six years, the court, citing the *Munn* Case, said: "If a state of facts could exist that would justify the change in a remedy which has been made, we must presume it did exist, and that the law was passed on that account." The *Munn* decision has been cited numerous times by the Supreme Court as an authority in actions such as the one before us. *Georgia R. & Bkg. Co. v. Smith*, 128 U. S. 174, 180, 32 L. ed. 377, 380, 9 Sup. Ct. Rep. 47; *Budd v. New York*, 143 U. S. 517, 543, 36 L. ed. 247, 255, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; *German Alliance Ins. Co. v. Lewis*, 233 U. S. 409, 58 L. ed. 1020, L.R.A.1915C, 1189, 34 Sup. Ct. Rep. 612; *Brooks Scanlon Co. v. Railroad Commission*, 251 U. S. 396, 64 L. ed. 323, P.U.R.1920C, 579, 40 Sup. Ct. Rep. 183, decided February 2, this year. In the *Lewis* Case, I find this: "*Munn v. Illinois* was approved in many state decisions, but it was brought to the review of this court in *Budd v. New York*, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468, and its doctrine, after elaborate consideration, reaffirmed, and against the same arguments which

are now urged against the Kansas statute." Thus it is demonstrated that the doctrine of the *Munn Case* is firmly embedded in our law.

The majority say with stress that the renting of property in the District is a private business, and, because of this, not affected with a public interest. The same argument was advanced in the *Munn* and *Budd Cases*, *supra*. In both, the owners of the property concerned were private individuals, doing a private business without any privilege or monopoly granted to them by the state; yet it was held, as I have shown, that their property was affected with a public interest. Speaking of the dissenting opinion of Mr. Justice Brewer in the *Budd Case*, in which he urged the private character of the property there involved, the Supreme Court in the *German Alliance Case*, 233 U. S. 409, 58 L. ed. 1020, L.R.A.1915C, 1189, 34 Sup. Ct. Rep. 612, said: "Every consideration was adduced, based on the private character of the business regulated, and, for that reason, its constitutional immunity from regulation, with all the power of argument and illustration of which that great judge was a master. The considerations urged did not prevail. Against them, the court opposed the ever-existing police power in government, and its necessary exercise for the public good, and declared its entire accommodation to the limitations of the Constitution. The court was not deterred by the charge (repeated in the case at bar) that its decision had the sweeping and dangerous comprehension of subjecting to legislative regulation all of the businesses and affairs of life and the prices of all commodities." While in a sense contracts between landlords and tenants are private, their effects, under conditions like those enumerated by Congress in the act; go beyond the individuals to the contract, and "when this is so," says the Supreme Court in the *German Alliance Case*, "there are many examples of regulation."

The Supreme Court has approved a statute prohibiting the sale of intoxicating liquors (*Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273); limiting the hours of employment in mines and smelters (*Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383); forbidding the sale of cigarettes without license (*Gundling v. Chicago*, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633); requiring the redemption in cash of store orders issued in payment of wages (*Knoxville Iron Co. v. Harbison*, 183 U. S. 13, 46 L. ed. 55, 22 Sup. Ct. Rep. 1); prohibiting contracts for options to sell or buy grain (*Booth v. Illinois*, 184 U. S. 425, 46 L. ed. 623, 22 Sup. Ct. Rep. 425); prescribing the hours of labor for those employed by the state or its municipalities (*Atkins v. Kansas*, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124); permitting an individual to condemn property for the purpose of obtaining water for his land (*Clark v. Nash*, 198 U. S. 361, 49 L. ed. 1085, 25 Sup. Ct. Rep. 676, 4 Ann. Cas. 1171); forbidding the employment of women in laundries more than ten hours a day (*Muller v. Oregon*, 208 U. S. 412, 52 L. ed. 551, 28 Sup. Ct. Rep. 324, 13 Ann. Cas. 957); making it unlawful to contract to pay miners employed at quantity rates upon the basis of screened coal, instead of weight of the coal as originally produced in the mine (*McLean v. Arkansas*, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206); prohibiting contracts limiting liability for injuries, made in advance of the injury received (*Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259); and regulating the rates to be charged for fire insurance (*German Alliance Ins. Co. v. Lewis*, 233 U. S. 389, 58 L. ed. 1011, L.R.A.1915C, 1189, 34 Sup. Ct. Rep. 612). In each of these cases the right of private contract was involved just as much as it is between a landlord and tenant; yet that did not deter the court from holding that the business or property was

affected with a public interest and subject to regulation by the legislature. Courts may take cognizance of whatever is or ought to be generally known, within the limits of their jurisdiction. *Illinois ex rel. McNichols v. Pease*, 207 U. S. 100, 111, 52 L. ed. 121, 126, 28 Sup. Ct. Rep. 58; *Underhill v. Hernandez*, 168 U. S. 250, 42 L. ed. 456, 18 Sup. Ct. Rep. 83; 15 R. C. L. § 2, p. 1057. I believe the facts found by Congress in § 122 of the act are substantially correct. It would, in truth, be a bold act to deny their verity. A careful analysis of the facts in the *Munn*, *Budd*, *McGuire*, and *German Alliance Ins. Co. Cases*, supra, fails to reveal a reason more imperative for a regulatory act than that which existed when the Ball Statute was enacted.

There is, then, not only the rule of the *Munn* Case, namely, that if the facts could exist they must be presumed to exist, but also the knowledge that they did exist, when the act was passed. The burden of establishing that they did not is on the person who attacks the act. *Erie Railroad Co. v. Williams*, 233 U. S. 699, 58 L. ed. 1160, 51 L.R.A. (N.S.) 1097, 34 Sup. Ct. Rep. 761. Not a thing has been produced to support this burden. None the less we are asked to find, and the majority have yielded to the request, that there is no truth in the congressional statement. To this I am totally unable to agree.

When it is considered that this District was selected as the seat of the government of the United States (U. S. Const. art. 1, § 8), and that there existed therein a condition of affairs such as Congress sets forth in the act, to say that the government is powerless to afford any relief is to attribute to it a weakness that would be, indeed, unfortunate.

The decisions cited by the majority on this point either support my position or can be easily differentiated from the case before us; but I can analyze only one (*Weems S. B. Co. v. People's S. B. Co.* 214 U. S. 345, 53 L. ed. 1024, 29 Sup. Ct. Rep.

661, 16 Ann. Cas. 1222), without unreasonably extending this opinion. I take that case because appellant seems to place much reliance upon it. The complainant, a steamboat company, owned wharves on the Rappahannock river. The defendants, a steamboat company and its officers, demanded the right to use the wharves without the consent of the owner, upon paying a reasonable compensation. The court held that the complainant was not obliged to yield to the demands of the defendants, and an injunction issued against the latter, forbidding them to interfere with complainant in the use of its property. The complainant had not offered its property for rent. No statute was involved. It was an attempt by the defendants to compel the complainant to grant them a right in its private property. Nothing of that nature is involved here. Therein lies the distinction between that case and this. Property owners are not obliged to devote their property to rental purposes, but when they do, under the conditions established here, it is subject to the regulatory power of Congress. "Looking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is 'affected with a public interest, it ceases to be *juris privati* only.'" *Munn v. Illinois*, 94 U. S. 126, 24 L. ed. 84.

In the light of what has been said, I see no escape from the conclusion that the business of renting property in this District under the conditions mentioned is affected with a public interest.

Third. The fact that Congress has power to regulate does not establish by any means that it may disregard constitutional guaranties and deprive an owner of his property without due process, or deny him a reasonable compensation for its use. The power is subject to constitutional limitations. As I have heretofore shown, the act under review does not impinge on any constitutional right which *Hirsh* is

entitled to assert here. If in a proper action by him it should appear that the enforcement of any of the provisions of the act would deprive him of such a right, the courts will be open for his protection. Certain provisions may be void, but that would not render the whole act illegal. Section 121 provides: "If any clause, sentence, paragraph, or part of this title [act] shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof but shall be confined in its operations to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered." In a decision of the Supreme Court of the United States rendered March 22d, this year, the constitutionality of certain statutes of Oklahoma was considered. The statute prescribed that a commission should fix maximum rates for services performed by a laundry company. It was provided that disobedience to an order establishing rates would be a contempt of the commission, and subject the recalcitrant company to a penalty not exceeding \$500 a day. No right of direct appeal to the courts from the action of the commission fixing the rates was permitted, but the company might appeal from a judgment finding it guilty of contempt for disobeying the commission's order. If, how-

ever, it failed on the appeal, it might be subjected to the penalty. The Supreme Court held that "a judicial review beset by such deterrents does not satisfy the constitutional requirements," and therefore that the provisions of the acts imposing a penalty pending an appeal were unconstitutional in certain aspects; but that did not, in the judgment of the court, render the other parts of the acts void. It was ruled that "if upon final hearing the maximum rates fixed should be found not to be confiscatory, a permanent injunction should nevertheless issue to restrain the enforcement of penalties accrued pendente lite, provided that it also be found that the plaintiff had reasonable ground to contest them as being confiscatory." *Oklahoma Operating Co. v. Love*, 252 U. S. 331, 64 L. ed. 596, 40 Sup. Ct. Rep. 338. So, here, if any of the provisions of the act before us should be found to be offensive to the Constitution, they may fall without dragging down the remainder of the act.

For the reasons given, I think the judgment of the lower court should be affirmed.

Petition for writ of certiorari denied by the Supreme Court of the United States, October 18, 1920 (U. S. Adv. Ops. 1920-21, p. 45). — U. S. —, 65 L. ed. —, 41 Sup. Ct. Rep. 13.

ANNOTATION.

Constitutionality of rent laws.

This note is confined to the power of the legislature to pass statutes for the relief of tenants.

While this subject has but recently acquired importance because of the passage of rent laws by Congress (applicable to the District of Columbia) and the state legislatures, because of conditions arising out of or following the World War, statutes for the relief of tenants were passed many

years ago, as appears from 16 R. C. L. §§ 477 et seq.

The Pennsylvania Act of April 15, 1869, for the extinguishment of ground rents, was held unconstitutional in *Palairot's Appeal* (1871) 67 Pa. 479. 5 Am. Rep. 450, upon the ground that it transferred the property of one man to another without the former's consent, in violation of the state Bill of Rights, and that it impaired a cor-

tract, and was therefore prohibited both by the United States and the state Constitutions.

But in *Schellenberg v. Frank* (1905) 139 Mich. 183, 102 N. W. 644, the court upheld § 25 of chapter 308 of the Laws of 1897, relating to proceedings to recover possession of land, which section denied to the landlord the right to bring an action for treble damages for the unlawful detainer of his property, if he sued on the bond given by the tenant on appeal from the summary proceeding. This decision was based upon the ground that to assert that the legislature had no authority to compel a landlord to make such election was to deny to the legislature authority to prescribe the conditions under which one may use a statutory remedy, and that the authority to prescribe such condition was implied in the constitutional grant of authority to legislate.

And it was held to be within the power of the New Jersey legislature to enact § 113 of the District Court Act, and § 7 of the Act of 1903, which re-enacted a law of 1847 that gave a tenant the right to recover from the landlord in an action of trespass, damages for any unlawful proceeding in summary proceedings. This remedy was given in place of an appeal, the court saying that nothing in the Constitution of the state suggested a constitutional right of appeal, except from the orphans' court and circuit court, and that it was within the power of a state to alter or regulate appeals, or to make the decision of the court of first instance final. *McGann v. La Brecque Co.* (1920) — N. J. —, 109 Atl. 501.

As to the validity of the recent laws for the relief of tenants, there appears to be some conflict. Thus, the act of Congress of May 31, 1918 (40 Stat. at L. 593, chap. 90), known as the "Saulsbury Resolution," was held unconstitutional in *Willson v. McDonnell* (1919) — App. D. C. —, 265 Fed. 432. This act broadly prohibits any judicial proceeding to recover possession of leased premises in the District of Columbia until a treaty is concluded between the United States and

Germany, and during the life of the act, and purports to perpetuate, with some exceptions, existing leases, at the rental in force at the date of the passage of the act. This decision was based upon the ground that the resolution not only deprived the citizens of property without compensation, but was not uniform or intended to be uniform in its operation, as it affected and was intended to affect in one way property already under lease, and in another way property not under lease.

The preceding case was followed in *Groot v. Reilly* (1919) 49 App. D. C. 388, 266 Fed. 1008, and *Heitmuller v. Stokes* (1920) 49 App. D. C. 391, 266 Fed. 1011, which likewise held the Saulsbury Resolution unconstitutional.

In *Maxwell v. Brayshaw* (1919) 49 App. D. C. 57, 258 Fed. 957, the court held that it was unnecessary to pass upon the constitutionality of such resolution, since the case was not within its provisions.

The following year another act relating to the renting of property in the District of Columbia was passed, being the Act of Congress of October 22, 1919 (41 Stat. at L. 298, chap. 80), known as the "Ball Rent Law;" and this act was held unconstitutional in the reported case (*HIRSH v. BLOCK*, ante, 1233). This act provides for the appointment of a rent commission vested with absolute jurisdiction over landlords and tenants, the fixing of rents, and the continuing and making of leases within the District of Columbia for a period of two years, unless the act is sooner repealed by Congress. The court held that the act was a violation of the 5th Amendment of the Federal Constitution, saying in this connection: "Plaintiff had a vested estate and reversion in fee in the property in question, to come into possession on January 1, 1920. Defendant's right of possession terminated on December 31, 1919, by the express terms of his lease, a contract valid and existing when this act was passed. This right of reversion is a property right, of which plaintiff cannot be divested except by due process of law. The act gives defendant the option of retaining possession of the

property at the rental fixed in the lease, which is continued in force, or, if dissatisfied, he may apply to the commission for a reduction of the rent. If reduced by the commission, plaintiff is powerless to have a review of the facts upon which the action of the commission is based. Not only is plaintiff denied any remedy for this continued detention of his property, but he is forbidden to sell his property except subject to and burdened by the option of the tenant. It would seem, therefore, that if the property clauses of the Constitution are longer to have any restraining power over Congress, the case here presented is one within the inhibition of the 5th Amendment." And the court further said that this taking of private property did not amount to the taking of private property for a public use, that the renting of property in the District of Columbia was a private business, and that a private business could not be made public or impressed with a public interest merely by legislative fiat, and that a public interest could not be thus created, or property rights be divested, by an arbitrary exercise of the police power.

The holding of the reported case (*HIRSH v. BLOCK*, ante, 1238) was followed without discussion in a subsequent case between the same parties in (1920) — App. D. C. —, 267 Fed. 631.

The New York legislature, in 1920, passed twelve statutes, to wit, chapters 130 to 139, 209, and 210, of the laws of that year, to give relief to tenants from the grave situation which had arisen due to increasing rents. These laws were passed as emergency legislation, and apply only to the large cities of the state, and are limited in duration till November 1, 1922. One of these laws, chapter 136 of the Laws of 1920, which permits a tenant, in an action at law for recovery of rent, to set up the defense that the rent is unjust and unreasonable, and that the agreement under which the same is sought to be recovered is oppressive, was held constitutional in *78th Street & B. Co. v. Rosenbaum* (1920) 111 Misc. 577, 182

N. Y. Supp. 505. The validity of this law was held to rest upon the police power of the state, and, secondly, upon the equally broad principles of public policy. The court said in this connection: "We have arrived at a point where, in an emergency, there are no property rights which are not subject to the police power of the state. The legislature is the exclusive judge of the existence of an emergency. Every person who carries on a business emerges from his privacy and owes an obligation to the community in the conduct of his business. This is especially true in the case of real estate, as the use and control of lands from the earliest times have been most persistently associated with, and applied to be subject to, the public interest. . . . Irrespective of the police power, the statute is valid upon the principle of public policy. The right of freedom of action is limited when it interferes with public policy. . . . It is therefore apparent that the doctrine is firmly embedded in our jurisprudence that where one takes an undue advantage of another's situation and circumstances, and thereby obtains an unfair and unconscionable contract the court may grant relief. This condition applies to the making of leases at the present time. Landlords and tenants cannot contract on an equal basis. The tenant is compelled by sheer necessity of having a place to dwell in, to agree to any conditions that may be imposed by the landlord. As the statute well says, the freedom of contract is impaired. Chapter 136 does nothing else but what equity has decreed should be done in similar cases. It permits the equitable defense of oppression to be set up in an appropriate case. That under our procedure equitable defenses may be interposed in actions at law is unquestioned. The remedy given by the legislature is not an innovation. It only puts in statutory form what has been the law from time immemorial. The legislature has determined by enactment what is public policy."

And in *Paterno Investing Corp. v. Katz* (1920) 112 Misc. 242, 184 N. Y.

Supp. 129, where the question was whether this law (Laws 1920, chap. 136) was retroactive, and if so, whether it was constitutional, it being held that the law was not retroactive, the court said, in regard to its validity: "If in fact an emergency exists and conditions have arisen 'which seriously affected and endangered the public welfare, health, and morals in the city of New York,' it was not only the right but the duty of the legislature to pass statutes which would tend reasonably to correct the conditions and remove the danger to the public welfare, health, and morals. The fact that housing conditions are congested is so well known that the courts might well take judicial notice of it, and certainly have no right to nullify the declaration of the legislature that such conditions exist. The legislature has passed this statute to remedy in part this condition."

Another one of the New York statutes, chapter 137 of the Laws of 1920, which gives the courts discretionary power in summary proceedings to stay the issuance of a warrant in such proceedings for not more than twelve months, upon proof that the tenant cannot find another dwelling house, and on condition of the deposit by the tenant of an amount of rent determined by the court to be reasonable, was held constitutional in *Kuenzli v. Stone* (1920) 112 Misc. 125, 182 N. Y. Supp. 680. This law was held to be a valid exercise of the police power of the state, and, for that reason, not open to the objection of impairing the obligation of contracts. Another reason given for this holding was that summary proceeding was a remedy first created by the legislature, and could be modified or abolished by it, the court, in this connection, saying: "Nor is there any vested right to a particular remedy. . . . A statute is not unconstitutional merely because it changes, abolishes, or impairs an existing remedy or a cause of action that has accrued prior to the passage of the act. . . . Clearly the statute under review is remedial, and the remedy is only modified in its form to what it was before. In addition to

that, owners of real property still have the remedy of an action in ejectment. It cannot be said, therefore, that owners of property have been deprived of all remedy under such a state of facts."

And in *Blek v. Davis* (1920) 193 App. Div. 215, 183 N. Y. Supp. 737, where the landlord, in a summary proceeding, insisted that the same law (Laws 1920, chap. 137) was unconstitutional, the court said that courts were reluctant to declare the action of the co-ordinate branch of the government unconstitutional, and should not do so unless a clear case was presented, necessitating such decision, and that upon the record presented in the case, with no appearance by the tenant or his attorney upon the appeal, they should not proceed to determine the constitutionality of the statute.

In *Horn v. Klugman* (1920) 112 Misc. 171, 183 N. Y. Supp. 150, the court said, in reference to chapter 139 of the New York Laws of 1920: "The statute has a laudatory humane objective. While it may create some hardships, the good secured and the mischief prevented are of more far-reaching results. If the intent and force of this statute, as construed, are found to be impracticable, harsh, and unjust, courts have no alternative but to uphold and enforce it, leaving it to the legislature to remedy, especially when it is for the general good, and in force for a limited time only." This law provides that no summary proceeding shall be maintainable in certain cases, unless the petitioner alleges in the petition, and proves, that the rent of the premises described in the petition is no greater than the amount paid by the tenants preceding the default for which the proceeding is brought, or has not been increased more than 25 per centum over the rent as it existed one year prior to the time of the presentation of the petition.

And in *Shanik v. Eckhardt* (1920) 112 Misc. 86, 183 N. Y. Supp. 155, the court stated that the constitutionality of the New York laws was not questioned.

Later in the year 1920, at an extraor-

dinary session called for that purpose, the New York legislature passed stronger laws for the relief of tenants (chaps. 942 to 945, 947, 948, and 950 to 953, of the Laws of 1920, effective September 27, 1920).

Chapters 942 and 947, applicable to cities having a population of one million or more, and cities in a county adjoining such a city, respectively suspend until November 1, 1922, the remedies by summary proceedings and ejectment to recover from tenants or occupants the possession of dwellings, including apartments and tenement houses, except where the person holding it is shown to be objectionable, or the landlord seeks to occupy the premises as a dwelling for himself and family, or intends to demolish the building and construct a new building, or has sold to a co-operative-ownership-plan corporation, providing such tenants or occupants are ready, able, and willing to pay reasonable rent or price for their use and occupation. Chapter 944, which applies to cities of the first class, declares it to be a defense to an action for rent that the rate charged is unjust and unreasonable.

By its recent decision in *People ex rel. Durham Realty Corp. v. La Fetra* (1921) — N. Y. —, — N. E. —, 64 N. Y. L. J. 2021, and *People ex rel. Brixton Operating Corp. v. La Fetra* (1921) — N. Y. —, — N. E. —, 64 N. Y. L. J. 2021, the New York court of appeals has upheld the constitutionality of these chapters generally and specifically, as against the objections that they took property without due process of law, denied the equal protection of the laws, took private property not only for private use, but without compensation, and, as applied to existing leases, impaired the obligation of contracts. While the question in these cases came before the court in a mandamus proceeding to compel the issuance of a precept in summary proceedings, and thus directly brought up the constitutionality of chapter 942, in relation to the summary proceedings, the court expressly treated the three chapters as parts of a single

legislative scheme for the relief of tenants, and upheld all three.

The ground of the decision is stated comprehensively at the close of the prevailing opinion, in the following language: "The conclusion is, in the light of present theories of the police power, that the state may regulate a business, however honest in itself, if it is or may become an instrument of widespread oppression (*People v. Beakes Dairy Co.* (1918) 222 N. Y. 416, 3 A.L.R. 1260, 119 N. E. 115, and cases cited: *Payne v. Kansas* (1918) 248 U. S. 112, 63 L. ed. 153, 39 Sup. Ct. Rep. 32); that the business of renting homes in the city of New York is emergently such an instrument, and has therefore become subject to control by the public for the common good; that the regulation of rents and the suspension of possessory remedies so far tend to accomplish the purpose as to supervene the constitutional inhibitions relied upon to defeat the laws before us." The court also said: "The struggle to meet changing conditions through new legislation constantly goes on. The fundamental question is whether society is prepared for the change. The law of each age is ultimately what that age thinks should be the law." In other parts of the opinion the emergency character of the legislation is commented upon, and, speaking generally, the legislation is upheld as a legitimate exercise of the police power. Specifically, the court observed: "No tenant is forced out of his home so long as he pays the fair monthly rent, but a dispossession warrant may be issued if he fails to pay. A comprehensive substitute for the possessory remedies thus becomes the keystone of the arch." Again, the court says: "If property rights are here invaded, in a degree, compensation therefor has been provided, and possession is to be regained when such compensation remains unpaid. What is taken is the right to use one's property oppressively, and it is the destruction of that right that is contemplated, and not the transfer thereof to the public use. The taking is therefore analogous to the abatement of a nuisance, or to the establishment of

building restrictions, and it is within the police power." Answering the objection that the laws deny equal protection of the law, the court said: "One class of landlords is selected for regulation, because one class conspicuously offends; one class of tenants has protection, because all who seek homes cannot be provided with places to sleep and eat. Those who are out of possession, willing to pay exorbitant rentals, or unable to pay any rental whatever, have been left to shift for themselves. But such classifications deny to no one the equal protection of the laws. The distinction between the groups is real, and rests upon a substantial basis." Discussing the objection that the laws impair the obligation of contracts, the court said: "The rule alike for state and nation is that private contract rights must yield to the public welfare, when the latter is appropriately declared and defined and the two conflict." As regards the objection of uncertainty, the court said: "No constitutional difficulty presents itself in the way of enforcing the laws on the ground of uncertainty as to what constitutes a reasonable rent or an oppressive agreement. Courts and jury are, in civil cases, constantly dealing with questions of proper care, just compensation, reasonable conduct, fair market value, and the like. It is quite a different thing to say that Congress may not punish the act of making 'any unjust or unreasonable rate or charge' in dealing with necessities, because the language is too indefinite and uncertain upon which to fasten criminal liability (*United States v. L. Cohen Grocery Co.* (U. S. Adv. Ops. 1920-1921, p. 300) — U. S. —, 65 L. ed. —, 41 Sup. Ct. Rep. —). The test is not what the jury may say, but what the jury may reasonably infer from the evidence (*Nash v. United States* (1913) 229 U. S. 373, 57 L. ed. 1232, 33 Sup. Ct. Rep. 780). The exaction of an unjust and unreasonable rent makes oppressive the agreement under which the same is sought to be recovered."

McLaughlin, L. J., dissents for the reasons given in an opinion in another case, decided at the same time

(*Edgar A. Levy Leasing Co. v. Siegel* (1921) — N. Y. —, — N. E. —, 64 N. Y. L. J. 2022). He was of opinion that chap. 944, as applied to leases made prior to its passage, was unconstitutional as impairing the obligation of a contract. He observed in this connection that the defendant, several months prior to the passage of the act, freely, deliberately, and with full knowledge of what he was doing, entered into the renewal lease, but under the act he can violate the agreement because it is unjust, unreasonable, and oppressive, but the landlord is bound; and that the acts enforced a substitution of the new contract which the parties never made, and the terms to which they never agreed. He concludes that such substitution not only impairs the obligation of the contract of renewal, but destroys it, and therefore comes within the constitutional prohibition. In considering the objection that the act deprives the plaintiff of his property without due process of law, he said: "If this does not amount to depriving a landlord of his property . . . it is difficult to imagine what would. . . . In determining what is due process of law, regard must be had to substance, and not to form. . . . The protection of property involves the protection of its value. . . . It is not difficult to see how the value of property occupied by tenants when the act went into effect might be very materially impaired or reduced. There is no way in which the landlord can obtain possession for upwards of two years. Indeed, he cannot sell it, if required to give immediate possession." In holding that the act denied equal protection of the laws, he said: "He [the landlord] must accept the fair rental value, irrespective of what the tenant has agreed to pay, while the owner of a building in process of construction, or one constructed after the passage of the act, may exact whatever rent he sees fit. The act, therefore, is not uniform upon the same class of persons. One class is compelled arbitrarily to retain tenants, whether desired or not, and to accept what the court fixes as a fair rental, while the

other class may select its tenants and fix the rent at an amount upon which the parties agree." In support of his opinion that the act takes private property for a private use, he observed: "The renting of property can no more be said to be for a public use in the city of New York than can the sale of food, clothing, or any other article. Of course, the landlord is a 'vender of space' [a phrase quoted from the majority opinion in *La Fetra Case* already referred to], the baker is a vender of bread, the butcher is a vender of meat, the tailor is the vender of clothing; indeed, every person who sells any kind of property is a vender of the article sold; all are engaged in a private enterprise; but this does not give the state the right to fix the price at which the sale shall be made, unless it be for the public health, public morals, or the general welfare. If it does, there is little, if anything, left of the constitutional provisions relating to the protection of property and the right to contract with reference to it. The power to fix rental rates between private individuals is not analogous to nor controlled by the decisions which have upheld the power of the legislature to fix rates for service, where the owner has devoted the business affected to a public use."

Speaking generally, he observed: "The police power is not superior to the Constitution; on the contrary, it is subject to applicable constitutional limitations." In concluding, he said: "A statute ought not to be pronounced unconstitutional unless it clearly appears to be so. This, to me, does so appear. All citizens should have houses in which to live, but if there are not enough for all, that is no reason why those who are in should be kept there, and those who are out should be allowed to care and shift for themselves. The state has the same regard for one class as the other. Nor should one landlord be treated differently from another. All in the same class should be treated alike. This is what the state and Federal Constitutions require. These safeguards cannot be overthrown by the

exercise of the police power, a power which no one has as yet attempted accurately to define or state just where it commences or ends. It seems to me much better to adhere strictly to the Constitution, the anchor of good, safe, and sound government, rather than to embark on the sea of paternalism, the dangers of which cannot be foreseen or the perils foretold."

It may be interesting to note that rent laws similar to those in this country have been passed in England, and that, in an opinion in one of the recent English cases (*Remon v. City of London Real Property Co.* [1921] 1 K. B. (Eng.) 49), in construing such a law, the court said: "The policy of the statute is a matter for Parliament and not for me, but those who ask for and pass such legislation should not be surprised if, as one of the effects, existing houses are not let, but only offered for sale, and no fresh houses are built by private enterprise."

The court of appeals, at the time and upon the authority of the *La Fetra Case*, decided *Gutttag v. Shatzkin* (1921) — N. Y. —, — N. E. —, 64 N. Y. L. J. 2022, reversing the decision of the appellate division (1920) 194 App. Div. 509, 186 N. Y. Supp. 47, 64 N. Y. L. J. 1043, and affirming the decision at special term (1920) 113 Misc. 362, 185 N. Y. Supp. 71, and *Edgar A. Levy Leasing Corp. v. Siegel* (1921) — N. Y. —, — N. E. —, 64 N. Y. L. J. 2022, affirming the decision of the appellate division (1920) 194 App. Div. 482, 186 N. Y. Supp. 5, 64 N. Y. L. J. 1075.

In view of the novelty and importance of the question involved it has been thought that it may be of service to indicate the views expressed by some of the lower courts in passing upon the constitutionality of the law before the decision of the court of appeals already discussed.

These laws were upheld generally by the United States district court of the southern district of New York, as a valid exercise of the police power, in *Marcus Brown Holding Co. v. Feldman* (1920) 269 Fed. 306, 64 N. Y. L. J. 959.

The application and validity of chapter 947 were involved in *Heyman v. Osterweis* (1920) 113 Misc. 282, 185 N. Y. Supp. 311, an action to dispossess a tenant by ejectment. The court in this case held that this law did not apply to leases or terms commencing prior to September 27, 1920, and that, if construed so to apply, the act, read in *pari materia* with the other housing acts, would be unconstitutional, because, assuming that the leasing of tenements is a business impressed with a public use, and, as such, subject to the exercise of the police power, the result of these acts is to force upon the landlord the continuance of such use, and to deprive him of his right to withdraw his grant by discontinuing the use. The court said that, while he put his decision on the ground that the law was not applicable in this case, he might properly add that he had grave doubts as to the constitutionality of the act in question, when construed in the light of the legislation of which it was a part, because (1) it deprives landlords, such as plaintiff, of all remedy for the repossession of their property; it is not based upon any proper application of the doctrine of eminent domain, and cannot otherwise be sustained as a valid exercise of the police power; and (2) it is discriminatory because, as between owners of old and new buildings, and as between owners who seek to regain possession of the property for their personal use and those who seek possession for other purposes, the act denies the equal protection of the law.

In *William Brandt & Co. v. Weil* (1920) 113 Misc. 320, 185 N. Y. Supp. 497, where a landlord brought a suit to compel his tenant specifically to perform his covenant to vacate at the expiration of his term, upon the theory that he was obliged to seek the aid of a court of equity because the legislature had abolished all existing legal remedies for the enforcement of his right of repossession, the court held that equity could not grant relief, because in doing so it would in effect nullify the legislative will, and that the landlord must obtain relief by as-

sailing the statute. The statutes involved were chapters 942 and 947 of the Laws of 1920, which suspended respectively the possessory remedies of summary proceedings and ejectment. As stated by the court, it was the intent of the legislature, by these statutes, to abolish for the period mentioned therein all those remedies (except such incidental remedies as are customarily applied in equity, in actions that are brought under one of the well-defined heads of equity jurisdiction) for the repossession of his property that were available to the owner of the class of houses in question, at the time the acts were passed.

In the case of *Gutttag v. Shatzkin* (1920) 113 Misc. 362, 185 N. Y. Supp. 71, chap. 947 was upheld. That decision was reversed by the appellate division in (1920) 194 App. Div. 509, 186 N. Y. Supp. 47, 64 N. Y. L. J. 1043. But the decision of the appellate division was reversed, and that of the special term affirmed, by the court of appeals in (1921) — N. Y. —, — N. E. —, 64 N. Y. L. J. 2022, upon the authority of the *La Fetra* Cases.

In *People ex rel. Wasserman v. Fagan* (1920) 113 Misc. 255, 184 N. Y. Supp. 308, an application for a writ of mandamus to compel the clerk of the municipal court to issue a warrant pursuant to a final order in summary proceedings, which the clerk refused to do on account of the provision in chap. 942 of the Laws of 1920 that, in a pending proceeding for the recovery of real property on the ground that the occupant holds over after the expiration of his term, a warrant shall not be issued, except in certain cases, not including the one in question, the relator contended that the statute was unconstitutional upon the ground that the landlord had a property right in the final order of the court. The court, in overruling this contention, said: "The final order, which it may be conceded is in effect a judgment, . . . is 'not a contract, in the ordinary sense of an agreement reached between persons, to whose terms their mutual assent has been given, and it is in that sense that the word is used in the Federal Constitution. . . .

But a final judgment creates and vests substantial rights. . . . It is unnecessary to determine whether such rights extend to the remedy or process under the final order, namely, the warrant, for such rights as the relator has here, whether of contract or property, must yield to the public necessity. What was said by Mr. Justice Kelby in *Kuenzli v. Stone* (1920) 112 Misc. 125, 182 N. Y. Supp. 680, in considering chapter 137 of the Laws of 1920, applies with equal force to this case and the act now under consideration. At page 130. 'Chapter 137 of the Laws of 1920 was clearly enacted in the exercise of the police power of the state. Its purpose was to promote the welfare of the more thickly populated sections of the state by reason of a shortage in the supply of housing facilities. The prohibition in the Federal Constitution that no state legislature shall pass any law impairing the obligation of contracts does not restrict the power of the state to protect the public health, public morals, or the public safety, in so far as the one or the other may be involved in the execution of such contracts. . . . The legislative act under review having been passed under the circumstances above noted, it must be held to have been a valid exercise of power, and for that reason it cannot be said that the law is void by reason of impairing the obligation of contracts.'"

The appellate division of the first department, in *People ex rel. Durham Realty Corp. v. La Fetra* (1920) — App. Div. —, 186 N. Y. Supp. 63, 64 N. Y. L. J. 1113, upheld chap. 942, as against the technical objection that it was not passed in the manner provided by art. 111, § 15, of the state Constitution, which reads that "no bill shall be passed or become a law unless it shall have been printed and upon the desks of the members in its final form at least three calendar legislative days prior to its final passage, unless the governor or the acting governor shall have certified to the necessity of its immediate passage under his hand and the seal of the state."

In *People ex rel. Brixton Oper-*

ating Corp. v. La Fetra (1920) 194 App. Div. 523, 186 N. Y. Supp. 58, 64 N. Y. L. J. 1113, the same court upheld the same law (chap. 942) on the merits, upon the ground that an adequate remedy in ejectment remained to the landlord. That assumption was upon the prior holding by the court that chap. 947, which suspended the remedy by ejectment, was unconstitutional. The premise of the conclusion was the decision of the appellate division in *Gutttag v. Shatzkin* (1920) 194 App. Div. 509, 186 N. Y. Supp. 47, 64 N. Y. L. J. 1043, which, as already shown, was reversed by the court of appeals. The *Brixton Case*, however, as already shown, was affirmed by the court of appeals upon other grounds.

This law (Laws 1920, chap. 942) was sustained by the appellate division of the second department, in *People ex rel. Rayland Realty Co. v. Fagan* (1920) 194 App. Div. 23, 186 N. Y. Supp. 23, 64 N. Y. L. J. 827, even as applying to the issuance of dispossess warrants pursuant to final orders made before the enactment of the law.

But in *People ex rel. H. D. H. Realty Corp. v. Murphy* (1920) 194 App. Div. 530, 186 N. Y. Supp. 38, 64 N. Y. L. J. 1059, the appellate division of the first department reached the conclusion that such law (chap. 942) was invalid in so far as it forbids the issuance of warrants based on such orders; but, their attention having been called to the contrary decision of the second department in the preceding case, though still adhering to their own views, they followed that decision, because both cases were soon to be reviewed by the court of appeals, and in order, meanwhile, to have a uniform rule throughout New York city.

Chapter 944 of the Laws of 1920, limiting landlords to the recovery of a reasonable rent, was held to be a valid exercise of the police power, by the appellate division of the first department, in *Edgar A. Levy Leasing Co. v. Siegel* (1920) 194 App. Div. 482, 186 N. Y. Supp. 5, 64 N. Y. L. J. 1075, affirmed by the court of appeals in (1921) — N. Y. —, — N. E. —, 64 N. Y. L. J. 2022.

And the same court, in *People ex rel. Nassoit v. Young*, — App. Div. —, 186 N. Y. Supp. 334, 64 N. Y. L. J. 1239, upheld the validity of the N. Y. Municipal Court Rule 35, requiring that all actions for rent shall be brought in the district within which the premises are situated. Prior to the adoption of this rule, the landlord could bring the action in the district of his residence, and compel the tenant to travel a great distance in order to defend the action.

In a recent case (*Stell v. Jersey City* (1920) — N. J. L. —, 111 Atl. 274), the New Jersey supreme court held that resolutions by the commissioners of Jersey City, which, after reciting the exaction of unreasonable rents by landlords and the bringing of innumerable dispossession proceedings, authorized the use of public funds to defend such proceedings, were held invalid as contrary to the constitutional provision to the effect that no city shall give any money or property, or make loans, or become security upon ac-

count of any individual, association, or corporation. The court observed that the Walsh Commission Government Act, authorizing the passage of ordinances necessary for the protection of life, health, and property, and to preserve and enforce good government and general welfare, order, and security of the city, did not include authority to deprive owners of property of the beneficial use thereof. An ordinance requiring the owner of property occupied for living purposes to file with the city clerk a copy of any notice served upon tenants or occupants, demanding possession of the premises or increasing the rent thereof, was also held invalid in that case, as imposing an additional burden upon the owner of rented property, for no bona fide purpose, but for a mere pretense that its object was to assist the city clerk in dividing the city into election districts, and aid him to ascertain the number of inhabitants therein. G. V. L.

JOSEPH MOSSEW, Plff. in Err.,
v.
UNITED STATES.

United States Circuit Court of Appeals, Second Circuit — May 19, 1920.

(266 Fed. 18.)

Criminal law — National Defense Act — unjust rate for necessities.

1. No conviction can be had for violation of the provision of the National Defense Act, which declares it to be unlawful to make any unjust or unreasonable rate or charge in handling or dealing in necessities, since the statute provides no penalty for failure to obey the provision.

[See note on this question beginning on page 1265.]

— violation of statute — absence of penalty — effect.

2. No conviction can be had for violation of a statute for which no penalty is provided.

Appeal — error — refusal to set aside judgment.

3. A writ of error is the proper remedy for refusal to set aside an erro-

neous conviction after lapse of the term at which it was found.

Judgment — conviction — void — setting aside after term.

4. A conviction on an indictment void for failure to charge a crime may be set aside after lapse of the term at which it was found.

[See 8 R. C. L. 243-245.]

ERROR to the District Court of the United States for the Northern District of New York to review a judgment convicting defendant of selling sugar at an unfair, unjust, and unreasonable rate. *Reversed.*

The facts are stated in the opinion of the court.

Argued before Ward, Hough, and Manton, Circuit Judges.

Messrs. Mangan & Mangan for plaintiff in error.

Mr. D. B. Lucey for the United States.

Manton, Circuit Judge, delivered the opinion of the court:

This indictment was presented by the grand jury on the 10th day of June, 1919. The first count of the indictment charges that the plaintiff in error, within the jurisdiction of the district court, was engaged as a retail grocer, doing business in the city of Binghamton, state and northern district of New York, and was there handling and selling certain necessities of life, including granulated sugar.

"That at all the said times herein mentioned the fair, just, reasonable, and controlling rate, charge, and price in handling and dealing in granulated sugar to the retail trade in said city of Binghamton was and is from 10 to 11 cents per pound, which said fair, just, and reasonable rate and charge in handling and dealing in granulated sugar to the retail trade had theretofore been fixed according to law by the proclamation of the President of the United States and the rules and regulations promulgated by the President of the United States and the United States Food Administrator, pursuant to the provisions of the National Defense Act, approved August 10, 1917, and the amendments thereto.

"That on the 8th day of July, 1919, the said defendant, in the said city of Binghamton, did unlawfully, knowingly, and feloniously, for the purpose of gain and profit, handle, sell, and distribute to one Margaret Donovan 3 pounds of granulated sugar, for which said defendant did then and there exact from and charge to the said Margaret Donovan 15 cents per pound for the said sugar, which said rate and charge

was then and there unfair, unjust, and reasonable in handling and dealing in said granulated sugar, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States."

The second count of the indictment alleges that in violation of the National Defense Act (chap. 53, 40 Stat. at L. 276, approved August 10, 1917, Comp. Stat. §§ 3115¹/₄-3115¹/₂, Fed. Stat. Anno. Supp. 1918, pp. 181, 46), the plaintiff in error dealt in sugar as follows:

"That at all the said times herein mentioned the fair, just, reasonable, and controlling rate, charge, and price in handling and dealing in granulated sugar to the retail trade in the said city of Binghamton was and is from 10 to 11 cents per pound, which said fair, just, and reasonable rate and charge in handling and dealing in granulated sugar to the retail trade in said city had theretofore been fixed according to law by the proclamation of the President of the United States and the rules and regulations promulgated by the President of the United States and the Food Administrator, pursuant to the provisions of the National Defense Act approved August 10, 1917, and the amendments thereto.

"That on the 9th day of July, 1919, the said defendant in the said city of Binghamton did unlawfully, knowingly, and feloniously, for the purpose of gaining profit, handle, sell, and distribute to one John Nealon, 10 pounds of granulated sugar, for which said defendant did then and there exact from and charge to said John Nealon, 15 cents per pound for said sugar, which said rate and charge was then and there unfair, unjust, and unreasonable in handling and dealing in said granulated sugar, contrary to the form of statute in such case made and

provided, and against the peace and dignity of the United States."

The third count of the indictment alleges as follows:

"That at all the said times herein mentioned the fair, just, reasonable, and controlling rate, charge, and price in handling and dealing in granulated sugar to the retail trade in the said city of Binghamton was and is from 10 to 11 cents per pound, which said fair, just, and reasonable rate and charge in handling and dealing in granulated sugar to the retail trade had theretofore been fixed according to law by the certain proclamation of the President of the United States and the rules and regulations promulgated by the President and the United States Food Administrator, pursuant to the provisions of the National Defense Act, approved August 10, 1917, and the amendments thereto.

"That on the 29th day of July, 1919, the said defendant in the said city of Binghamton did unlawfully, knowingly, and feloniously, for the purpose of gaining profit, handle, sell, and distribute to one Albert F. Deuren a large quantity of granulated sugar, for which the said defendant did then and there exact from and charge to the said Albert F. Deuren the sum of 15 cents per pound, which said rate and charge was then and there unfair, unjust, and unreasonable in handling and dealing in said granulated sugar, contrary to the form of statute in such case made and provided, and against the peace and dignity of the United States."

This indictment is intended to be an accusation against the plaintiff in error for a violation of an act of Congress passed August 10, 1917, relating to conservation of supply and control of disposition of necessities. It is intended to guard against waste and a monopolizing or hoarding of necessities—to guard against unfair and unjust practices. It is also aimed at unjust and unreasonable charges in regard to such necessities. Among other things, the act provides (§ 4 [§ 3115ff, Fed.

Stat. Anno. Supp. 1918, p. 183]): "It is hereby made unlawful for any person to wilfully destroy any necessities for the purpose of enhancing the price or restricting the supply thereof; knowingly to commit waste or wilfully to permit preventable deterioration of any necessities in or in connection with their production, manufacture or distribution; to hoard, as defined in § 6 of this act, any necessities; . . . to engage in any discriminatory and unfair, or any deceptive or wasteful practice or device, or to make any unjust or unreasonable rate or charge, in handling or dealing in or with any necessities; to conspire, combine, agree, or arrange with any other person . . . to exact excessive prices for any necessities; or to aid or abet the doing of any act made unlawful by this section."

Section 5 of the act (§ 3115½g) provides for licensing dealers, and imposes a penalty for violation of this section. It provides that its provisions shall not apply to retail dealers. Section 6 (§ 3115½gg) defines hoarding, and provides a penalty for violation of its provisions; but charging an excessive or unreasonable price is not within the definition of hoarding. Section 9 (§ 3115½i) provides a penalty for conspiracy in regard to necessities.

On August 12, 1919, the plaintiff in error pleaded not guilty, but thereafter withdrew this plea and pleaded guilty. He was sentenced to pay a fine of \$200 on the first count of the indictment, \$200 on the second count, and \$100 on the third count. The fine was paid the same day.

Section 4 declares it unlawful to make any unjust or unreasonable rate or charge in handling or dealing in necessities, but there is no provision for punishment of this particular act thus made unlawful. As to other offenses which are denounced by the act, for the doing of which acts the section makes it unlawful, a penalty is prescribed; but nowhere in the act is a penalty prescribed for doing any of the acts

made unlawful by this section, and there is no general provision in the act announcing a penalty or prescribing punishment for a violation of these provisions, where no specific penalty or punishment is provided. It further appears that this alleged indictment charges certain acts as unlawful, that is to say, making an unreasonable and unjust

**Criminal law—
National Defense
Act—unjust rate
for necessities.**

charge for sugar; but no penalty or punishment for a violation of the statute is prescribed by a valid statute.

We are of the opinion that no crime is charged in this indictment. Therefore the conviction, even though upon plaintiff in error's plea of guilty, is void.

**—violation of
statute—absence
of penalty—
effect.**

Payment of the fine cannot be deemed to be a voluntary contribution to the government, and has been held not to be a bar in a suit to recover. *United States v. Rothstein*, 109 C. C. A. 521, 187 Fed. 269; *Durr v. Howard*, 6 Ark. 461; *Devlin v. United States*, 12 Ct. Cl. 266.

When the application was made to the district judge below to set aside and vacate the conviction, the term of court at which he pleaded guilty had expired. The district court held

**Appeal—error—
refusal to set
aside judgment.**

that it could not set aside or alter its final judgment after the expiration of the term at which the judgment was entered. The plaintiff in error has properly selected his remedy by suing out this writ of error.

In *Bronson v. Schulten*, 104 U. S. 415, 26 L. ed. 797, the court said: "It is a general rule of law that all the judgments, decrees, or other orders of the courts, however conclusive in their character, are under the control of the court which pronounces them during the term at which they are rendered or entered of record, and they may then be set aside, vacated, modified, or annulled by that court. But it is a rule equally well established that, after

the term has ended, all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify, or correct them; and, if errors exist, they can only be corrected by such proceeding by a writ of error or appeal as may be allowed in a court which, by law, can review the decision. So strongly has this principle been upheld by this court that, while realizing that there is no court which can review its decisions, it has invariably refused all applications for rehearing made after the adjournment of the court for the term at which the judgment was rendered; and this is placed upon the ground that the case has passed beyond the control of the court."

In *Suydam v. Williamson*, 20 How. 433, 15 L. ed. 978, it was said: "The rule is that, whenever the error is apparent on the record, it is open to revision, whether it be made to appear by bill of exceptions or in any other manner."

In *Tennessee v. Davis*, 100 U. S. 257, 25 L. ed. 648, it was said: Congress "must first make an act a crime, affix a punishment to it, and prescribe what courts have jurisdiction of such an indictment, before any Federal tribunal can determine the guilt or innocence of the supposed offender." Citing *United States v. Hudson*, 7 Cranch, 32, 3 L. ed. 259.

And in the same case it was further said (100 U. S., at page 279): "Since that decision the law has been considered as settled that the circuit courts have no jurisdiction to try and sentence an offender, unless it appears that the offense charged is defined by an act of Congress, and that the act defining the offense, or some other act, prescribes the punishment to be imposed, and specifies the court that shall have jurisdiction of the offense."

In *United States v. Hudson*, supra, it was said: "The only question which this case presents is whether the circuit courts of the United States can exercise a com-

mon-law jurisdiction in criminal cases. . . . The only ground on which it has ever been contended that this jurisdiction could be maintained is that, upon the formation of any political body, an implied power to preserve its own existence and promote the end and object of its creation necessarily results to it. . . . If it may communicate certain implied powers to the general government, it would not follow that the courts of that government are vested with jurisdiction over any particular act done by an individual in supposed violation of the peace and dignity of the sovereign power. The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offense. Certain implied powers must necessarily result to our courts of justice, from the nature of their institution. But jurisdiction of crimes against the state is not among those powers; . . . but all exercise of criminal jurisdiction in common-law cases, we are of opinion, is not within their implied powers."

By failure to provide a penalty for an infraction of this statute, or to prescribe a punishment, the statute does not denounce the unlawful act as criminal. It is neither a misdemeanor nor a felony. A crime is "a wrong which the government no-

tices as injurious to the public, and punishes in what is called a criminal proceeding in its own name." 1 Bishop, Crim. Law, § 43.

Although no demurrer was interposed or exception taken which then raised the question of the sufficiency of the indictment in the district court, assignments of error have been filed which present to us the sufficiency of the indictment on this writ of error. We think that the indictment is insufficient to charge a crime, and is therefore void. The payment of the fine after this conviction was void. It was held in *United States v. Rothstein*, 109 C. C. A. 521, 187 Fed. 269, where a plea of nolo contendere was entered, and a fine imposed and paid, and subsequently the statute under which the fine was paid was declared unconstitutional, that the defendant therein named may petition successfully to refund his fine paid, when the indictment was subsequently dismissed. A void judgment may lawfully be canceled on motion after notice, even after the expiration of the term on which it is entered. *Ex parte Crenshaw*, 15 Pet. 119, 10 L. ed. 682.

Judgment—
conviction—
void—setting
aside after term.

We think the writ of error should be sustained, and the judgment reversed.

ANNOTATION.

Decisions under the "Lever Act" (Act of August 10, 1917, amended in 1919).

- I. Constitutionality, 1266.
- II. Construction, 1271.

The Lever Act, also known as the National Defense Act, the Food Control Act, and the Food Conservation Act (chap. 53, 40 Stat. at L. 276, approved August 10, 1917, Comp. Stat. § 3115*ie*, Fed. Stat. Anno. Supp. 1918, p. 181, amended October 22, 1919, 41 Stat. at L. 297, chap. 80), was passed, as stated in its preamble, for the purpose of assuring an adequate supply and equitable distribution, and of fa-

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cilitating the movement of foods, feeds, and fuel, and of preventing, locally or generally, scarcity, monopolization, hoarding, injurious speculation, manipulation, and private controls, affecting such supply, distribution, and movement, and of establishing and maintaining governmental control of such necessities during the war. The amendment of 1919 added also wearing apparel.

The amendment of 1919 is known as the Food Control and the District of Columbia Rents Act, title two of the

amendment containing provisions for the prevention of rent profiteering in the District of Columbia, but this part of the act is not treated in this annotation. The question of its constitutionality is considered in the annotation accompanying *HIRSH v. BLOCK*, ante, 1238, on the constitutionality of rental laws.

I. Constitutionality.

The United States Supreme Court by its recent decision in *United States v. L. Cohen Grocery Co.* (U. S. Adv. Ops. 1920-21, p. 300) — U. S. —, 65 L. ed. —, 41 Sup. Ct. Rep. —, has definitely declared that § 4 of the original act, as amended by § 2 of the Act of 1919, which purported to prohibit excessive charges or prices for necessities, is unconstitutional, because in violation of the guaranties of the 5th and 6th Amendments to the Federal Constitution, in that, because of its uncertainty, it does not fix an ascertainable standard of guilt, and is inadequate to inform persons, accused of violation thereof, of the nature and cause of the accusation against them. The following cases involving the 4th section were disposed of at the same time as and upon the authority of, the *Cohen Case*, viz.: *Tedrow v. A. T. Lewis & Son Dry Goods Co.* (U. S. Adv. Ops. 1920-21, p. 305) — U. S. —, 65 L. ed. —, 41 Sup. Ct. Rep. —; *Kennington v. Palmer* (U. S. Adv. Ops. 1920-21, p. 306) — U. S. —, 65 L. ed. —, 41 Sup. Ct. Rep. —; *Kinnane v. Detroit Creamery Co.* (U. S. Adv. Ops. 1920-21, p. 307) — U. S. —, 65 L. ed. —, 41 Sup. Ct. Rep. —; *United States v. Swartz* (U. S. Adv. Ops. 1920-21, p. 307) — U. S. —, 65 L. ed. —, 41 Sup. Ct. Rep. —; *United States v. Smith* (U. S. Adv. Ops. 1920-21, p. 307) — U. S. —, 65 L. ed. —, 41 Sup. Ct. Rep. —; *C. A. Weed & Co. v. Lockwood* (U. S. Adv. Ops. 1920-21, p. 308) — U. S. —, 65 L. ed. —, 41 Sup. Ct. Rep. —; *G. S. Willard Co. v. Palmer* (U. S. Adv. Ops. 1920-21, p. 308) — U. S. —, 65 L. ed. —, 41 Sup. Ct. Rep. —; *Oglesby Grocery Co. v. United States* (U. S. Adv. Ops. 1920-21, p. 309) — U. S. —, 65 L. ed. —, 41 Sup. Ct. Rep. —; *Weeds v. United States* (U. S. Adv. Ops. 1920-

21, p. 309) — U. S. —, 65 L. ed. —, 41 Sup. Ct. Rep. —. In *Weeds v. United States* (U. S.) supra, it was expressly held that the charge as to conspiracy to exact excessive prices was equally as wanting in standard, and equally as vague, as the provision as to unjust and unreasonable rates and charges dealt with in the *Cohen Case*. In the *Cohen Case* the court said in support of its decision: "Observe that the section forbids no specific or definite act. It confines the subject-matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against. In fact, we see no reason to doubt the soundness of the observation of the court below, in its opinion, to the effect that to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest, when unjust and unreasonable in the estimation of the court and jury."

Prior to the decision in the *Cohen Case*, the *Lever Act* had been upheld generally in a number of cases. In view of the fact that the decision in that case does not necessarily affect all the sections of the act, and of the possibility of future legislative attempts to accomplish the purpose of § 4 to prevent "profiteering," avoiding defects which proved fatal to that section as drafted, it has been thought that it may be of service to indicate the holdings and to some extent the reasoning of the earlier case, though in some instances they dealt with § 4, and have been expressly reversed on the authority of the *Cohen Case*.

Thus, the *Lever Act* generally was upheld in *United States v. Oglesby Grocery Co.* (1920) 264 Fed. 691, reversed in (U. S. Adv. Ops. 1920-21, p. 309) — U. S. —, 65 L. ed. —, 41 Sup. Ct. Rep. —, upon the ground that it was within the war power of Congress. The court, in this con-

nection, said: "The war powers of [Congress must be held to be equal to whatever is necessary to successfully prosecute a war and maintain the public safety. In modern wars, not only armies and peoples, but industries, must be mobilized. Every citizen and every dollar must fight. Economic control is as important as military. Disaster and discontent at home are as fundamental and vital as in the field. The powers of Congress, in time of war, are comparable to the police powers of the states in time of peace, and equally incapable of fixed limits. No doubt is entertained of the original power to make this legislation."

And this act, as amended in 1919, was upheld in *United States v. Spokane Dry Goods Co.* (1920) 264 Fed. 209, as against the objection that Congress had no power to enact such legislation in any form, and that the language of the act defining the crime was too indefinite and uncertain. The theory of the first objection was that the war power of the Federal government, under the 5th Amendment to the Constitution, is only commensurate with the police power of the states under the 14th Amendment, and inasmuch as the states are powerless under that Amendment, to regulate prices in cases such as those then before the court, the Federal government is equally powerless to regulate such prices under the 5th Amendment, even as a war measure. The court said that it must be conceded that there is great force in the argument, and that it finds support in many adjudications and declarations of the Supreme Court; but if the war power of Congress and the President is to be thus limited and restricted, it will be difficult, if not impossible, to sustain much of the war-time legislation of Congress, and a decision of such far-reaching consequences, involving, as it does or may, the very life and foundation of the government, should come from the court of last resort, and not from any inferior court, and for this reason the court refused to hold the act unconstitutional.

That a state of war technically ex-

isted at the time of the amendment, in 1919, of the Lever Act, and that Congress had the power to adopt such amendment, the court said, in *United States v. Russel* (1920) 265 Fed. 414, might be decided without discussion.

And in *C. A. Weed & Co. v. Lockwood* (1920) 264 Fed. 453, affirmed in (1920) 266 Fed. 785, reversed in (*U. S. Adv. Ops.* 1920-21, p. 308) — *U. S.* —, 65 L. ed. —, 41 Sup. Ct. Rep. —, the court said that, when the original bill was debated in Congress, it was designated as an "emergency war measure," and inasmuch as it had been decided in *Hamilton v. Kentucky Distilleries & Warehouse Co.* (1919) 251 U. S. 160, 64 L. ed. 194, 40 Sup. Ct. Rep. 106, that the war must technically be regarded as continuing until demobilization is complete, and until the President has proclaimed an end of the war, the power of Congress to prevent by appropriate legislation the evils of greed and profiteering must be upheld. And in the affirmance of this case, reported in (1920) 266 Fed. 785, the court said: "Since we are still in a state of war, and the war-time emergency has not expired, we are of the opinion that Congress could legislate, as it did, under the authority of its war powers, without contravening article 1, § 8, clause 18, of the Constitution," which forbids legislation to deprive a citizen of property without due process of law.

And it was held in *United States v. Armstrong* (1920) 265 Fed. 683, that conceding that Congress, under the war power, could validly enact the Lever Act at the time of its passage, it had, at least within reasonable limitations, the power to provide when the act should cease to be in force.

In *United States v. Oglesby Grocery Co.* (1920) 264 Fed. 691, *supra*, in overruling the contention that the war power of Congress had expired, and that the exercise of it by the passage of the Lever Act had fallen by the cessation of the war by the signing of the armistice, the court said that the original Lever Act stated that its provisions shall cease to be in effect when the existing state of war between the United States and Germany shall have

terminated, and the fact and date of such termination shall be ascertained and proclaimed by the President, and that no such proclamation had been made by the President, but instead numerous proclamations had been made by him since the armistice in enforcement of this act, and that Congress itself subsequently amended the act, and that Congress and the President were the constitutional judges of the state of war and peace, and their decisions should be abided in patience by the people and the courts.

And the district judge in *United States v. Swedlow* (1920) 264 Fed. 1016, said that the Lever Act was one of many acts passed by Congress wholly for war purposes, and valid only because it was an exercise of the war power, and that, under the ruling of the Supreme Court, he must hold that its validity had not yet ceased.

The validity of various sections of the Lever Act had been passed upon by the lower Federal courts prior to the decision in the *Cohen Case*. Thus, § 25 of the act, authorizing the President to fix the prices of coal and coke, was upheld in *United States v. Pennsylvania Central Coal Co.* (1918) 256 Fed. 703. The objections to this section were that it was not within the power of Congress to enact it, and it was violative of the 4th Amendment of the Constitution; that it unlawfully deprived a citizen of his rights to freely contract; that it attempted unlawfully to empower the Federal authorities to regulate and govern intrastate traffic, thus illegally interfering with the property right of the citizens to contract within the state; that it deprived defendant of the just and equal protection of the law; and that it created an unjust discrimination in the sale of commodities. The court, in answering these objections, said: "We are engaged in a great war, involving not only the fundamental rights of the nation and her people, but, in case of an adverse issue, the very existence of the Republic itself. This war, constitutionally declared by Congress, requires the raising, equipping, and supporting of armies and

navies, of which the President of the United States is the Commander in Chief. That the safety of the Republic is the first law is as true now as when the Romans so declared. To the high office of Commander in Chief necessarily belong many inherent powers. He has authority, without any act of Congress, to exercise all belligerent rights. He may institute a blockade, levy contributions on the enemy, and authorize the military commanders to form a civil and military government in the conquered territory. He may establish there courts of justice. When a state of war exists, the whole nation is pledged to its successful prosecution. Its resources must be controlled and conserved, that large armies may be maintained in the field. Restrictions which in times of peace would be oppressive and unlawful become, in times of war, a legal necessity. Prices must be regulated and controlled that the strong may not oppress the weak, nor be permitted to extort unreasonable profits through the stress and exigencies of war. The section of the act of Congress here in question, seeking to regulate the prices of coal and coke, is clearly a measure necessary for the efficient prosecution of the war; and, as the welfare of the nation is higher than the rights of any state, I cannot doubt that it is well within the constitutional power of Congress to enact."

Section 6, prohibiting the hoarding of necessities, is not subject to the criticism of being class legislation, because it is provided that such section shall not include or relate to transactions on any exchange, board of trade, or similar institution or place of business that may be permitted by the President under authority conferred upon him by another section, and because it provides that any accumulating or withholding by any farmer or gardener, co-operative association of farmers or gardeners, including live-stock farmers, or any other person, of the product of any farm, garden, or other land owned, leased, or cultivated by him, shall not be deemed to be hoarding within the

meaning of this act. *United States v. Swedlow* (Fed.) supra.

And in the preceding case, as in *Merritt v. United States* (1920) — C. C. A. —, 264 Fed. 870, such section was held not to be void on the ground of indefiniteness and uncertainty as to the meaning of hoarding. The provision in that regard is: "Necessaries shall be deemed to be hoarded within the meaning of this act, when either (a) held, contracted for, or arranged for by any person in a quantity in excess of his reasonable requirements for use or consumption by himself and dependents for a reasonable time; or (b) held, contracted for, or arranged for by any manufacturer, wholesaler, retailer, or other dealer, in a quantity in excess of the reasonable requirements of his business, for use or sale by him for a reasonable time, or reasonably required to furnish necessities produced in surplus quantities seasonally throughout the period of scant or no production; or (c) withheld, whether by possession or under any contract or arrangement, from the market by any person for the purpose of unreasonably increasing or diminishing the price."

And in *United States v. Armstrong* (1920) 265 Fed. 683, a district court overruled a charge of indefiniteness and uncertainty made against § 9, which provides "that any person who conspires, combines, agrees, or arranges with any other person (a) to limit the facilities for transporting, producing, manufacturing, supplying, storing, or dealing in any necessities; (b) to restrict the supply of any necessities; (c) to restrict the distribution of any necessities; (d) to prevent, limit, or lessen the manufacture or production of any necessities in order to enhance the price thereof shall, upon conviction thereof, be fined."

Section 9 was repealed by the amendment of 1919, but the provision of § 4, as amended, denouncing conspiracies to exact excessive prices for necessities, was held void in *United States v. Bernstein* (1920) 267 Fed. 295.

Prior to the decision of the United States Supreme Court in *United States*

v. L. Cohen Grocery Co. (U. S.) supra, holding such section unconstitutional, § 4 of the original act, amended by § 2 of the amendment of 1919, making it unlawful for any person to make an unjust or unreasonable rate or charge for handling or dealing in or with necessities, was held to be within the constitutional powers of Congress to enact war measures, in *C. A. Weed & Co. v. Lockwood* (1920) 266 Fed. 785, reversed in (U. S. Adv. Ops. 1920-21, p. 308) — U. S. —, 65 L. ed. —, 41 Sup. Ct. Rep. —, upon authority of *United States v. L. Cohen Grocery Co.* (U. S.) supra; *United States v. Oglesby Grocery Co.* (1920) 264 Fed. 691, reversed in (U. S. Adv. Ops. 1920-21, p. 309) — U. S. —, 65 L. ed. —, 41 Sup. Ct. Rep. —, upon authority of *United States v. L. Cohen Grocery Co.* (U. S.) supra; *United States v. Rosenblum* (1920) 264 Fed. 578; and *United States v. Russel* (1920) 265 Fed. 414.

In *C. A. Weed & Co. v. Lockwood* (Fed.) supra, the circuit court of appeals of the second circuit took the view that this section (§ 4) did not contravene art. 1, § 8, clause 18, of the Constitution, which forbids legislation that deprives the citizen of property without due process of law, and that it was not objectionable as class legislation, because it does not apply to farmers, gardeners, horticulturists, vineyarders, planters, ranchmen, dairymen, stockmen, or other agriculturists, with respect to the farm products produced or raised upon land owned, leased, or cultivated by them.

But this section (§ 4), as amended in 1919, was by a district court, in *United States v. Armstrong* (1920) 265 Fed. 683, because it did not apply to farmers, etc., held to contain an arbitrary classification, and to be repugnant to the "due process" clause of the 5th Amendment of the Federal Constitution. And this case also held the same, for the same reason, as to § 26, which provides "that any person carrying on or employed in commerce . . . in any article suitable for human food, fuel, or other necessities of life, who . . .

shall store, acquire, or hold, or who shall destroy or make away with any such article for the purpose of limiting the supply thereof to the public or affecting the market price thereof, in such commerce, whether temporarily or otherwise, shall be deemed guilty of a felony. . . . Provided, that any storing or holding by any farmer, gardener, or other person of the products of any farm, garden, or other land cultivated by him shall not be deemed to be a storing or holding within the meaning of this act: Provided further, that farmers and fruit growers, co-operative and other exchanges, or societies of a similar character shall not be included within the provisions of this section."

And also in *United States v. Bernstein* (Fed.) supra, this section (§ 4), as amended, was held to be in contravention of the same constitutional amendment.

That § 4 was not void for uncertainty or indefiniteness was held in *C. A. Weed & Co. v. Lockwood* (1920) 266 Fed. 785, supra; *United States v. Oglesby Grocery Co.* (1920) 264 Fed. 691, supra; *United States v. Rosenblum* (1920) 264 Fed. 578, supra; *United States v. Spokane Dry Goods Co.* (1920) 264 Fed. 209; and *United States v. Russel* (1920) 265 Fed. 414, supra.

In *C. A. Weed & Co. v. Lockwood* (Fed.) supra, the appellant attacked the validity of this provision (§ 4), claiming that it was too vague and indefinite to constitute a valid definition of crime, and that it was in contravention of article 6 of the Constitution which provides that in all criminal prosecutions the accused shall enjoy the right to be informed of the nature and cause of the accusation. As it may be of interest to contrast the reasoning of the court on this point with that of the United States Supreme Court in *United States v. L. Cohen Grocery Co.* (U. S.) supra, its opinion has been quoted. The court said: "The contention is advanced that the language of the statute: 'It is hereby made unlawful for any person willfully . . . to make any unjust or unreasonable rate or charge in han-

dling or dealing in or with any necessities, to conspire [or] combine . . . with any other person . . . to exact excessive prices for any necessities,'—provides or establishes no particular standard of conduct; that ideas of reasonableness and excessiveness are so vague and variant that no dealer can tell whether his charges or prices are lawful, except by the subsequent opinion of the jury; and it is said that a process of law that would condemn one to lose property or liberty for an act, without having previously clearly denounced the act as a crime, would not seem to be due process, the argument being that the subsequent finding of a jury, therefore, expressing its opinion that the particular act constituting the sale as unlawful at the price charged could not have been known to the defendant, and therefore knowing it only after conviction, would have all of the oppressiveness of an *ex post facto* law. The contention is that the words 'unjust and unreasonable' make for the mischief. . . . Where the statute is within the legislative power of Congress, the courts are slow to say that they cannot understand and enforce its provisions. Before doing so, the courts exhaust their efforts at practical construction. . . . In the criminal side of the court, statutes are enforced daily which prohibit schemes to defraud, and there are no schedules of acts or specific definition of the forbidden conduct. There is left to the courts freedom to condemn any new or ingenious way that was unknown at the time the statutes were enacted. In determining what is an unjust and unreasonable rate, many elements may be submitted to the jury; the cost price to the merchant, his overhead charges, his rent, what is a customary and usual margin of profit as it exists in the trade, the length of time he carried the article, and his interest charges may also be of importance. The defendant can be generally guided by these elements, which should plainly lead him between the extreme of the obviously illegal and the plainly lawful."

However, the view taken by the

United States Supreme Court in *United States v. L. Cohen Grocery Co.* (U. S.) *supra*, was anticipated in a number of cases in the district court. Thus, in *United States v. L. Cohen Grocery Co.* (1920) 264 Fed. 218, affirmed in (U. S. Adv. Ops. 1920-21, p. 300) — U. S. —, 65 L. ed. —, 41 Sup. Ct. Rep. —, and in *Detroit Creamery Co. v. Kinnane* (1920) 264 Fed. 845, affirmed in (U. S. Adv. Ops. 1920-21, p. 307) — U. S. —, 65 L. ed. —, 41 Sup. Ct. Rep. —, upon authority of *United States v. L. Cohen Grocery Co.* (U. S.) *supra*, district courts held this section (§ 4) invalid as too uncertain and indefinite, in violation of the 6th Amendment of the Constitution.

And in *United States v. Bernstein* (1920) 267 Fed. 295, the same was held as to this section (§ 4); as amended in 1919.

II. Construction.

Although § 4, in its present form, has been practically eliminated from the Lever Act by the decision in the Cohen Case, the cases construing that section, as well as those construing other sections of the act, have been set out in the annotation. It will be observed that some, at least, of the cases involving § 4, construed words or phrases which must almost necessarily be used in any legislation seeking to accomplish the purpose of that section, even though the objectionable features of the section in its present form are avoided.

After the reversal in the reported case (*MOSSEW v. UNITED STATES*, ante, 1261) of the defendant's conviction, the indictment was quashed, and he applied for a refund of the fine paid by him. There being no provision therefor in the Lever Act, he petitioned the court to order, after a summary investigation, under § 9636 of the Barnes Code (Comp. Stat. § 10,130, 3 Fed. Stat. Anno. 2d ed. p. 332), the Secretary of the Treasury to make remission of the fine, but his application was denied in *United States v. Mossew* (1920) 268 Fed. 383, upon the ground that it was the wrong remedy.

Upon the question as to the continuation in force of the Lever Act,

regardless of an actual condition of peace, it was held in *United States v. Armstrong* (1920) 265 Fed. 683, that, so far as a state of war might be fixed by act of Congress, such state existed, at least until October 22, 1919, the time of the passage of the amendment, and the court could try offenses against the act committed before that time, especially in view of the provision of § 24 that "any offense committed and all penalties, forfeitures, or liabilities incurred prior to such termination may be prosecuted or punished in the same manner and with the same effect as if this act had not been terminated."

In *Kuenster v. Meredith* (1920) 264 Fed. 243, the court said that the Lever Act made the live stock commission business at the Chicago stockyards unlawful unless licensed by the Secretary of Agriculture, and it was held that while there was nothing in the statute, the presidential proclamation, or the rules and regulations, expressly making the license revocable, the power to revoke was implied, and that the provision in stockyards licenses that each one is subject to revocation for violation by the licensee of any provision of the statute or regulations was valid; but it was held in this case that the licensee, admittedly guilty of making excessive feed charges, had not violated the statute or the regulations, because there was no evidence that his action was wilful. The sections of the act and the regulations involved were: § 4, providing that it is unlawful for any person wilfully to make any unjust and unreasonable rate or charge in handling, or dealing in, or with any necessities; § 5, providing that any person who wilfully fails or refuses to discontinue any unjust, unreasonable, discriminatory, and unfair profit or practice, in accordance with the requirement of an order issued under this section, or any regulation prescribed under this section, shall be punished; and § 7 of regulation 3, providing that a licensee shall not make any unjust charge for feeding live stock in, or in connection with, stockyards.

The words "any necessities" in §

4 of the original Lever Act, providing that it is unlawful to make any unjust or unreasonable charges relating thereto, cannot be construed to embrace a piece of cloth, in view of § 1, which states that the object of the act is to control foods, feeds, and fuel, "hereafter in this act called necessities," nor is cloth "wearing apparel," which was added to § 1 by the amendment of 1919. *United States v. American Woolen Co.* (1920) 265 Fed. 404.

An indictment under the original § 4 of the Lever Act for profiteering in sugar was held in the reported case (*MOSSEW v. UNITED STATES*, ante, 1261) not to charge a crime, upon the ground that no penalty was prescribed in such section for such act, nor was any punishment prescribed in any other part of the act. And the same was held in *United States v. Armstrong* (1920) 265 Fed. 683, on a prosecution for a conspiracy to violate such section. This omission was, however, remedied in the amendment of 1919.

An indictment for profiteering in clothing, under § 2 of the amendment of 1919, was upheld in *C. A. Weed & Co. v. Lockwood* (1920) 264 Fed. 453, affirmed on another point in (1920) 266 Fed. 785, reversed in (*U. S. Adv. Ops.* 1920-21, p. 308) — *U. S.* —, 65 L. ed. —, 41 Sup. Ct. Rep. —, as against the objection that it was void because the President had power to determine prices of necessities, and omitted to do so, and that it was a prerequisite to the violation of the act that he should specify a fair price for wearing apparel. The court, answering this objection, said: "But § 1, which authorizes the President to make regulations and to issue 'such orders as are essential effectively to carry out the provisions of this act,' does not, in my opinion, require that he fix the prices of wearing apparel or necessities. By specific reference the President was empowered, in other sections of the Lever Act, to fix the price of wheat, coal, and coke, but not that of wearing apparel or food, and his failure to do so, perhaps because of its recognized futility, does not render the indictment invalid."

A similar indictment was upheld in

United States v. Spokane Dry Goods Co. (1920) 264 Fed. 209, as against the objection that the indictment did not charge or allege when the goods were purchased or procured, or that the selling price was in itself unreasonable or unjust, the court saying that the indictment did not stop with the mere averment of the difference between the purchasing and selling price, but further charged that the selling price was an unreasonable, unfair, and excessive price, that this latter averment, coupled with the averment showing a difference between the purchasing and selling price, brought the case clearly within the prohibition of the statute.

Under §§ 10 and 12 of the Lever Act and § 120 of chapter 134 of the Act of Congress of June 3, 1916 (*Comp. Stat.* §§ 3115f and 3115g, 9 Fed. Stat. Anno. 2d ed. p. 1343), known as the National Defense Act, the President can seize and operate plants for the manufacture of yarn, and through the War Industries Board, a duly created government agency, control its use. In *Crown Embroidery Works v. Gordon* (1920) 190 App. Div. 472, 180 N. Y. Supp. 158, § 10 authorizes the President to requisition any supplies required for the maintenance of the Army or Navy, or any other public use connected with the common defense, and § 12 authorizes him, for any like purpose, to take over and operate manufacturing plants, and § 120 of the Act of 1916 authorizes him in time of war, or when war is imminent, to commandeer manufacturing plants and materials, and to appoint a board on the mobilization of industries essential to military preparedness.

The word "may," in the last clause of the 1st paragraph of § 25 of the Lever Act, is permissive, which clause provides that the authority of the President to fix the price of coal and coke may be exercised by him through the agency of the Federal Trade Commission. *United States v. Ford* (1920) 263 Fed. 449. The court said: "And that it was so intended is clear from the context. It may be noted that the 3d paragraph vests in the President a similar optional discretion to act

through the commission or otherwise. The authority of the commission, under the 13th paragraph of the section, is to fix local prices only after direction by the President to make the investigation authorized by the 11th paragraph. The grant of powers to the commission is contingent, and does not become effective until that direction is given. Such grant does not, therefore, require the construction of the 1st paragraph, to the effect that the President can act only through the commission, for which the defendant contends."

An indictment under § 25 which charged that the defendants, engaged in the business of jobbers of coal, with full knowledge that the President had fixed a maximum price for the sale of coal, unlawfully combined to demand and receive from certain parties a higher price per ton than the maximum price fixed by the President, was held in *United States v. Pennsylvania Central Coal Co.* (1918) 256 Fed. 703, to be sufficiently specific to define and identify the offense charged, the court saying that it was not necessary that the offense which was intended to be committed as a result of the conspiracy should be described with the particularity required in an indictment in which such matter is charged as a substantive crime, and that it was unnecessary, in alleging overt acts in the indictment, committed by one of the conspirators, to set forth in what manner the several overt acts tended to effect the purpose of the conspiracy, but that it was sufficient to allege that such acts were done to effect its object.

In *Majestic Coal Co. v. W. J. Bush & Co.* (1918) 171 N. Y. Supp. 662, the court upheld a coal jobber's contract for the sale of coal at the cost price

plus the profit allowed by the President's executive order, made under § 25 of the Lever Act, although the contract was made after the executive order fixing the price of coal at the mines, and a like order, stating a jobber's permissible margin of profit, where the jobber purchased the coal, before the order of the President fixing the price, at a cost in excess of such price, and the jobber's contract for the sale of such coal was made before the promulgation of a rule by the United States Fuel Administrator, to the effect that a jobber who, at the date of the President's order fixing the price of coal, held a contract for the purchase of coal without having already sold or contracted to sell the coal, shall not sell such coal at more than the price fixed by the President for the sale of coal after the date of such order, plus the jobber's commission.

Where a contract for the sale of coal is made, after the President had fixed the price thereof under § 25 of the Lever Act, in excess of the price so fixed, and during the delivery of the coal the price is twice raised by the Fuel Administrator, the seller, assuming the contract to be lawful, can recover only the price fixed by the President or the Fuel Administrator, when such price does not exceed the contract price, and can recover only the contract price, when the price fixed by the Fuel Administrator is in excess thereof, since under the Lever Act the Fuel Administrator was only authorized to fix the maximum price of coal, and is not empowered to deprive parties of the right to contract for coal at a lower price. *Bewly-Darst Coal Co. v. Chattanooga Gas Co.* (1920) 142 Tenn. 460, 220 S. W. 1083.

G. V. I.

MERCHANTS' NATIONAL BANK, Respt.,
v.
LLOYD H. SMITH et al., Appts.

CHARLES W. HICKMAN, Appt.,
v.
SAME, Respts.

South Carolina Supreme Court — July 16, 1918.

(110 S. C. 458, 96 S. E. 690.)

Bills and notes — overdue interest — bona fide purchaser.

That interest is due and unpaid on an unmatured note does not affect the bona fides of one purchasing it.

[See note on this question beginning on page 1277.]

(Gary, Ch. J., and Fraser, J., dissent.)

APPEAL by defendants from a judgment of the Common Pleas Circuit Court for Pickens County (Gary, J.) in favor of the plaintiff bank, in an action on a note. *Affirmed.*

APPEAL by plaintiff Hickman from a judgment of the Common Pleas Circuit Court for Pickens County (Gary, J.) in favor of defendants in an action on a note. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Cothran, Dean, & Cothran, for plaintiffs, Hickman and bank:

A verdict should have been directed in favor of plaintiffs for the reason that no other inference can reasonably be drawn from the testimony than that they were commercial assignees of the note sued upon.

Citizens Trust & Sav. Bank v. Stackhouse, 91 S. C. 455, 40 L.R.A. (N.S.) 454, 74 S. E. 977; New England Nat. Bank v. Wallace, 97 S. C. 52, 80 S. E. 460; Central Nat. Bank v. Grimes, 98 S. C. 218, 82 S. E. 420; Commerce Trust Co. v. Grimes, 98 S. C. 220, 82 S. E. 420; Edens v. Gibson, 100 S. C. 354, 84 S. E. 1005; City Nat. Bank v. Given, 103 S. C. 174, 87 S. E. 998; Farmers Bank v. Crawford, 103 S. C. 340, 88 S. E. 13; Trimble v. Carlisle, 103 S. C. 411, 88 S. E. 28; Cannon v. Clarendon Hardware Co. 103 S. C. 538, 88 S. E. 284; Harrison v. Crosby, 104 S. C. 350, 88 S. E. 1102.

The fact that a note calls for interest payable annually, and is assigned after the first interest period has passed, but before the maturity of the note, is not of itself sufficient to affect the purchaser with notice that

the instrument is dishonored, or to put him on inquiry concerning the same, or to constitute a circumstance carrying the question to the jury.

Dan. Neg. Inst. 5th ed. § 787; Kelley v. Whitney, 30 Am. Rep. 697, and note, 45 Wis. 110; Boss v. Hewitt, 15 Wis. 261; National Bank of N. A. v. Kirby, 108 Mass. 497; Bigelow, Bills, 2d ed. 445; Cooper v. Hocking Valley Nat. Bank, 21 App. 358 (Ind.) 69 Am. St. Rep. 365, 50 N. E. 775; Fox v. Hartford & W. H. Horse R. Co. 70 Conn. 1, 38 Atl. 871; Gilbough v. Norfolk & P. R. Co. 1 Hughes, 410, Fed. Cas. No. 5,419; State ex rel. Plock v. Cobb, 64 Ala. 158; 1 Jones, Mortg. 6th ed. § 841, p. 882; Patterson v. Wright, 64 Wis. 289, 25 N. W. 10; Cooper v. Hocking Valley Nat. Bank, 21 Ind. App. 358, 69 Am. St. Rep. 365, 50 N. E. 775; United States Nat. Bank v. Floss, 38 Or. 68, 84 Am. St. Rep. 752, 62 Pac. 751; Tuke v. Feagin, — Tex. Civ. App. —, 181 S. W. 805; Winter v. Nobs, 19 Idaho, 18, 112 Pac. 525, Ann. Cas. 1912C, 302; Gillette v. Hodge, 95 C. C. A. 205, 170 Fed. 313; Taylor v. American Nat. Bank, 63 Fla. 631, 57 So. 678, Ann. Cas. 1914A, 309; Mendenhall Lumber

Co. v. State Bank, 97 Miss. 648, 54 So. 883; Bank of Edgefield v. Farmers' Co-op. Mfg. Co. 18 L.R.A. 201, 2 C. C. A. 637, 2 U. S. App. 282, 52 Fed. 98; Spencer v. Alki Point Transp. Co. 53 Wash. 77, 132 Am. St. Rep. 1058, 101 Pac. 509; Keene Five Cent Sav. Bank v. Reid, 59 C. C. A. 225, 123 Fed. 221; Crissey v. Morrill, 60 C. C. A. 460, 125 Fed. 884; Cromwell v. Sac County, 96 U. S. 51, 24 L. ed. 681; Indiana & I. C. R. Co. v. Sprague, 103 U. S. 756, 26 L. ed. 554; Thompson v. Perrine, 106 U. S. 589, 27 L. ed. 298, 1 Sup. Ct. Rep. 564, 568; Morgan v. United States, 113 U. S. 476, 28 L. ed. 1044, 5 Sup. Ct. 588.

Messrs. Carey & Carey, for defendants.

The mere nonpayment of overdue interest does not dishonor a negotiable note; still it is a fact to be left to the jury, in connection with other facts and circumstances, in determining the question whether the holder has taken the note in good faith and without notice of existing defenses.

Morton v. New Orleans & S. R. Co. 79 Ala. 590; National Bank of N. A. v. Kirby, 108 Mass. 497; Fidelity Trust Co. v. Mays, 142 Ga. 821, 83 S. E. 961; Fidelity Trust Co. v. Whitehead, 165 N. C. 74, 80 S. E. 1065, Ann. Cas. 1915D, 200; Merchants Nat. Bank v. Brisch, 154 Mo. App. 631, 136 S. W. 28; Union Nat. Bank v. Winsor, 101 Minn. 470, 118 Am. St. Rep. 641, 112 N. W. 999, 11 Ann. Cas. 204; Citizens Trust & Sav. Bank v. Stackhouse, 91 S. C. 455, 40 L.R.A.(N.S.) 454, 74 S. E. 977.

Watts, J., delivered the opinion of the court:

The two cases above stated were heard together, and are known as the Bank Case and the Hickman Case, for convenience of reference. The Bank Case is a suit on a note dated January 14, 1907, due October 1, 1909, for \$1,000, and the Hickman Case is a similar suit on a note of the same date for \$1,000, due October 1, 1910. Both notes were given for a stallion sold the defendants by J. Crouch & Son, of the state of Indiana. The plaintiffs claim to be purchasers of value before due of said notes, without notice of the defenses relied upon by the defendants.

The suits were filed in the court of

common pleas for Pickens county August 26, 1910. Long after the issues were made up in the cases, on the 19th day of October, 1914, the plaintiffs procured assignments of the original contracts of sale of said horse, and on the 25th day of September, 1915, filed supplemental complaints, setting up in each case a second cause of action arising out of these contracts and assignments. The defendants in their answers deny that the plaintiffs are purchasers before due, in good faith, for value, of said notes, and set up failure of consideration in said notes, breach of warranty, and fraud in procuring the contracts, and alterations of said notes after they were given, and allege that the plaintiffs took said notes with notice, and occupy the same position as J. Crouch & Son, with whom all the contracts were made. On these pleadings the cases were tried before Judge F. B. Gary at the March, 1916, term of court. At the close of the testimony the plaintiffs made a motion for directed verdicts. The motion was refused in both cases, the trial judge holding that they should both go to the jury. He afterwards changed his mind as to the Bank Case, and directed a verdict for the plaintiff, but sent the Hickman Case to the jury, which resulted in a verdict for the defendants. From the judgment in the Bank Case the defendants have appealed, and in the other case Hickman has appealed.

In the Hickman Case the appellant by ten exceptions alleges error in not directing a verdict for the plaintiff, and in the Bank Case the appellants by six exceptions allege error in directing a verdict in favor of the plaintiff. The exceptions in the Bank Case are overruled. His Honor had ample authority for directing a verdict under the facts of the case as developed in evidence and under the authorities of this court. Citizens Trust & Sav. Bank v. Stackhouse, 91 S. C. 455, 40 L.R.A.(N.S.) 454, 74 S. E. 977; New England Nat. Bank v. Wallace,

97 S. C. 52, 80 S. E. 460; Central Nat. Bank v. Grimes, 98 S. C. 218, 82 S. E. 420; Edens v. Gibson, 100 S. C. 354, 84 S. E. 1005; City Nat. Bank v. Given, 103 S. C. 174, 87 S. E. 998; Farmers Bank v. Crawford, 103 S. C. 340, 88 S. E. 13; Trimble v. Carlisle, 103 S. C. 411, 88 S. E. 28; Cannon v. Clarendon Hardware Co. 103 S. C. 538, 88 S. E. 284; Harrison v. Crosby, 104 S. C. 350, 88 S. E. 1102; Farmers & M. Bank v. Whitehead, 105 S. C. 100, 89 S. E. 657.

In the Hickman Case the facts are identical, but as to the alleged interlineation of the words "without offset" in the note his Honor charged the jury that, even if the interlineation had been made after the execution and delivery of the note, it did not amount to an alteration of the note in a material particular, and could not affect the validity of the note. There is no exception or appeal from that ruling on the part of his Honor. An alteration of a note in any immaterial particular will not affect its validity.

The other circumstances claimed to constitute notice that the annual interest on the note was past due and unpaid at the time the note was assigned, but before the maturity of

**Bills and notes—
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the note, are not sufficient to affect the purchaser with notice, or put him on inquiry concerning the same, or to constitute such a circumstance as to carry the case to the jury. The note sued on is dated January 14, 1907; maturity October 1, 1910; date of transfer, July 19, 1910; interest to be paid annually. The mere fact that the interest was not paid cannot affect a bona fide purchaser for value of negotiable paper, as it is a mere incident of the debt, and the holder loses no right as against the parties, whether makers or indorsers, by failure to demand it, and it does not constitute a circumstance to put purchaser on notice or to make inquiry. The fact alone that instalments of interest were overdue and unpaid, disconnected with other facts, is not suf-

ficient to affect the position of one who takes a negotiable note for value before maturity and becomes a bona fide holder, and Hickman's note is not subject to the defenses set up. We think the exceptions of Hickman should be sustained, and that his Honor was in error in not directing a verdict in favor of the appellant.

The judgment of the court is that the judgment of the Circuit Court in the case of Merchants' National Bank be affirmed, and that in the case of C. W. Hickman that the judgment be reversed, and the case remanded to the Circuit Court, with instructions to the clerk of court of Pickens county to enter up judgment for the plaintiff for the sum of \$1,059.32, with interest at 6 per cent per annum from October 1, 1910, and 10 per cent attorney's fees, under the authority of Pee Dee Naval Stores Co. v. Hamer, 92 S. C. 423, 75 S. E. 695.

Hydrick and Gage, JJ., concur.

Fraser, J. dissenting:

I cannot concur in the opinion of Mr. Justice Watts in this case. There is no binding authority in this state. I do not question the authority of the case of Citizens Trust & Sav. Bank v. Stackhouse, 91 S. C. 455, 40 L.R.A. (N.S.) 454, 74 S. E. 977. That is the leading case, and the strongest of them all. A negotiable note transferred before maturity must be paid, unless the maker can show actual notice. The Stackhouse Case did not hold that the entire amount stated in the note must be due and unpaid before defenses could be let in. That question was not before the court. Does the failure to pay interest when due give the same notice of defects that the failure to pay the principal gives? I know that the authorities differ on this question. When there is no binding authority, it seems to me, a court should follow that line of authorities that is in its judgment most in accord with the reason of the rule. The presumption is that the obligation set forth in the note

will be performed, and, when it is not, then the fact that the obligation is not met puts the purchaser on the inquiry. The payment of the interest on a note is as much a part of the obligation as the payment of the principal. The obligation is just as truly broken by the failure to pay the interest as the failure to pay the principal. Indeed, the failure to pay interest discredits the note more than the failure to pay the principal, because it is easier to pay interest than to pay the principal. I cannot find a basis for the presumption that one who cannot or will not do that which is comparatively easy will do that which is comparatively difficult. Besides this, the Negotiable Instru-

ment Act—Acts 1914, p. 677 § 52 (4)—is comprehensive and says: Section 52: "A holder in due course is a holder who has taken the instrument under the following conditions: . . . (4) That at the time it was negotiated to him he had *no* notice of *any* infirmity in the instrument or defect in the title of the person negotiating it." (*Italics mine.*)

The failure to pay the principal is notice of infirmity. I cannot see how it can be that failure to pay instalments of interest can be held to be "*no notice of any infirmity.*"

For these reasons, I dissent.

Gary, Ch. J., concurs with Fraser, J.

ANNOTATION.

Effect on bona fides of purchase of promissory note of fact that there is interest due and unpaid upon it.

Considering the importance of this question, the cases which have passed upon it are surprisingly few. Several of the cases which are generally cited as authority upon it have dealt with defaulted-interest coupons on bonds of various kinds. While bonds are a species of negotiable paper, there may be sufficient distinction between them and strictly commercial paper to justify a ruling that overdue interest coupons would not affect the bona fides of a purchaser, while overdue interest on a promissory note might do so. Originally, bills and notes were intended to take the place, to some extent, of money, and circulate as money, while bonds are more in the nature of a permanent investment, and do not, as a rule, pass from hand to hand as currency. The promissory note, so long as it is fair on its face, will pass from person to person, free of all equities which the maker may have against the payee. It thus, to a limited extent, serves the purpose of a circulating medium, and forms part of the currency of the country. But to have that effect it must be fair on its face; that is, there must be no suspicious circumstances which would lead the

indorsee to believe that there were defenses against it. Under the Negotiable Instruments Acts, which are believed to be a mere codification of the law merchant upon the subject, there are three main requirements which must exist to give the indorsee a title free from equities which may be affected by the fact that there is interest due and unpaid upon the note: (1) The indorsee must be a bona fide purchaser; (2) he must have purchased before maturity; and (3) he must have purchased without notice of any previous dishonor of the note. In considering this question, this annotation will be confined strictly to cases which have dealt with commercial paper proper, omitting those which have involved bonds, and it will deal with overdue interest, omitting the cases dealing with overdue instalments of principal. A distinction will also be made between cases where the notes simply bear interest without fixing the time for payment, in which case the interest is not overdue until the note matures.

Thus a note payable on demand, with interest, is not overdue when indorsed a number of years after date,

if no demand has been made, although no interest has been paid upon it. *Brooks v. Mitchell* (1841) 9 Mees. & W. 15, 152 Eng. Reprint, 7, 11 L. J. Exch. N. S. 51.

But in *Guckian v. Newbold* (1902) 23 R. I. 553, 51 Atl. 210, it appeared that a demand note upon which no interest had been paid was negotiated eighteen months after date, and the court held that it was overdue, and the indorsee was charged with equities. The court explained the holding on the first hearing [(1900) 22 R. I. 279, 47 Atl. 543], that the "nonpayment of annual interest would clearly render the note overdue," as meaning that, since no time of payment of interest was provided, and it was therefore not payable until the note was paid, when a demand note has run so long with no apparent reason for delay, and when, in addition, the note provided for interest, which most men expect to receive at least once a year, and the payment of which would have recognized the obligation, but none was paid, the note must be taken as overdue.

There are cases in which the note provided that default in interest should render the whole debt immediately due. In such cases, there would seem to be little doubt that one purchasing after the interest was defaulted would not be within the protection of the law merchant, because he had purchased overdue paper.

In *Hodge v. Wallace* (1906) 129 Wis. 84, 116 Am. St. Rep. 938, 108 N. W. 212, it was held that if the note provides that delinquency in payment of interest shall cause the whole note to become due and collectable, one taking the note after default in payment of interest takes it subject to equities.

So, in *Cofer v. Beverly* (1916) — Tex. Civ. App. —, 184 S. W. 608, where there was a provision that default in payment of interest should, at the option of the holder, mature the note, and the note was transferred after the interest fell due, the court said if the payee had exercised his option the note was past due when the transfer was made, and if the option had not

been exercised, the transferee was in possession of facts which would have led him to a knowledge that by agreement the time for payment of interest was waived.

But in *Gillette v. Hodge* (1909) 95 C. C. A. 205, 170 Fed. 313, where the note contained a provision that it should become immediately due if there was a default in payment of interest, and the maker contended that it was dishonored when transferred because there was interest due and unpaid on the note, the court said the difficulty with this contention is that the provision of the note upon which it is based is not self-executory. It simply gave the holder the option to declare the note due for default in the payment of interest.

Due interest does not make note overdue.

The courts seem to agree that the mere fact that interest is overdue on the note does not mature the note, and therefore a purchaser is not subject to equities on the ground that he has purchased overdue paper.

Georgia. — *Fidelity Trust Co. v. Mays* (1914) 142 Ga. 821, 83 S. E. 961.

Iowa. — *Higby v. Bahrenfuss* (1917) 180 Iowa, 316, 163 N. W. 247.

Oklahoma. — *McPherrin v. Tittle* (1913) 36 Okla. 510, 44 L.R.A.(N.S.) 395, 129 Pac. 721.

Oregon. — *United States Nat. Bank v. Floss* (1900) 38 Or. 68, 84 Am. St. Rep. 752, 62 Pac. 751.

Wisconsin. — *Boss v. Hewitt* (1862) 15 Wis. 261; *Kelley v. Whitney* (1878) 45 Wis. 110, 30 Am. Rep. 697.

Canada. — *Union Invest. Co. v. Wells* (1907) 39 Can. S. C. 625.

The case containing the most elaborate discussion of the question is *Union Invest. Co. v. Wells* (Can.) *supra*, where the court held that the rule that overdue paper was taken subject to equities was based upon the fact that, by the custom of merchants, certain instruments do not, after maturity, pass as mercantile currency. And there is a conclusive presumption that a person taking such an instrument after maturity takes it with a suspicion concerning the title of the one from whom he receives it. But such

principle obviously fails of application to instruments which are of such a character and in such a state that in respect to them no such presumption can generally arise. The court then says a bill not on its face overdue carries no suspicion. The failure to meet the obligation to pay the interest does not appear on the face of the instrument. One intending to take such paper cannot be required to investigate as to whether or not the interest has been paid. It is the absence of the necessity of such an investigation which distinguishes current negotiable instruments from other classes of personal property. That the character of the instrument, as overdue or not, could not change from time to time, as interest was paid or not. The court concludes its argument by stating that inasmuch as the grounds upon which the rule relating to overdue instruments is founded do not justify the application of it by reason only of a default in respect of a particular payment, so to apply it would, in effect, be to introduce a new rule respecting the currency of negotiable instruments, which would greatly impair, if not destroy, the negotiable character of a large class of such instruments now universally regarded and treated as a part of the commercial currency of the country.

A note is not overdue by reason of a failure to pay interest prior to the maturity of the principal, in the absence of a stipulation to that effect, because the interest is a mere incident to the debt. But while the paper is not dishonored by failure to pay the interest when due, the fact of unpaid interest is proper to be considered by the jury in connection with all the other facts and circumstances, on the question whether or not the transferee is entitled to the position of one who purchased in good faith and without notice of existing defenses. *McPherrin v. Tittle* (1913) 36 Okla. 510, 44 L.R.A.(N.S.) 395, 129 Pac. 721.

In *United States Nat. Bank v. Floss* (Or.) *supra*, where the defense was that plaintiff was not a bona fide holder, because there was interest due and unpaid on the note at the time of the

transfer, the court says the better rule, and the one supported by the text-writers and the great weight of authority, is that a note is not overdue by reason of a failure to pay interest prior to the maturity of the principal, in the absence of a stipulation to that effect, because interest is a mere incident to the debt. In that case, the note was payable in instalments, each of which had been promptly paid when it fell due. The court further says the reason for the rule that negotiable paper, transferred after maturity, is subject to the same defenses in the hands of the assignee as could have been made between the original parties, is that payment must be presumed to have been withheld because the maker had some defense. But this reason cannot apply where the instalments of principal have been regularly paid.

In *Higby v. Bahrenfuss* (1917) 180 Iowa, 316, 163 N. W. 247, the court adopts the reasoning that a promissory note matures only when it becomes due by its terms, and one who purchases it in good faith for value before it matures is within the protection of the law merchant, although interest is overdue at the time of such purchase.

In holding that, generally, it was a question for the jury to determine whether or not the circumstances were such as to put a prudent man on notice, the court in *Fidelity Trust Co. v. Mays* (1914) 142 Ga. 821, 83 S. E. 961, says, unless so provided in the contract, the nonpayment of interest does not mature the principal. But the failure to pay the interest may be shown in connection with other facts, in determining whether or not the circumstances were sufficient to put a prudent man on guard.

In *Boss v. Hewitt* (1862) 15 Wis. 261, the court says the fact that the interest had not been paid does not make the case equivalent to a purchase after maturity, so as to let in defenses. The interest is a mere incident of the debt, and although it is frequently provided that it shall be paid at stated periods, before the principal falls due, we know of no authority holding that a failure to pay it dishonors the note.

And we do not think it should have that effect. The maturity of the note, within the meaning of the commercial rule upon this subject, is the time when the principal becomes due.

In a subsequent Wisconsin case, *Hart v. Stickney* (1877) 41 Wis. 630, 22 Am. Rep. 728, following *Newell v. Gregg* (N. Y.) *infra*, the court says the fact that the interest on a note is due and unpaid is of equal character, to show dishonor, as the non-payment of instalments.

But in *Kelley v. Whitney* (1878) 45 Wis. 110, 30 Am. Rep. 697, the court held that the ruling in *Hart v. Stickney* was a mere dictum, and since the earlier case of *Boss v. Hewitt* was entirely overlooked, and was sustained by implication by many decisions made in the farm mortgage cases, and upon municipal bonds, it was the duty of the court to adhere to the rule that the purchaser for value of unmatured commercial paper with interest overdue was not, from that fact alone, affected with notice of prior equities or infirmities in the title.

Effect of nonpayment of interest as dishonor.

The question whether or not the nonpayment of interest, when due, is dishonor of the paper, is not so easy of solution, and upon it the courts have disagreed. The argument seems strong that the promise to pay the interest is as much a part of the agreement as the promise to pay the principal, and if the interest is not paid the paper is as much dishonored as though any other promise was not kept. Some of the courts have assumed that the default in interest does not appear on the face of the paper, but if the interest is due, and its payment is not indorsed on the paper, it would seem that the paper itself carries the notice of dishonor which charges the purchaser with notice; and when to this fact is added the further fact, which appears in many of the cases, that the purchaser advanced the amount of overdue interest, there can be no question but that he knew that the paper was, to that extent, dishonored.

The following cases have held that

default in payment of interest was a dishonor of the paper:

Georgia.—*Park v. Buxton* (1912) 10 Ga. App. 356, 73 S. E. 557.

Minnesota. — *First Nat. Bank v. Forsyth* (1897) 67 Minn. 257, 64 Am. St. Rep. 415, 69 N. W. 909.

Missouri.—*Merchants Nat. Bank v. Brisch* (1911) 154 Mo. App. 631, 136 S. W. 28.

New York.—*Newell v. Gregg* (1868) 51 Barb. 263.

Texas.—*Tuke v. Feagin* (1915) — Tex. Civ. App. —, 181 S. W. 805.

Canada. — *Jennings v. Napanee Brush, Co.* (1884) 4 Can. L. T. Occn. N. 595; *Moore v. Scott* (1907) 16 Manitoba L. R. 492; *Peters v. Perras* (1909) 1 Alberta L. R. 201.

The cases which have held default in interest was not a dishonor of the paper are:

Idaho.—*Winter v. Nobs* (1910) 19 Idaho, 18, 112 Pac. 525, Ann. Cas. 1912C, 302.

Indiana.—*Cooper v. Hocking Valley Nat. Bank* (1898) 21 Ind. App. 358, 69 Am. St. Rep. 365, 50 N. E. 775; *Cooper v. Merchants' & M. Nat. Bank* (1900) 25 Ind. App. 341, 57 N. E. 569.

Massachusetts. — *National Bank v. Kirby* (1871) 108 Mass. 497.

Wisconsin. — *Patterson v. Wright* (1885) 64 Wis. 289, 25 N. W. 10.

The leading case holding that default in payment of interest dishonored the note is *Newell v. Gregg* (1868) 51 Barb. (N. Y.) 263, in which the court says the payment of interest annually was as much a part of the agreement as the promise to pay the principal. It was a portion of the debt. The entire debt was evidenced by one written promise to pay, and this promise was broken when the note was purchased. When the instrument furnishes evidence that the written promise to pay has been broken, the person taking the note takes it with a warning that the maker may have some defenses. His neglect to pay is a dishonoring of his promise, and is a warning to all subsequent takers of the note. No one can become a bona fide holder of a note so as to shut out a valid defense by the maker, when

such holder takes it after, by its terms, money is past due upon it.

In *Park v. Buxton* (Ga.) *supra*, it is said negotiable paper is dishonored by a breach of the engagement which it imports, since any fact which would tend to show that the paper was dishonored would destroy its character of negotiability. In other words, if there is upon the face of the paper anything indicative of dishonor, the purchaser takes it at his peril. A promise to pay a negotiable promissory note applies to interest as well as to the principal. The obligation to pay the interest is just as strong as the obligation to pay the principal, and the failure to pay the interest would indicate that the promisor had broken his promise, and had dishonored and destroyed the negotiable character of the obligation. Anything that dishonors any part of the note dishonors the whole note. And it is a question for the jury to determine whether failure to pay the interest on the note is a circumstance which would place a prudent man upon his guard in purchasing the note.

And a note upon which the interest is overdue carries on its face evidence of its dishonor. *Merchants Nat. Bank v. Brisch* (Mo.) *supra*.

In *First Nat. Bank v. Forsyth* (Minn.) *supra*, the court follows its prior ruling in *First Nat. Bank v. Scott County* (1869) 14 Minn. 77, Gil. 59, 100 Am. Dec. 194, which was a bond case, to the effect that nonpayment of interest dishonored the note, although stating that if the question were a new one in the state, it might possibly be inclined to adopt the Massachusetts doctrine as founded on the better reasoning. But it said that the difference between the two doctrines is not so great as might at first seem, for, even under the Massachusetts rule, the nonpayment of interest is a fact proper to be considered in connection with other circumstances upon the question whether the holder is entitled to the position of one who has purchased the paper in good faith and without notice of existing defenses.

In *Moore v. Scott* (1907) 16 Manitoba L. R. 492, it was held that defaulted interest dishonored the note.
11 A.L.R.—81.

The court says the interest is a part of the contract, and a part of the contract was dishonored when the note was transferred. To give rights under the law merchant the note must not be overdue, because an overdue note raises a suspicion that the payee cannot enforce payment. Any default in the payment of interest must raise the same suspicion. And it was held that the note was both overdue and dishonored. *Perdue, J.*, says the note sued upon in this case was, to the knowledge of the plaintiff, overdue in respect to a stated instalment of money payable under it at the time the plaintiff acquired it, and that he cannot, therefore, be held to be a holder in due course under the Bills of Exchange Act.

In *Peters v. Perras* (1908) 1 Alberta L. R. 201, 8 West. L. R. 162, affirming (1907) 1 Alberta L. R. 1, 7 West. L. R. 193, the court held that the fact that interest was overdue at time of transfer put the transferee on inquiry. This was reversed by the supreme court (1909) 42 Can. S. C. 244, on an evidence question, but the report states that *Union Invest. Co. v. Wells* (1907) 39 Can. S. C. 625, *supra*, was followed.

In *Jennings v. Napanee Brush Co.* (1884) 4 Can. L. T. Occn. N. 595, which was an action to hold the indorser for interest, which failed because of want of demand and notice, the court said the interest is a debt as much as the principal sum secured by the note, and disapproved of the cases which held that default in payment of interest did not dishonor the note.

In *Tuke v. Feagin* (1915) — Tex. Civ. App. —, 181 S. W. 805, the effort was to enjoin prosecution of an action to enforce a note and interest, and the contention was that, as to the interest, the plaintiff was not an innocent purchaser, because it was overdue when he took the note; but the court denied the injunction on the ground that if the interest was overdue the defense was as available against the purchaser as against the payee, and therefore there was no ground for injunction.

The leading case in favor of the theory that nonpayment of interest does

not dishonor the note is *National Bank v. Kirby* (1871) 108 Mass. 497, where the court held that the mere fact that there are no indorsements upon the note of interest payments which have matured does not amount to a dishonor which will subject the note to all defenses. The court says if it is true that the failure to pay interest ever, as matter of law, amounts to dishonor of the note, it can only affect one who has knowledge of the fact. Want of indorsement does not apprise the person to whom the note is transferred that there has been no payment. The court further says in its effect upon the credit of a note it is manifest that a failure to pay interest is not to be ranked with a failure to pay principal. ✓ Interest is an incident of the debt, and differs from it in many respects. The court, however, continues: But while the nonpayment of interest is not to be allowed the effect claimed for it, it is still a fact proper to be considered by the jury in connection with other circumstances, on the question whether the holder is entitled to the position of one who has taken in good faith and without actual or constructive notice of existing defenses.

In *Winter v. Nobs* (1910) 19 Idaho, 18, 112 Pac. 525, Ann. Cas. 1912C, 302, it is held that mere failure to pay a particular instalment of interest does not amount to a dishonor of a negotiable instrument, and will not charge the purchaser with notice of fraud or misrepresentation in the contract or in the issuance or circulation of the note.

And *Cooper v. Hocking Valley Nat. Bank* (1898) 21 Ind. App. 358, 69 Am. St. Rep. 835, 50 N. E. 775, held that a bona fide purchaser for value of negotiable paper is within the protection of the law merchant, although interest on the note was due and unpaid at the time of purchase. Failure to pay the interest does not dishonor the note.

Notice that there is interest due and unpaid on the note does not affect the bona fides of the purchase. *Patterson v. Wright* (1885) 64 Wis. 289, 25 N. W. 10.

The reported case (*MERCHANTS' NAT. BANK v. SMITH*, ante, 1274) must

be regarded as holding that nonpayment of interest does not dishonor the note, because it goes to the full extent of holding that it does not affect the bona fides of the purchase.

In *Union Invest. Co. v. Wells* (Can.) supra, which contains a very elaborate discussion of the question, the court says there is no evidence that the plaintiff had any knowledge of the fact that the interest had not been paid, and assuming that the note had been dishonored within the meaning of the Bills of Exchange Act, such fact does not appear, since there is nothing to show that the note, which was payable at a particular place, was ever presented there or elsewhere for the payment of interest, and therefore the indorsee could not be said to have taken a dishonored note with notice of its character.

Failure to indorse payments of interest on the note does not charge the indorsees with notice that they have not in fact been made, and render the note dishonored within the statute, providing that a holder in due course is one who becomes holder before the instrument is overdue and without notice that it has been previously dishonored, although the mortgage by which the note is secured provides that default in an interest payment shall render the note at once due and payable. *Taylor v. American Nat. Bank* (1912) 63 Fla. 631, 57 So. 678, Ann. Cas. 1914A, 309.

Nonpayment of interest as a circumstance affecting bona fides.

Many of the cases which have not taken the advanced position that failure to pay interest dishonored the note have held that it was a fact which might be considered with others, in determining whether or not the necessary element of bona fides on the part of the purchaser existed. The leading case (*National Bank v. Kirby* (Mass.) supra) holding that nonpayment of interest did not amount to dishonor also held that it was a circumstance to be considered on the question of bona fides.

And the same ruling was made in *McPherrin v. Tittle* (1913) 36 Okla. 510, 44 L.R.A. (N.S.) 395, 129 Pac. 721,

supra, and Fidelity Trust Co. v. Mays (1914) 142 Ga. 821, 83 S. E. 961, supra, which held that nonpayment of interest did not mature the paper.

So in Union Nat. Bank v. Mailloux (1911) 27 S. D. 543, 132 N. W. 168, the fact of overdue interest was one of the suspicious circumstances mentioned which destroyed the bona fides of the purchase.

The circumstance that interest is overdue is sufficient to put the purchaser on inquiry, and, at least, present the question for submission to the jury as to the bona fides of the purchase of the note after such inquiry. Citizens' Sav. Bank v. Couse (1910) 68 Misc. 153, 124 N. Y. Supp. 79.

The fact that interest is overdue is a circumstance against the note which may be considered with other circumstances, upon the question of the bona fides of the purchase. Lumpkin v. Lutgens (1919) 143 Minn. 139, 172 N. W. 893; Shultz v. Crewdson (1917) 95 Wash. 266, 163 Pac. 734; Vaughan v. Schneider (1913) — Alberta, —, 24 West. L. R. 313, 11 D. L. R. 290.

The fact that an instalment of interest is overdue may be considered by the jury, together with such facts as that there is no indorsement of payments on the note, that the note is purchased at a considerable discount, and that, although the indorser is solvent, the holder brings action in

another state against the maker, upon the question whether or not the indorsee had such notice as to destroy his bona fides. Fidelity Trust Co. v. Whitehead (1914) 165 N. C. 74, 80 S. E. 1065, Ann. Cas. 1915D, 200.

The fact that the note when purchased had overdue interest coupons upon it, and provided that if default was made in payment of interest when due the whole note might become due, was regarded as an element in determining the bona fides of the purchase, in Yeomans v. Nachman (1917) 198 Mo. App. 195, 198 S. W. 180.

In Ireland v. Scharpenberg (1909) 54 Wash. 558, 103 Pac. 801, the court says counsel "contend that default in payment of interest was of itself notice of dishonor. We do not agree with this contention. . . . Such facts appearing by the instrument might or might not be sufficient for such showing of dishonor. The weight to be given to such facts might be largely influenced by the length of time such interest had remained unpaid after its maturity. While we hold mere nonpayment of interest, after maturity thereof, does not of itself show the paper as being dishonored, it nevertheless is a circumstance of some weight to be considered by the jury in determining the good faith of the purchaser." H. P. F.

W. B. MANUFACTURING COMPANY

v.

JOSEPH RUBENSTEIN et al., Appts.

Massachusetts Supreme Judicial Court—June 24, 1920.

(236 Mass. 215, 128 N. E. 21.)

Tradename — use of initials.

1. A partnership cannot use merely the initials of its firm name as a tradename, if it conflicts with a tradename adopted by another, on the theory that the initials constitute the name of the firm.

[See note on this question beginning on page 1286.]

Appeal — report of evidence — effect of finding.

2. A finding by the trial court, after a hearing in which witnesses have

been called in person to testify, will not be reversed on appeal with report of the evidence.

[See 2 R. C. L. 203.]

Tradename — interference of equity.

3. Although equity will not interfere to protect a merchant against harm arising from the failure of purchasers to exercise ordinary attention which would enable them to notice the difference between his name and that of a competitor, it will not permit one to assume a trade characterization so closely like that of another as to be likely to mislead the public.

[See 26 R. C. L. 880 et seq.]

Unfair competition — adoption of name similar to that of another.

4. A firm doing business under the name W. B. Mfg. Co. will be protected against the institution of a business by another at the same address under the name R. B. Mfg. Co., if customers are misled thereby.

[See 26 R. C. L. 883.]

Appeal — finding against damages — error.

5. There is no error in law in finding absence of damages, although profits have been made, in a suit for unfair competition in business.

Reference — discretion of master — qualification of witness.

6. Whether or not a witness is qualified as an expert in an action to recover damages for unfair competition is within the discretion of the master.

[See 11 R. C. L. 574.]

Evidence — suit for unfair competition — sales to old customers.

7. In a suit for damages for attempting to appropriate the business name of plaintiff, defendant cannot show the business done with old customers so as to establish what their profits would have been without the wrongful appropriation.

APPEAL by defendants from a decree of the Superior Court for Suffolk County (Fox, J.) confirming the Master's report in favor of plaintiff in a suit brought to restrain defendants from conducting business under the firm style of R. B. Manufacturing Company. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. James A. Tirrell for appellants.
Messrs. Jacobs & Jacobs for appellee.

Rugg, Ch. J., delivered the opinion of the court:

This is a suit in equity wherein the plaintiff, a Massachusetts corporation, seeks to restrain the defendants from conducting business under the firm style of R. B. Manufacturing Company. The case was heard upon oral evidence by a judge of the superior court, who made this finding of fact:

"The plaintiff's corporate name is 'The W. B. Manufacturing Company,' and its place of business is 65 Essex street, Boston.

"Before January 1, 1917, the defendants had been doing business in Fall River for many years under the name of Rubenstein Bros., and their business was not a competing business. January 1, 1917, the defendants moved to 65 Essex street, Boston, dropped the name 'Rubenstein Bros.,' assumed the name 'R. B. Manufacturing Company,' and entered into active competition with

the plaintiff in its own line of business. It has not been contended by either party that the object of the defendants in dropping the name by which they had been known to the trade for many years was to drop the reputation which went with it. The more probable explanation of their conduct is that they wished to get the benefit of the plaintiff's reputation."

It is the well-settled rule in equity that while it is the duty of this court, on an appeal with report of the evidence, to examine the evidence with care and to reach its own conclusion as to the facts, yet a finding made by the trial court, after a hearing in which witnesses have been called in person to testify before him, will not be reversed unless plainly wrong. *Lindsey v. Bird*, 193 Mass. 200, 79 N. E. 263. Careful consideration of this record convinces us that the finding was right. It must stand.

It is urged in behalf of the defendants that they have a legal

Appeal—report of evidence—effect of finding.

right to use the letters "R. B.," on the footing that it is their name because an abbreviation for Rubenstein Brothers. It is enough to say that this contention has no foundation either in fact or in law. Initials

**Tradename—
use of initials.**

alone do not constitute the name. Description or abbreviation is not the equivalent of a name. The distinctive characterization in words by which one is known and distinguished from others is the name of a person. *Connors v. Lowell*, 209 Mass. 111-118, 95 N. E. 412, Ann. Cas. 1912B, 627. The right of one to use his own name in business, even when the same as or like that of another, has recently been considered in *Burns v. William J. Burns International Detective Agency*, 235 Mass. 553, 127 N. E. 834, where the authorities are collected. Those principles have no bearing upon the case at bar because two or more detached and separated letters of the alphabet do not constitute a name. Cases like *Com. v. Gleason*, 110 Mass. 66, and *Carleton v. Rugg*, 149 Mass. 550, 5 L.R.A. 193, 14 Am. St. Rep. 446, 22 N. E. 55, have no relevancy to the facts disclosed on this record.

The defendants must stand on the ground that they have no natural or superior right to the use of the designation or identifying letters selected by them for their business. The single question in this connection is whether the trade designation adopted by them is sufficiently similar to that of the plaintiff to be likely to confuse or mislead those using ordinary discrimination. There was ample evidence that the plaintiff had established a trade reputation in connection with its name. *C. A. Briggs Co. v. National Wafer Co.* 215 Mass. 100, 102 N. E. 87, Ann. Cas. 1914C, 926. While a court of equity will not interfere to protect one against harm arising

**—interference
of equity.**

from failure on the part of purchasers to exercise ordinary attention, when thereby they

would be enabled to notice the difference between the two names or marks, it will not permit one to assume a trade characterization so closely like that of another as to be likely to mislead the public. *McLean v. Fleming*, 96 U. S. 245, 255, 24 L. ed. 828, 832. It seems plain, both from the nature of the designation adopted by the defendants and from the evidence specific to the effect that mistakes of identity had occurred among customers of the plaintiff, that the latter's right to be secured from unfair competition was infringed. *Reading Stove Works O. P. & Co. v. S. M. Howes Co.* 201 Mass. 437, 21 L.R.A. (N.S.) 979, 87 N. E. 751.

**Unfair
competition—
adoption of
name similar
to that of
another.**

The case was referred to a master to ascertain damages and profits. He found that profits had been made, but found no damages. In this there was no error of law. *Forster Mfg. Co. v. Cutter-Tower Co.* 215 Mass. 136, 101 N. E. 1083.

**Appeal—finding
against damages
—error.**

The master found, in substance, that the defendants had not furnished all the information within their control as to costs of goods and profits made by them. There was no error in the admission of evidence by the master. Whether a witness was qualified to testify as an expert was, under the circumstances, within the discretion of the master. *Westinghouse Electric & Mfg. Co. v. Wagner Electric & Mfg. Co.* 225 U. S. 604, 56 L. ed. 1222, 41 L.R.A. (N.S.) 658, 32 Sup. Ct. Rep. 691.

**Reference—
discretion of
master—
qualification of
witness.**

The rulings of the master respecting rules for computation of profits and losses were in accordance with the principles laid down in *Nelson v. J. H. Winchell & Co.* 203 Mass. 75, 91, 23 L.R.A. (N.S.) 1150, 89 N. E. 180.

The defendants were not entitled

as of right, under the circumstances, to show sales made by them to their old customers, and establish thereby what they might have made if they had conducted their business without attempting to appropriate the benefit of the name of the plaintiff. *Saxlehner v. Eisner & M. Co.* 70 C. C. A. 452, 138 Fed. 22; *W. R. Lynn Shoe Co. v. Auburn-*

**Evidence—
suit for unfair
competition—
sales to old
customers.**

Lynn Shoe Co. 100 Me. 461, 479, 4 L.R.A.(N.S.) 960, 62 Atl. 499.

Whether the master should reopen the case for further hearing rested in his discretion under the circumstances. *New York Bank Note Co. v. Kidder Press Mfg. Co.* 192 Mass. 391-405, 78 N. E. 463.

Clearly whether the master's report should be recommitted was within the discretion of the court.

Decree affirmed with costs.

ANNOTATION.

Right to protection in use of initials as a trademark or tradename, or upon the ground of unfair competition.

It is provided by the Federal Trade-mark Act that no mark consisting of insignia of the United States shall be registered, and in view of this it has been held that no trademark having the letters "U. S." as the most prominent feature can be registered, even though such letters form the initials of the corporation seeking the registration. *Re United States Rubber Co.* (1920) — App. D. C. —, 265 Fed. 1016, holding that the letters "U. S." written on a disk could not be registered as a trademark for shoes.

And in the reported case (*W. B. Mfg. Co. v. RUBENSTEIN*, ante, 1283) it was held that the fact that the letters used as a tradename are the initials of the user's name does not necessarily permit their use as such, if the name thus chosen conflicts with a tradename previously adopted by another and is likely to confuse the public to the latter's injury. In this case the court protected a firm doing business under the name "W. B. Mfg. Co." against the institution of a similar business by another at the same place under the name "R. B. Mfg. Co.," on the ground that customers might be misled thereby.

And where a person has adopted his initials as a trademark and sold the same along with his plant, the purchaser will be protected in the use thereof as against the vendor, who subsequently seeks again to use his initials as a trademark on a like line of products. It was so held with re-

spect to the initials "J. W. J.," in *Symonds v. Jones* (1890) 82 Me. 302, 8 L.R.A. 570, 17 Am. St. Rep. 485, 19 Atl. 820, in overruling the contention by J. W. Jones that no one else could acquire the right to use his initials, or prevent his using them as a trademark.

But there is no doubt that as a general rule initials may constitute a valid trademark; at least, in the United States. It was so held in *General Electric Co. v. Re-New Lamp Co.* (1903) 121 Fed. 164 (on final hearing in (1904) 128 Fed. 154), with respect to the letters "G. E." And in *G. & J. Tire Co. v. G. J. G. Motor Car Co.* (1913) 39 App. D. C. 508, the commissioner of patents was upheld in registering the initials "G. & J." as a trademark. And in *B. V. D. Co. v. Potterf* (1915) 43 App. D. C. 33, a similar conclusion was reached as to the letters "P. C. G." Again, in *United States ex rel. Koechlin v. Marble* (1882) 22 Off. Gaz. (Fed.) 1366, the commissioner of patents held that the letters "W. G." in a monogram were registerable as a trademark. And in *Geo. T. Staggy Co. v. Taylor* (1894) 95 Ky. 651, 27 S. W. 247, it appears that the initials "O. F. C." were registered as a trademark for whisky. And this seems to have been the rule in England under the earlier trademark acts. At least, in *Hall v. Barrows* (1863) 4 DeG. J. & S. 150, 46 Eng. Reprint, 873, 3 New Re-

ports, 259, 33 L. J. Ch. N. S. 204, 10 Jur. N. S. 55, 9 L. T. N. S. 561, 12 Week. Rep. 322, the initials of a partnership, "B. B. H." with a crown, were held to constitute a valid trademark. And in *Re Barrows* (1877) L. R. 5 Ch. Div. (Eng.) 353, 46 L. J. Ch. N. S. 450, 36 L. T. N. S. 291, 25 Week. Rep. 407, it was held that the initials "B. B. H." could be registered as a trademark under the English Trademarks Registration Act of 1875. And in *Re Albert Baker & Co.* [1908] 2 Ch. (Eng.) 86, 77 L. J. Ch. N. S. 473, 98 L. T. N. S. 721, 24 Times L. R. 467, 25 Rep. Pat. Cas. 513, it was held that the initials "A. B. C." could be registered as a trademark. And in *Bayer v. Baird* (1898) 35 Scot. L. R. 913, 25 R. 1142, as set out in 3 *Butterworths' Ten Years' Dig.* (1898-1907) cols. 891, 892, it was held that a corset maker whose initials were C. B., and who had stamped his product "C. B." for so long a time that it had become known by that name, could prevent the use of the letters "C. B." as a mark by a rival in trade. And that the initials "G. B. D." may be a trademark, see *Bondier v. Depatie*, 3 *Dorion* (Eng.) 233, as set out in *Sebastian on Trademarks*, p. 77. And see *Moet v. Pickering* (1878) L. R. 8 Ch. Div. (Eng.) 372, 47 L. J. Ch. N. S. 527, 38 L. T. N. S. 799, 26 Week. Rep. 637, wherein the initials "M. & C." with a star, seem to have been regarded as a valid trademark; and *Frankau v. Pope*, 11 *Cape of Good Hope*, 209, as cited in *Hopkins on Trademarks*, p. 342, and in *Sebastian on Trademarks*, p. 78. But the modern English rule seems to be to the contrary. Thus, in *Registrar v. W. & G. DuCros* [1913] A. C. (Eng.) 624, 83 L. J. Ch. N. S. 1, 109 L. T. N. S. 687, 29 Times L. R. 772, 57 Sol. Jo. 728, 30 Rep. Pat. Cas. 660, 51 Scot. L. R. 588, modifying [1912] 1 Ch. 644, 81 L. J. Ch. N. S. 201, 105 L. T. N. S. 890, 29 Rep. Pat. Cas. 65, it was held that the initial letters of the Christian names of partners, namely, "W. & G.," could not be registered under the English Trademarks Act of 1905. This was upon the theory that the mark was not sufficiently distinctive, and that its registration might seriously

embarrass others of similar initials, who might wish to use the same in marking their goods with their initials. However, Lord Shaw remarked that had the applicants used their full initials, "W. & G. Du C.," the "whole action might have had a different complexion." And again, in *Re Garrett* [1916] 1 Ch. (Eng.) 436, 85 L. J. Ch. N. S. 350, 114 L. T. N. S. 976, 60 Sol. Jo. 401, 33 Rep. Pat. Cas. 117, it was held that the initials "O. G." were not subject to registration, the argument being that "the practice in trade of using the initials of firms was so hardened that they did not amount to distinctive marks," and that "to grant the exclusive use of any letters to any trader would be oppressive."

In several instances the right of plaintiff to protection against the use by defendant of initials that are the duplicates of, or very similar to, those used by plaintiff, has been denied where defendant's use was honest and did not mislead or deceive the public.

Thus, in *H. Mueller Mfg. Co. v. A. Y. McDonaly & M. Mfg. Co.* (1908) 164 Fed. 1001, modified on other grounds in (1910) 106 C. C. A. 312, 183 Fed. 972, it was held that a manufacturer of plumbers' supplies which had adopted as a trademark the letters "H. M.," the initials of the principal words in its corporate name, which it placed in a shield-shaped space with a diamond-shaped figure between the letters, could not enjoin a rival manufacturer from adopting and using on similar products a trademark consisting of the initials "M. M.," taken from its corporate name and placed within a diamond-shaped space with nothing between the letters, it being held that the similarity between the marks was not such as to deceive purchasers using reasonable care, and consequently that there was no infringement. The court said: "Does the arrangement by defendant of the initial letters of its corporate name, in connection with the figure of a diamond placed horizontally upon plumbers' goods made by it, infringe the complainant's trademark? Remove the trademarks of complainant and defendant from the article of manufacture upon which each is im-

pressed, and examine them separately, and it is quite apparent that no one exercising the slightest diligence in inspecting them could be deceived, or led to believe that they were the same, or that one was made in imitation of the other. A purchaser of goods is required to exercise reasonable care in examining them to ascertain that he gets what he wants, and a dealer is not required, in adopting a trademark or in dressing his goods, to select a mark, or so dress the goods, that under no circumstances can a careless purchaser be misled or deceived. All that fair dealing requires is that the dealer shall adopt such a mark, or so dress his goods, that an ordinary person exercising reasonable care to guard against imposition will not be beguiled into purchasing an article that he does not intend to purchase." On the original hearing in this case (1904) 132 Fed. 586, the court, in discussing the right of rival manufacturing corporations to use their initials in their trademarks, said: "The letters adopted by the complainant and the defendant, respectively, are the initials of the principal words or names comprising the corporate name of each. Assuming, without deciding, that complainant had acquired the prior right to the use of its trademark, the defendant has the right to use its own name, or the initials thereof, as a part of its trademark, to indicate its own goods, providing it does not do so in a manner and form to mislead the public and deceive buyers as to the identity of the goods, and lead them to believe that defendant's goods are those of complainant's manufacture."

And in *Gallet v. R. & G. Soap & Supply Co.* (1918) 166 C. C. A. 248, 254 Fed. 802, it was again held that foreign manufacturers of high-grade soaps and toilet articles, who used the trademark "R. & G." in monogram, could not enjoin the R. & G. Soap & Supply Company, which manufactured low-priced soaps, etc., from using the letters "R. & G.," which were the initials of the organizers of the corporation, upon its products, there being no claim of fraud and no evidence of confusion with plaintiff's goods or

interference with his trade, and it also appearing that ordinary attention by a purchaser of the products of either concern would enable him at once to distinguish it from the product of the other.

So, in *Re Albert Baker & Co.* [1908] 2 Ch. (Eng.) 86, 77 L. J. Ch. N. S. 473, 98 L. T. N. S. 721, 24 Times L. R. 467, 25 Rep. Pat. Cas. 513, it was held that the initials "A. B. C." of rival firms could both be registered, the court overruling the objection that the second mark was calculated to deceive, and would therefore be entitled to no protection in court.

And in *Heide v. Wallace & Co.* (1904) 129 Fed. 649, affirmed in (1905) 68 C. C. A. 16, 135 Fed. 346, in applying the rule that to constitute infringement of a trademark or tradename as unfair competition there must be something more than the mere duplication by the one party of the other's tradename, and that this must be found in the deceptive use of imitative methods, it was held that a manufacturer of diamond-shaped licorice pastilles, each of which had embossed thereon the letters "H-H," could not enjoin a rival concern from selling a similar diamond-shaped article, having the letter "W" embossed thereon.

And of course, where the dissimilarity in the letters or their surroundings is so great that a mere inspection would prevent the ordinary purchaser from being deceived, the rule is that there is no unfair competition. Thus, in *Bass, Ratcliff, & Gretton v. Henry Zeltner Brewing Co.* (1898) 87 Fed. 468, affirmed on opinion below (1899) 37 C. C. A. 355, 95 Fed. 1006, it was held that one using a plain red triangle on the label on bottled ale could not enjoin, on the ground of unfair competition, the use by a manufacturer of beer, on the labels on his bottled goods, a similar red triangle having a large white "Z" thereon, the letter "Z" being the initial of the principal word in the firm name. And in *B. V. D. Co. v. Potterf* (1915) 43 App. D. C. 33, it was held that the initials "B. V. D." were so dissimilar from the initials "P. C. G." that no confusion in trade could result from the registra-

tion and use of the latter trademark, even though the marks were used by different persons on similar products. And again in *B. Payn's Sons Tobacco Co. v. Payette* (1914) 86 Misc. 276, 149 N. Y. Supp. 183, affirmed in (1915) 171 App. Div. 960, 155 N. Y. Supp. 1095, it was held that the trademark "B. & M.," which consisted of the initial letters of the surnames of members of a firm manufacturing cigars, was not so similar to a trademark consisting of the initials "P. & M." as to constitute an infringement, it not appearing that the public generally were liable to be deceived by the similarity. So, in *Lafean v. Weeks* (P. C. Wiest Co. v. Weeks) (1896) 177 Pa. 412, 34 L.R.A. 172, 35 Atl. 693, it was held that the initials "W. H. W.," printed in script, in white, in a horizontal line upon a red background, on boxes of confectionery, did not infringe a trademark for confectionery described in the register as the initials "P. C. W.," generally arranged to appear as script, printed in a horizontal line upon a background of "any suitable color," and which distinctly states that the essential features are the letters, the court maintaining that there was no such similarity of appearance as would be likely to deceive purchasers.

And the law places no inhibition upon the use of similar initials as trademarks by different persons, so long as the goods to which they are applied are so distinctive in class and quality as to forbid the probability of confusion in trade, it being the rule that, before it can be held that the similarity of the marks will cause confusion in trade, it must appear that the marks are to be applied to goods of the same general class and of the same descriptive properties. It was so ruled in *G. & J. Tire Co. v. G. J. G. Motor Car Co.* (1913) 39 App. D. C. 508, in holding that the letters "G. & J.," inclosed in a triangle and registered as a trademark to be used on automobile tires, did not prevent the registration by another corporation of the trademark "G. J. G.," inclosed in a similar triangular border to be used on automobiles.

And it has been held that a manufacturer will not be protected in the

exclusive use of his or its initials as a trademark where such mark is not attached to its product for the legitimate purpose of indicating its origin, but rather is resorted to for an ulterior purpose, such as destroying the utility of the product for remaking and reselling after having once become useless for the purpose originally intended. This was the conclusion reached in *General Electric Co. v. Re-New Lamp Co.* (1903) 121 Fed. 164, where the trademark "G. E." was worked into the inside of electric light bulbs for the purpose of preventing other manufacturers from rebuilding the bulbs after they had been burned out, and in which the complainant was standing strictly on its technical rights as the owner of a technical trademark, without having charged any intended or actual deception of the public by the defendant. But upon final hearing in (1904) 128 Fed. 154, an injunction was granted on the theory that the trademark in question had been affixed for a legitimate purpose, it having also been found that in rebuilding the lamps it could be removed at a small cost.

In *Burt v. Smith* (1895) 17 C. C. A. 573, 35 U. S. App. 837, 71 Fed. 161, it was held that, considering only the question of infringement without reference to intent, the mere use by the defendants of their firm initials, "B. & S.," upon coughdrops sold by them, did not infringe the trademark "S. B." which had been registered by Smith Brothers for use on their coughdrops. In this case the court expressly refused to consider the question of unfair competition, on the ground that it did not have jurisdiction of that question.

On the other hand, the use of imitative initials will not be permitted where the similarity is such that persons using ordinary caution are likely to be deceived.

Thus, in *Godillot v. American Grocery Co.* (1896) 71 Fed. 873, upon the theory that one cannot by imitative devices be permitted to deceive purchasers, and that equity will intervene where the resemblance is so close that purchasers exercising ordinary cau-

tion are likely to be misled, it was held that a trademark consisting of the letters "A. G.," combined in a monogram and used upon groceries sold by Alexis Godillot and his grantees of the right to use the mark, was infringed by the adoption by the successor to such grantees' business of a mark "A. G. Co.," in a similar monogram, which was applied to coffee and cigars, the right to use the mark "A. G." having been retransferred to Godillot prior to the succession of the A. G. Company to the business of the original grantee of the right to use the trademark. And a similar conclusion was reached in *Godillot v. Harris* (1880) 81 N. Y. 263, where the only material change was the substitution of the monogram "F. G." for the monogram "A. G."

And in *Giron v. Gartner* (1891) 47 Fed. 467, where a manufacturer of ribbon used as its trademark "G. & F.," with the ampersand as prominent as the initials, but on some of their goods used it with the ampersand greatly reduced in size, it was held that such use was unfair to a rival manufacturer of ribbon, whose trademark was "G. F.;" that it must be regarded as having been so used with intent to delude the public; and that such use would be restrained as well as all use of the trademark "G. & F.," except with the ampersand of equal prominence with the initials. So, in *Frank v. Sleeper* (1890) 150 Mass. 583, 23 N. E. 213, where Nathan Samuel adopted his initials "N. S." as a trademark for cigars, and assigned the same to another, it was held that such other could enjoin the use of the symbol "N. & S." by a third person, as a trademark to be used for cigars, on the ground that it constituted an infringement of the plaintiff's mark. The court held that the letters "N. S." constituted a valid trademark, used to represent a cigar of a certain and distinctive kind, and that it was a symbol which did not indicate mere personal selection.

And in *Singer Mfg. Co. v. Bent* (1896) 163 U. S. 205, 41 L. ed. 131, 16 Sup. Ct. Rep. 1016, it was held that the lettering, "New York S. M. Mfg.

Co.," corresponding in size and style of letter with the lettering "The Singer Manfg. Co." on the brass plates of the latter company, cannot lawfully be used on sewing machines similar to those of the Singer Company by a company bearing the former name, although it does not employ the name "Singer," where the position and size, as well as the inscription found on the plate, are imitations of those used by the Singer Company, and clearly are calculated to deceive the public as to the source of manufacturing.

And in *Standard Table Oil Cloth Co. v. Trenton Oil Cloth & Linoleum Co.* (1906) 71 N. J. Eq. 555, 63 Atl. 846, the court, while admitting that one corporation cannot restrain another from stamping the initials of its name upon its goods, especially where such name was taken prior to the incorporation of the complainant, ruled that all that complainant can ask is that defendant shall not be allowed to use marks, letters, or other indicia, by which he may induce purchasers to believe that the goods which it is manufacturing and selling are the manufacture of another, and, applying the rule, held that a trademark consisting of the firm initials "T. O. C.," inclosed in an ellipse with the word "Standard" above and "Company" below, was infringed by a mark used on similar products, and consisting of an ellipse containing the words "Superior," and "quality" in corresponding position with "Standard" and "Company," together with the initials "T. O. C. & L. Co." of its corporate name.

And it has been held that the intent with which any specific combination of letters is used is immaterial, provided their use tends, as a matter of fact, to deceive purchasers using ordinary care. See *B. Payn's Sons Tobacco Co. v. Payette* (1914) 86 Misc. 276, 149 N. Y. Supp. 183, affirmed in (1915) 171 App. Div. 960, 155 N. Y. Supp. 1095.

Where the question is one of trademark opposition, that is, opposition by the owner of one trademark to the registration of a similar trademark to be used on goods of the same descriptive properties, the test is whether the

marks are so similar as to be likely to cause confusion in trade. Applying this test, it was held in *Arrow Electric Co. v. Northeast Electric Co.* (1918) 48 App. D. C. 225, that a proposed trademark, consisting of a circle representing a globe on which was inscribed the initials "N." and "E.," with

an arrow extending between them pointing in a northeasterly direction, was so similar to a prior trademark, consisting of an arrow extending in a parallel direction through the letter "E.," as to cause confusion in trade and prevent registration of the former mark.
G. J. C.

FRANK P. SISK, Admr., etc., of Edward J. Sisk, Deceased, Appt.,
v.
MARIA RAPUANO et al.

Connecticut Supreme Court of Errors — January 29, 1920.

(94 Conn. 294, 108 Atl. 858.)

Mortgage — satisfaction — application of insurance.

1. The collection by the trustee in bankruptcy of a mortgagor who insured the property for the benefit of himself and of the mortgagee as his interest might appear, of the proceeds of the policy after the equity of redemption has been conveyed by the bankrupt to a stranger, and the payment as part of the same transaction of the amount of the mortgage claim to the mortgagee, effect a satisfaction of the mortgage in favor of such stranger, although the trustee in bankruptcy has it assigned to himself.

[See note on this question beginning on page 1295.]

Bankruptcy — dealing with trustee — notice.

2. One dealing with a trustee in bankruptcy is bound to take notice of the limitations upon his authority.

Subrogation — right of mortgagor satisfying debt after assigning property.

3. Neither a mortgagor who sells

the property subject to the mortgage, nor his trustee in bankruptcy, can be subrogated to the rights of the mortgagee upon satisfying the mortgage from the proceeds of insurance upon the property, if he warranted the property free from encumbrances and undertook that the mortgage debt should be paid out of the insurance.

[See note in 2 A.L.R. 243.]

APPEAL by plaintiff from a judgment of the Superior Court for New Haven County (Case, J.) in favor of defendants, in an action brought to foreclose a mortgage. *No error.*

Statement by Beach, J.:

One Grillo, owner of the premises in question, being about to build thereon, borrowed \$2,500 for that purpose from Hannah Bowler, to be advanced as building operations required, and executed the mortgage in suit. At the same time the building was insured against loss by fire under a policy making the loss payable to the mortgagee as her inter-

est might appear. In December, 1916, the unfinished building was destroyed by fire at a time when only \$1,000 had been advanced to Grillo by Miss Bowler. The remaining \$1,500 was credited on the note. Grillo sold the equity in the property to Ruby for \$300, and Ruby conveyed to the defendant Rapuano. In March, 1917, Grillo was adjudged a bankrupt, and one Podoloff appointed trustee. Meantime the fire

loss had been adjusted at \$2,200, and Grillo's claim against the insurance company constituted the only asset of his estate. At Podoloff's request Miss Bowler executed and left with her attorneys a release of the insurance company and a transfer of the mortgage to Podoloff, trustee, and in May the insurer paid the loss to Podoloff, who, as part of the same transaction, turned over to Miss Bowler's attorneys \$1,017.43, being the amount of the mortgage debt, with interest, and received from them the above-mentioned release and transfer. Podoloff assigned the mortgage to the plaintiff Sisk. Sisk died after this action was commenced, and his administrator has entered to prosecute. Other facts are stated in the opinion.

Mr. Walter J. Walsh, for appellant:

The intention of the parties is to be regarded and carried into effect.

Bulkley v. Chapman, 9 Conn. 9; *New Haven Sav. Bank & Bldg. Asso. v. McPartlan*, 40 Conn. 96; *Boardman v. Larrabee*, 51 Conn. 44; 2 *Jones, Mortg.* 7th ed. ¶ 910; 27 *Cyc.* 1294; *Goodbody v. Goodbody*, 95 Ill. 456.

The court had no warrant to apply the money in payment of the mortgage when the parties concerned did not so apply it. The court made a contract for the parties which they did not want made themselves.

Treadwell v. Moore, 34 Me. 112; *Feldman v. Gamble*, 26 N. J. Eq. 497; *Dickey v. Permanent Land Co.* 63 Md. 177.

The judgment is erroneous because it ignores an absolute right of the trustee in bankruptcy in the insurance funds.

Gordon v. Ware Sav. Bank, 115 Mass. 591; *Fergus v. Wilmarth*, 117 Ill. 543, 7 N. E. 508; *Williams v. Lilley*, 67 Conn. 60, 37 L.R.A. 150, 34 Atl. 765; *Economy Bldg. Asso. v. Hungerbuehler*, 93 Pa. 258.

Mr. William J. McKenna for appellees.

Beach, J., delivered the opinion of the court:

The underlying question is whether the transaction described in the finding of facts amounts to a purchase of the mortgage by the trustee in bankruptcy, or whether, as the

trial court held, to a payment of the mortgage.

It is said that on the facts found the judgment is erroneous, because it violates the rule that the intention of the parties should prevail; that in this case the manifest intention of the parties was that the note and mortgage should be kept alive and not extinguished, and that the court has no right to apply the payment in satisfaction of the mortgage, when the parties had already made a different application of it. These propositions assume that the trustee and the mortgagee were free to deal with this insurance money as they saw fit, and might make such application of it as they chose; whereas the defendants claimed, and the court so rules, that, by the terms of the policy, the insurance money, or so much of it as was necessary for that purpose, had already been applied, or agreed to be applied in case of loss, to the payment of the mortgage, and that if the mortgagee elected to accept it, she could not make any other application of the fund without the consent of the mortgagor.

The subject of insurance for the benefit of the mortgagee is exhaustively treated in *Jones, Mortg.* §§ 400-417, and, some of the principal phases of it are discussed by Chief Justice Shaw in *King v. State Mut. F. Ins. Co.* 7 Cush. 1, 54 Am. Dec. 683. If a mortgagee insures his own interest at his own expense, the payment of a loss accruing before the mortgage debt is paid is not a payment on the mortgage, and authorities differ as to whether, in such a case, the insurance company, on paying the loss, is subrogated to the rights of the mortgagee. Mr. Justice Story, in *Carpenter v. Providence Washington Ins. Co.* 16 Pet. 495, 10 L. ed. 1044, holds that the insurer is subrogated. *King v. State Mut. F. Ins. Co.* supra, holds the other way. Conversely, the mortgagor may insure his separate interest without any reference to that of the mortgagee, and in case of loss is entitled to receive the insurance

and to deal with it as he pleases. *Carpenter v. Providence Washington Ins. Co.* supra; 27 Cyc. 1263; *Jones, Mortg.* § 397.

But when the insurance is effected by or at the expense of the mortgagor, and the policy is made payable to the mortgagee as his interest may appear, it is evidently for the benefit of both mortgagor and mortgagee. The contract of indemnity is primarily with the mortgagor, but the mortgagee is a third party beneficiary. In this state it is held that the insertion of the so-called open mortgage clause will not of itself entitle the mortgagee to sue on the policy. *Meriden Sav. Bank v. Home Mut. F. Ins. Co.* 50 Conn. 396; *Collinsville Sav. Soc. v. Boston Ins. Co.* 77 Conn. 676, 69 L.R.A. 924, 60 Atl. 647. Also, that before a loss occurs the mortgagee is only a conditional appointee of the property owner, and as such appointee entitled to receive so much of any sum that may become due under the policy as does not exceed his interest as mortgagee. *Collinsville Sav. Soc. v. Boston Ins. Co.* supra. In this case a loss had already occurred and become payable while the mortgage debt was still outstanding, and thereupon the appointment and the right of the mortgagee to receive so much of the insurance money as would satisfy the amount of the outstanding debt became absolute.

It sometimes happens that the loss becomes payable before the mortgage debt is due, and then it is said that the mortgagee is entitled to receive the money and apply it to the extinguishment of the debt as fast as it becomes due. *Thorp v. Croto*, 79 Vt. 390, 10 L.R.A. (N.S.) 1166, 118 Am. St. Rep. 961, 65 Atl. 562, 9 Ann. Cas. 58, and cases cited. A difference of opinion arose in that case on the question whether the mortgagee might apply the insurance money to the payment of interest, and the prevailing opinion holds that he was bound to retain it and apply it on successive instalments of the principal as they became due.

In this case, however, the mort-

gage debt was due when the insurance was paid on May 21, 1917, and no question can arise as to the proper application of the fund by the mortgagee. It will therefore be apparent that, if Miss Bowler had received her agreed share of the insurance money directly from the insurance company after the debt was due, she would be bound to apply it in extinguishment of the mortgage. *Connecticut Mut. L. Ins. Co. v. Scammon*, 117 U. S. 634, 29 L. ed. 1007, 6 Sup. Ct. Rep. 889; 27 Cyc. 1264. This follows from the fact that, notwithstanding the open mortgage clause, the contract for indemnity remains one exclusively between the insurance company and the mortgagor. *Collinsville Sav. Soc. v. Boston Ins. Co.* 77 Conn. 679, 69 L.R.A. 924, 60 Atl. 647, supra. In this case the contract of the insurance company to pay the mortgagee was for the benefit of Grillo, and for the purpose of extinguishing his liability on the note and of releasing his land from the encumbrance of the mortgage. After the loss, and before it had been adjusted, Grillo conveyed the land to Ruby by warranty deed free from all encumbrances, and undertook to apply the insurance money to the payment of the mortgage debt. He thus remained liable on the note and on the warranty, and had the same interest as before in requiring the insurance company to carry out its agreement so as to extinguish the debt and release the land. The appointment of the trustee in bankruptcy did not release the insurance company from its agreement with Grillo, and if the transaction recited in the finding amounted in substance and effect to a performance of the open-mortgage clause by the company, and the acceptance of the fund by the mortgagee, the mortgage debt was extinguished in the manner contracted for by the policy.

In order to accept the alternative claim of the plaintiff that the transaction was a purchase of the note and mortgage by the trustee with

funds belonging to the estate, it is necessary to reach the conclusion that Miss Bowler has abandoned her rights as appointee under the policy, in favor of the bankrupt estate, and permitted her share of the fund to become part of the general assets of the bankrupt estate. The finding is perfectly clear that she did not do so. It is found that the check to Hannah Bowler for the balance of the mortgage was executed by the trustee as part of the payment on the loss by the insurance company to the trustee; also that Miss Bowler did not release the insurance company until the trustee had turned the check for her share of the insurance money over to her attorneys, when they in turn surrendered to the trustee a release to the insurance company. In other words, the payment of the loss by the insurance company was contemporaneously accompanied by a division of the fund into two parts, one of which went to the mortgagee and the other to the trustee; and, since the part which went to the mortgagee simply passed through the trustee's hands because he had succeeded to Grillo's rights under the policy, it never became available for the general purposes of the bankrupt estate, and the court was fully justified in treating the alleged purchase of the note and mortgage as a futile attempt to keep the mortgage alive as against the mortgagor, and as against the land in the hands of the mortgagor's grantee.

In addition to this, the plaintiff's claim required the trial court to believe that the trustee in bankruptcy had used the funds of the estate to buy this mortgage, paying principal and interest in full, and had afterwards sold it to Sisk for \$100 in cash and a release of Sisk's claim of about \$1,900 against the estate. Such a transaction would have been quite outside of the powers and duties of trustees in bankruptcy as defined by § 47 of the Bankruptcy Act (Comp. Stat. § 9631). No claim appears to have been made by the plaintiff that such a purchase and

sale of the mortgage were specifically authorized by the referee or the court; and it is difficult to see why any responsible authority should permit a trustee in bankruptcy to buy an overdue demand note of the bankrupt, secured by a mortgage on real estate, the indorsement on the note being "without recourse and without warranty, express or implied," and the surrounding circumstances making it at least probable that the trustee was buying a lawsuit.

The only reasonable explanation of the affair is that which the court adopted, namely, that the trustee, who might either elect to carry out or not the contracts of the bankrupt, according to whether they seemed profitable or otherwise, elected to carry out the contract expressed by the policy, in order to obtain the balance of the insurance money for the estate. Having adopted and elected to carry out the contract expressed in the policy, he was bound to take it as he found it, including the open-mortgage clause. *Re De Long Furniture Co.* (D. C.) 188 Fed. 686, 26 Am. Bankr. Rep. 469.

The plaintiff relies on *Gordon v. Ware Sav. Bank*, 115 Mass. 591, in which it is said that "money received from the insurance took the place of the property destroyed, and was still collateral until applied . . . by mutual consent, or by some exercise by the mortgagee of the right to demand payment of the debt, and upon default of payment to convert the securities."

This is a correct statement of the equities arising from the facts of that case. There the money came into the mortgagee's hands before the debt was due, and it was held that it could not be applied in immediate extinguishment of a debt not yet due, without the consent of the mortgagor. But when, as in this case, the debt is due, the mortgagee has a present right to demand payment, and in default of payment to have possession of the collateral. The bankruptcy of Grillo was a

default, and the insurance money, or so much of it as was necessary to satisfy the mortgage, stood in the place of the original security, and was collateral. That being so, it is hard to see how the fund could be otherwise applied by the mortgagee than in extinguishment of the debt.

**Mortgage—
satisfaction—
application of
insurance.**

It is also claimed that Sisk was a holder in due course of the mortgage note, and as such not affected by any equitable defenses. But this action is not on the note; it is a suit in equity against one who is not a party to the note, and has never agreed to pay it, for a foreclosure of the mortgage. Besides, the maker of the note was bankrupt. The note itself was overdue when Sisk took it in November, 1917; the indorsements of the payee and trustee were not only without recourse, but without warranty, express or implied, and Sisk, in dealing with the trustee, was bound to take notice of the limits of his authority. The record of

**Bankruptcy—
dealing with
trustee—notice.**

a mortgage is not notice that it remains unpaid, and the surrounding circumstances were such as to put Sisk on inquiry.

A word may be said as to a possible claim which the plaintiff has not made. If a mortgagor sells the security subject to the mortgage debt, and is afterwards compelled to pay it, he may be subrogated to the rights of the mortgagee. Hart v.

Chase, 46 Conn. 207. In this case, however, Grillo warranted the land free from all encumbrances, and undertook that the mortgage debt should be paid out of the insurance; and it is apparent that Grillo, at least, was not equitably

**Subrogation—
right of mort-
gagor satisfying
debt after
assigning
property.**

entitled to subrogation. This equitable principle has no application when, as in this case, a part only of the original security is sold, and another part, which the mortgagor has agreed may be primarily applied to the satisfaction of the debt, is retained by the mortgagor for that purpose. Although the mortgagor's agreement with the insurer and with Ruby, that the insurance should be applied in the first instance to pay off the mortgage, might not of itself prevent the mortgagee from exercising her right to resort to the land, it is effective in equity to prevent the mortgagor, or his trustee in bankruptcy who elected to take the benefit of the policy, from afterwards purchasing the mortgage with the very fund out of which Grillo had agreed to pay it.

The assignments of error based on the refusal of the court to find as requested in paragraphs 26 and 27 of the plaintiff's draft finding are overruled. For the purposes of this opinion, substantially all of the other findings asked for have been assumed to be true.

There is no error.

ANNOTATION.

Application of insurance moneys received by mortgagee.

- I. Introductory, 1295.
- II. Insurance obtained by mortgagor, or for his benefit, 1296.
- III. Insurance obtained by mortgagor, or for his benefit, but forfeited by him, 1298.

I. Introductory.

The present note does not consider the right of the mortgagee to the proceeds of insurance on the mortgaged property, but, assuming that the mort-

- IV. Insurance obtained by the mortgagee for his own benefit, 1299.
- V. Insurance money paid to mortgagee before debt is due, 1301.
- VI. Effect of agreement of parties as to application, 1303.

gagee has rightfully obtained the proceeds of such insurance, whether the amount so received is to be applied as a payment on the mortgage debt.

The right of the insurance company to be subrogated to, or have an assignment of, the mortgagee's rights upon payment of the insurance, is not considered as an independent question. The right to the proceeds of insurance where the loss occurs after a mortgage foreclosure sale, but during redemption period, is the subject of the annotation following *Stockton Nat. Bank v. Home Ins. Co.* post, 1308.

II. Insurance obtained by mortgagor, or for his benefit.

Where the mortgagor obtains insurance on the mortgaged property under a policy containing the usual clause making any loss due him payable to the mortgagee as his interest may appear, the proceeds of such insurance, when received by the mortgagee, amount to a payment on the mortgage debt, extinguishing it pro tanto.

Alabama.—*Kirkland v. Arnold* (1912) 178 Ala. 227, 59 So. 162.

Arkansas.—*Bonham v. Johnson* (1911) 98 Ark. 459, 136 S. W. 191. See also *Kissire v. Plunkett-Jarrell Grocer Co.* (1912) 103 Ark. 473, 145 S. W. 567.

Connecticut.—*SISK v. RAPUANO* (reported herewith) ante, 1291.

Kansas.—*Home Ins. Co. v. Marshall* (1892) 48 Kan. 235, 29 Pac. 161.

Kentucky.—*Gardner v. Continental Ins. Co.* (1903) 25 Ky. L. Rep. 426, 75 S. W. 283.

Louisiana.—*Burbank v. Buhler* (1902) 108 La. 39, 32 So. 201.

Massachusetts.—*Graves v. Hampden F. Ins. Co.* (1865) 10 Allen, 281 (obiter).

New Hampshire.—*Smith v. Packard* (1849) 19 N. H. 575.

New Jersey.—*Pearman v. Gould* (1886) 42 N. J. Eq. 4, 5 Atl. 811.

Canada.—*Austin v. Story* (1863) 10 Grant, Ch. (U. C.) 306.

Some of these cases emphasize the fact that there was a stipulation in the mortgage that the property should be insured for the mortgagee's benefit. *Bonham v. Johnson* (Ark.) and *Home Ins. Co. v. Marshall* (Kan.) supra.

These principles are recognized in *Haley v. Manufacturers' F. & M. Ins. Co.* (1876) 120 Mass. 292, in case of a mortgage of personal property.

There seems to have been an express agreement that the mortgagee should collect the insurance and apply the proceeds upon notes secured by the mortgage, in *Wilcox v. Allen* (1877) 36 Mich. 160.

Where an insurance company which paid a loss to a first mortgagee took an assignment of the mortgage, a second mortgagee was held not entitled to have the insurance moneys applied to the extinguishment of the mortgage upon a bill filed by the insurance company for a foreclosure in *Westmaccott v. Hanley* (1875) 22 Grant, Ch. (U. C.) 382. The case is very meagerly stated; and the ground of the decision is not clear.

The court in *Bonham v. Johnson* (Ark.) supra, after referring to a stipulation in the mortgage that the property should be insured for the mortgagee's benefit, and the amount named in the policy should be payable to the mortgagee as his interest should appear, says: "His interest in the property was only to the extent of his lien to secure the payment of those notes. That was an appropriation in advance, by the parties, of the insurance money to the satisfaction of the two notes secured by the mortgage. When the money was paid over neither of the parties had the right, without the consent of the other, to disregard the application of payment, thus made in advance."

So, where the mortgagee obtains insurance under an agreement with the mortgagor, or for the benefit of the mortgagor as well as himself, the proceeds, in case of loss, must be applied on the indebtedness. *Concord Union Mut. F. Ins. Co. v. Woodbury* (1858) 45 Me. 447; *Stinchfield v. Milliken* (1880) 71 Me. 567; *Dick v. Franklin F. Ins. Co.* (1881) 10 Mo. App. 376, affirmed in (1883) 81 Mo. 103; *McDowell v. Morath* (1896) 64 Mo. App. 290; *Rutherford v. Sample* (1914) 186 Mo. App. 469, 171 S. W. 578; *Leyden v. Lawrence* (1911) 79 N. J. Eq. 113, 81 Atl. 121, affirmed in (1912) 80 N. J. Eq. 550, 85 Atl. 1134; *Kernochan v. New York Bowery F. Ins. Co.* (1858) 17 N. Y. 428; *Waring v. Loder* (1873) 53 N. Y. 581; *Stuyvesant Ins. Co. v.*

Reid (1916) 171 N. C. 513, 88 S. E. 779; Imperial F. Ins. Co. v. Bull (1889) 18 Can. S. C. 697, affirming (1887) 14 Ont. Rep. 322.

In *Thress v. Zempel* (1918) 40 N. D. 510, 169 N. W. 79, a mortgagee in possession of premises who insured the same, charging the premium to the rents and profits, and who upon a loss received a draft for the insurance money, payable to himself and the owner, of which he kept the larger share, was held liable to the owner in an action for money had and received.

The proceeds of insurance received by a mortgagee, who at the time he took out the insurance was owner of the property, which he subsequently sold, taking back a mortgage to secure the unpaid part of the purchase price, the policy being continued in force, was held to inure to the benefit of the mortgagor, in *Callahan v. Linthicum* (1875) 43 Md. 97, 20 Am. Rep. 106. There was nothing on the face of the policy to indicate that it was continued as an insurance only upon the interest of the mortgagee, and intended merely to cover the mortgage debt. On the other hand, it was entirely consistent with its terms to construe the policy as intended to cover, to the extent of the sum therein named, the whole property, as well the interest of the mortgagor as of the mortgagee. It is held that if such was the intention and contract of the parties the interest of the mortgagor would be protected, although his name did not appear in the policy. The action in this case was by the mortgagor against the mortgagee to recover the amount of the insurance, the mortgage debt having been paid in full.

The mere fact that the mortgagor has paid or is liable for the insurance premium has been held sufficient to require the proceeds of an insurance policy taken out by the mortgagee to be applied as a payment on the mortgage, where there was no stipulation in the policy for subrogation in favor of the insurance company of the rights of the mortgagee upon payment of the policy. *Pendleton v. Elliott* (1887) 67 Mich. 496, 35 N. W. 97. The court says: "If, however, the policy con-

tains no stipulation for subrogation in case of payment to the mortgagee, and there is any arrangement between the mortgagor and mortgagee, either verbal or written, by which the mortgagor becomes liable to pay for the insurance, he is entitled to the benefit thereof, and to have it applied in liquidation of the mortgage debt, pro tanto, and his right in this respect does not depend upon the fact that he has paid for the insurance, nor whether the mortgagee procured the insurance intending to look to the mortgagor for reimbursement of the premium; but it depends upon whether he is liable to the mortgagee therefor under any agreement, express or implied. And in such case, if the insurer receives the premium knowing it is paid by the mortgagor, or for him, he will not, in the absence of a stipulation therefor in the policy, be entitled to be substituted to the rights of the mortgagee against the mortgagor." That the mortgagor was entitled to the insurance as a credit upon the mortgage debt was further supported in this case, by the evidence, which indicated an agreement to this effect.

That payment to the mortgagee amounts to a payment on the mortgage has been held, even though there is a provision in the policy for subrogation in favor of the insurance company, where the insurance, taken out by the mortgagee, was issued in the name of the mortgagor, and paid for by him, and the subrogation clause was inserted without his knowledge. *Imperial F. Ins. Co. v. Bull* (1889) 18 Can. S. C. 697.

But in other cases, where there is such a stipulation for subrogation in favor of the insurance company, and it is provided in the policy that the interest of the mortgagee, "as mortgagee," is insured, and the proceeds are paid to the mortgagee it is held not to amount to a payment on the mortgage, notwithstanding the premiums are charged to the mortgagor under a provision in the mortgage. *Foster v. Van Reed* (1877) 70 N. Y. 19, 26 Am. Rep. 544. That a provision for subrogation prevents insurance being on the mortgagor's account is held

in *Stinchfield v. Milliken* (1880) 71 Me. 567, although seemingly the premium was paid by the mortgagor. The court in *Foster v. Van Reed* (N. Y.) *supra*, says that the provision in the mortgage authorizing the mortgagee to insure did not prevent her from insuring directly her own interest as mortgagee; "as she had authority to make such insurance, it would seem to follow that she had a right to make such terms with the insurer as might be agreed upon. It was optional, and not compulsory, and entirely competent for the mortgagee to procure a policy with or without a subrogation clause. The parties had a right to determine that when the insurers paid any loss to the assured, that the insurers should be entitled to an assignment of the mortgage, and such a provision is not in conflict with the insurance clause in the mortgage. Even although Mrs. Plank [the mortgagee] made declarations after the contract was entered into, showing that the insurance was made under the clause in the mortgage, these statements cannot prevail against the contract in the policy which provides that her interest as mortgagee was insured, and whatever arrangement preceded the policy could not affect or impair the rights of the company, who acted without knowledge of such an arrangement when the policy was issued. It is difficult to see how the insurer can be deprived of the right to subrogation, when it is made a part of the contract that it shall enjoy such right. And whether the company knew of the agreement in the mortgage at the time of issuing the policy, or assented to it, or otherwise, makes no difference, for in either case the contract between Mrs. Plank and the company is unaffected by it."

III. Insurance obtained by mortgagor, or for his benefit, but forfeited by him.

Where the mortgagor's rights have been forfeited, but, by a provision in the policy, the policy is continued as to the mortgagee, and it is further provided that in case of payment to the mortgagee when no liability existed to the mortgagor, the insurance company

should be subrogated to the rights of the mortgagee against the mortgagor, money paid to the mortgagee upon a loss does not amount to a payment upon the mortgage.

Indiana.—*Insurance Co. of N. A. v. Martin* (1898) 151 Ind. 209, 51 N. E. 361.

Massachusetts.—*Allen v. Watertown F. Ins. Co.* (1882) 132 Mass. 480.

Minnesota.—*Sterling F. Ins. Co. v. Beffrey* (1892) 48 Minn. 9, 50 N. W. 922.

New Hampshire.—*Badger v. Platts* (1894) 68 N. H. 222, 73 Am. St. Rep. 572, 44 Atl. 296.

New York.—*Springfield F. & M. Ins. Co. v. Allen* (1871) 43 N. Y. 389, 3 Am. Rep. 711; *Ulster County Sav. Inst. v. Leake* (1878) 73 N. Y. 161, 29 Am. Rep. 115; *Rapallo, J., in Hastings v. Westchester F. Ins. Co.* (1878) 73 N. Y. 141.

West Virginia.—*Gillespie v. Scottish Union & Nat. Ins. Co.* (1906) 61 W. Va. 169, 11 L.R.A. (N.S.) 143, 56 S. E. 213.

Canada.—*Guerin v. Manchester F. Assur. Co.* (1898) 29 Can. S. C. 139; *Bull v. North British Canadian Invest. Co.* (1887) 14 Ont. Rep. 322.

Although *Gillespie v. Scottish Union & Nat. Ins. Co.* (W. Va.) *supra*, is treated as one in which the interest of the mortgagor had been forfeited, it appears that the mortgagee had itself reinsured the buildings, upon the expiration of the first policy and the failure of the mortgagor to reinsure.

On the contrary, it has been held, where there is no clause providing for subrogation, that the mortgagee is bound to apply the proceeds of an insurance policy to the extinguishment of the mortgage debt, even though the mortgagor's interest has been forfeited by sale and conveyance of the property. *Graves v. Hampden F. Ins. Co.* (1865) 10 Allen (Mass.) 281. The court, after referring to the facts that by a stipulation in the mortgage the mortgagor agreed to keep the buildings on the mortgaged premises insured against fire for the benefit of the mortgagee, and under this agreement an insurance policy had been issued and continued to the time of loss, continues: "This policy thus

made legally secure to the mortgagee the payment of the sum of \$2,500 by the Hampden Fire Insurance Company as a vested right. There was, upon the happening of this loss, a change in the relation which the mortgagee sustained to the policy. What was before contingent became an absolute right to receive \$2,500 from a source which the mortgagor and the owner of the equity had provided, as a means, in a certain event, of paying that amount upon the mortgage. Having this available fund thus provided by the mortgagor and those succeeding to his rights, and the contingency having happened upon which he was to receive it, we think it must be held to be his duty to receive it and apply it to the payment of the debt secured by the mortgage."

The court in *Allen v. Watertown F. Ins. Co.* (Mass.) *supra*, says that the policy in that case seems to have been drawn to meet the decision in *Graves v. Hampden F. Ins. Co.* (1865) 10 Allen (Mass.) 281, *infra*, by inserting in the policy the provision that the insurance as to the interest of the mortgagee should not be invalidated by the act of the mortgagor, and that, when a loss after a forfeiture is paid to the mortgagee, the company should be subrogated to his rights under the mortgage to the extent of such payment. This, according to the court, was a contract which the parties were competent to make; under it the insurance was exclusively for the benefit of the mortgagee, after a forfeiture of the insurance by the mortgagor, so that the mortgagor and those claiming under him had no further beneficial interest in the policy, and payment to the mortgagee did not discharge the mortgage, but upon such payment the insurance company was subrogated to the rights of the mortgagee.

IV. Insurance obtained by the mortgagee for his own benefit.

Where the mortgagee effects insurance upon the mortgaged property at his own expense and for his own benefit, money received by him on the policy is not a payment on the mortgage.

United States.—*Carpenter v. Providence Washington Ins. Co.* (1842) 16 Pet. 495, 10 L. ed. 1044.

Illinois.—*Honore v. Lamar F. Ins. Co.* (1869) 51 Ill. 409; *Ely v. Ely* (1875) 80 Ill. 532 (obiter).

Maine.—*Concord Union Mut. F. Ins. Co. v. Woodbury* (1858) 45 Me. 447; *McIntire v. Plaisted* (1878) 68 Me. 363; *Stinchfield v. Milliken* (1880) 71 Me. 567; *Gould v. Maine Farmers Mut. F. Ins. Co.* (1916) 114 Me. 416, L.R.A. 1917A, 604, 96 Atl. 732 (obiter).

Maryland.—*Callahan v. Linthicum* (1875) 43 Md. 97, 20 Am. Rep. 106.

Massachusetts.—*White v. Brown* (1848) 2 Cush. 412; *King v. State Mut. F. Ins. Co.* (1851) 7 Cush. 1, 54 Am. Dec. 683; *Suffolk F. Ins. Co. v. Boyden* (1864) 9 Allen, 123; *Graves v. Hampden F. Ins. Co.* (1865) 10 Allen, 281.

Missouri.—*Dick v. Franklin F. Ins. Co.* (1881) 10 Mo. App. 376, affirmed in (1883) 81 Mo. 103; *McDowell v. Morath* (1896) 64 Mo. App. 290; *Rutherford v. Sample* (1914) 186 Mo. App. 469, 171 S. W. 578.

New Jersey.—*Leyden v. Lawrence* (1911) 79 N. J. Eq. 113, 81 Atl. 121, affirmed in (1912) 80 N. J. Eq. 550, 85 Atl. 1134.

North Carolina.—*Stuyvesant Ins. Co. v. Reid* (1916) 171 N. C. 513, 88 S. E. 779.

West Virginia.—*Dunbrack v. Neall* (1904) 55 W. Va. 565, 47 S. E. 303.

Canada.—*Russell v. Robertson* (1859) 1 Ch. Chamb. Rep. 72.

Insurance effected by the mortgagee was held to be for his sole benefit, where the insurance policy contained a provision that the insurance company was to be subrogated to the rights of the mortgagee upon the payment of the loss, and expressly provided that the interest of the mortgagee, "as mortgagee," was insured, notwithstanding the mortgage contained a provision authorizing the mortgagee to obtain insurance in case of the failure of the mortgagor so to obtain it, and to charge the premiums paid against the mortgagor, and the attempt by the mortgagee to charge the premiums paid on the insurance to the mortgagor. *Foster v. Van Reed* (1877) 70 N. Y. 19, 26 Am. Rep. 544.

These principles are recognized in *Haley v. Manufacturers' F. & M. Ins. Co.* (1876) 120 Mass. 292, in case of a mortgage of personal property. The same rule was held applicable in *Clark v. Wilson* (1869) 103 Mass. 219, 4 Am. Rep. 532, in case of a policy of marine insurance.

A mortgagee, who obtains insurance on personal property which is deposited with him as collateral security for the payment of a note of the owner, is not required to apply the proceeds thereof as a payment upon the note. *Honore v. Lamar F. Ins. Co.* (Ill.) supra.

The proceeds of insurance received by the mortgagee, who had effected the insurance for his own benefit after he had taken possession of the mortgaged premises, cannot be taken into account in adjusting the account for repairs between the holders of the equity of redemption and the mortgagee. *White v. Brown* (Mass.) supra.

Where a debtor, at his creditor's request, executes a bill of sale of part of a vessel to a third person, as trustee, for the security of the debt, which is to be reconveyed when the debt is paid, and dies, and afterwards such third person takes possession of the vessel and procures insurance on the interest held by him as trustee, the trustee's collection of the insurance money after the loss of the vessel gives the personal representative of the debtor no claim upon him for any part of it, in the absence of an agreement or understanding that the insurance was to be paid for the debtor's benefit, or a custom on the part of the manager of a vessel to insure the interest of other parties therein. *Burlingame v. Goodspeed* (1891) 153 Mass. 24, 10 L.R.A. 495, 26 N. E. 232.

A mortgagee who had gone into possession of the mortgaged premises, and who received the proceeds of an insurance policy on the life of a surety for the mortgagor, the mortgagee having paid the premium, was held not obligated to credit the amount received on the policy, on the debt, in favor of the mortgagor, who

was attempting to redeem. *Bell v. Ahearn* (1849) 12 Ir. Eq. Rep. 576.

Likewise, where the purchaser of property at foreclosure sale, subject to the right of redemption, takes out insurance for his own benefit and at his own expense, the proceeds paid him upon a loss do not inure to the benefit of the holder of the equity of redemption. *Deming Invest. Co. v. Dickerman* (1901) 63 Kan. 728, 88 Am. St. Rep. 265, 66 Pac. 1029.

Proceeds of insurance received by the purchaser of an equity of redemption at an execution sale thereof, who has taken out the insurance for his own benefit, is not a payment on the amount which the debtor is owing so as to entitle him to redeem. *Cushing v. Thompson* (1852) 34 Me. 496.

While beyond the scope of this discussion, it is interesting to note that it has been held that a clause in the mortgage, giving to the mortgagee the option to take out insurance at the expense of the mortgagor, does not compel him to do so; that, notwithstanding such a clause, the mortgagee is at liberty to insure for the joint benefit of himself and his mortgagor, at the expense of the mortgagor, or to insure at his own expense, solely for his own benefit. *Leyden v. Lawrence* (1911) 79 N. J. Eq. 113, 81 Atl. 121, affirmed in (1912) 80 N. J. Eq. 550, 85 Atl. 1134. It was held in this case to be impossible to indulge the inference that the mortgagee did insure at the expense or for the benefit of the mortgagor, in view of the fact that the insurance effected by the mortgagee was, by its terms, solely for his "mortgagee interest." See also *Foster v. Van Reed* (1877) 70 N. Y. 19, 26 Am. Rep. 544, supra, II.

The theory of the courts is, in brief, that the mortgagor, having no connection with the insurance, is not entitled to the benefit thereof. In *Honore v. Lamar F. Ins. Co.* (1869) 51 Ill. 409, a deposit of personal property as collateral security for the payment of a note was treated as a mortgage, and the court, in holding that the pledgee was not entitled to the benefit of insurance taken out by the pledgee at his own expense, says:

"The mortgagor, having had no connection with the insurance, cannot claim its benefit. As the premium was not paid by him or chargeable to him, as he was not aware even that an insurance had been effected until after the fire, it is difficult to see how such insurance, even when paid, can affect his liability upon his note." The court in *Cushing v. Thompson* (Me.) *supra*, in holding that one who was seeking to redeem from an execution sale of his equity of redemption was not entitled to credit for the proceeds of an insurance policy which the purchaser of the equity of redemption on the execution sale had taken out for his own benefit, says: "The interest insured was that of the defendant [the purchaser] alone. It does not appear that the complainant paid any part of the premium, had any connection with the insurance, or knew of its existence, till the loss of the property. The defendant could not have compelled payment from the complainant, of the premium, or any part of it. It is well settled that a contract of insurance does not run with the estate as incident thereto, but is an agreement with the underwriters against a loss which the assured may sustain, and not the loss which another may be subjected to, having an interest as mortgagor, redemptioner, or otherwise." According to the court in *King v. State Mut. F. Ins. Co.* (1851) 7 Cush. (Mass.) 1, 54 Am. Dec. 683, "the contract of insurance with the mortgagee is not an insurance of the debt, or the payment of the debt; that would be an insurance of the solvency of the debtor; of course, as a contract of indemnity, it is not broken by the nonpayment of the debt, or saved by its payment. It is not, strictly speaking, an insurance of the property in the sense of liability for the loss of the property by fire to anyone who may be the owner. It is, rather, a personal contract with the person having a proprietary interest in it, that the property shall sustain no loss by fire within the time expressed in the policy. It is a personal contract which does not pass to an assignee of the property. . . .

A mortgagee has a proprietary interest, a title as owner, in the mortgaged property; not a deed absolute, but defeasible; still, it is a proprietary interest in that property, and the insurer guarantees to him that the subject in which he has such interest shall not be destroyed or diminished by the peril insured against. There is no privity of contract or of estate, in fact or in law, between the insurer and the mortgagor; but each has a separate and independent contract with the mortgagee. On what ground, then, can the money thus paid by the insurer to the mortgagee be claimed by the mortgagor? . . . On a view of the whole question, the court is of opinion that a mortgagee who gets insurance for himself, when the insurance is general upon the property, without limiting it in terms to his interest as mortgagee, but when, in point of fact, his only insurable interest is that of a mortgagee, in case of a loss by fire, before the payment of the debt and discharge of the mortgage, has a right to recover the amount of the loss for his own use."

V. Insurance money paid to mortgagee before debt is due.

It is the general theory of some courts that insurance money, when received by the mortgagee, stands in place of the destroyed property; that, if part only of the mortgage debt be due, the moneys need not be applied to the part due, but may be held as security for the whole. *Edmonds v. Hamilton Provident & Loan Soc.* (1891) 18 Ont. App. Rep. 347. According to *MacLennan, J. A.*, "the insurance policy and the insurance money, when received, are a security in the same sense and to the same extent, exactly, as the land, and are redeemable on the same terms, and not otherwise, and . . . the mortgagee may receive it and keep it, just as he holds the land, until the last instalment of the mortgage debt becomes due. Every dollar of the insurance money is a security for every dollar of the debt, just as the whole mortgage debt is a charge upon

every foot of the land. The mortgagee is not obliged to apply it to arrears, either of principal or interest, unless he pleases, any more than he is obliged, having a power of sale, to sell portions of the land from time to time for that purpose. He may keep the insurance money by him, and sue for arrears or distrain for them, if he has that power, or he may at his option apply the whole or part of the insurance money to the arrears. It is part of his security, and whenever there is default he may resort to it, or he may resort to his personal or other remedy. Of course, as soon as the debt is reduced to an equality with the insurance money in his hands, he must apply the latter, pro tanto, from time to time, to subsequently maturing payments." The decision in *Corham v. Kingston* (1889) 17 Ont. Rep. 432, to the effect that the mortgagee must apply the insurance moneys to a payment of the first instalment due on the mortgage, is disapproved by *MacLennan, J. A.*, 18 Ont. App. Rep. 347. To the extent that it was held in the *Corham* Case that the mortgagee need not apply insurance money to the payment of principal or interest not yet due, that case is approved by *MacLennan*. But in *Larrabee v. Lumbert* (1850) 32 Me. 97, it was held that the proceeds of insurance policies should be applied to the payment of the interest due on all the notes secured by the mortgage, and the balance appropriated to the payment, pro tanto, of the principal of the unpaid note first payable.

The mortgagee cannot apply money received by him to the payment of an unmatured debt, without the consent of the mortgagor. *Gordon v. Ware Sav. Bank* (1874) 115 Mass. 588.

It was held in *Thorp v. Croto* (1907) 79 Vt. 390, 10 L.R.A.(N.S.) 1166, 118 Am. St. Rep. 961, 65 Atl. 562, 9 Ann. Cas. 58, that a mortgagee for whose benefit insurance is taken out on buildings upon the mortgaged property, by the mortgagor, must, upon collecting the loss under the policy, hold the fund and apply it upon the indebtedness as it falls due, unless the mortgagor consents to a different

application. The fact that one of the notes secured by the mortgage was not due when the insurance money was actually paid did not change the rule as to the application of the payment, for, without the consent of both parties, that would not authorize either to apply the payment to any debt other than that to which it had been appropriated in advance by the terms of the agreement. *Bornham v. Johnson* (1911) 98 Ark. 459, 136 S.W. 191. Although the question was not raised in *Kortlander v. Elston* (1892) 2 C. C. A. 657, 6 U. S. App. 283, 52 Fed. 180, it is said in that case to be the right of the mortgagee to hold the insurance money paid him, as security, until the instalments of the mortgage debt become due, and then, if they are unpaid, to use the insurance money to pay them, and that the mortgagee could not apply it to subsequent instalments except by agreement.

Under a contract to purchase real estate and pay the purchase price in instalments, which provides that the purchaser shall keep the property insured for the benefit of the vendor, the purchaser cannot, in case of injury to the property by fire, insist that the insurance money shall be applied in reduction of the indebtedness not yet due, when its amount, added to the value of the lot, does not equal the unpaid purchase money; but the vendor may apply it in restoring the property for the protection of its security. *Naquin v. Texas Sav. & Real Estate Invest. Asso.* (1902) 95 Tex. 313, 58 L.R.A. 711, 93 Am. St. Rep. 855, 67 S.W. 85.

Where a mortgagee, upon default in the payment of some instalments of interest, elected to declare the entire mortgage due as authorized in the mortgage, and obtained a decree and a day fixed for payment, and afterwards, and before that day arrived, houses on the premises were burned down and the mortgagee collected and applied to the mortgage account, insurance money, which was more than sufficient to pay all arrears of interest and costs, the foreclosure proceeding was stayed until the com-

ing due of the principal sum. *Gemmell v. Burn* (1878) 7 Ont. Pr. Rep. 381.

VI. Effect of agreement of parties as to application.

The mortgagor and mortgagee may, so far as their interests are concerned, by agreement, apply such money to other uses. *Kirkland v. Arnold* (1912) 178 Ala. 227, 59 So. 162.

Where the note secured by a mortgage is not yet due, and the insurance money is paid to a trustee for the holders of the note, and the mortgagor is unwilling to have the money credited upon the indebtedness, and by agreement of the parties the mortgagor is to erect a new building and receive the money when the building reaches a certain stage, and in the meantime the trustee deposits the money in a bank at the suggestion of the mortgagor, and before the building has reached the stage agreed upon, the bank fails, the mortgagor is not entitled to a credit upon his indebtedness of the full amount of the insurance money paid to the trustee. *Fergus v. Wilmarth* (1886) 117 Ill. 542, 7 N. E. 508.

A creditor of the mortgagor, who has no lien upon the mortgaged property, cannot object to the application of the insurance money to debts of the insured other than the mortgage debt. *American Brewing Co. v. Artigues* (1920) — La. —, 84 So. 571.

A mortgagee may give up any claim to insurance money and allow the mortgagor to receive the fund as his own, without the consent of other creditors of the mortgagor. *Jarrett v. Walsh* (1904) 20 Montg. Co. L. Rep. (Pa.) 147.

An agreement between the mortgagor and mortgagee that a portion of the insurance money shall be used in paying debts owed by the mortgagor to other parties is valid, so that the mortgagee cannot be charged with money so paid as against judgment creditors of the mortgagor, who had a lien upon the real estate inferior to the mortgage, of which the mortgagee had no knowledge at the time

of the agreement. *Sherman v. Foster* (1899) 158 N. Y. 587, 53 N. E. 504.

It has been held that the second mortgagee cannot complain of the application of the insurance money to the restoration of the destroyed buildings, and insist upon the amount of the insurance money as an indorsement upon the note. *Gordon v. Ware Sav. Bank* (1874) 115 Mass. 588.

An assignee of a mortgage to secure an indebtedness of the mortgagor, who had full knowledge of the dealings between the mortgagee and the mortgagor as to insurance, was held bound by the agreement in *Wilcox v. Allen* (1877) 36 Mich. 160.

Where life tenants and remaindermen join in a mortgage under the terms of which insurance is to be taken out on the buildings in favor of the mortgagee, and a loss results, and the proceeds are paid to the mortgagee, the life tenants and the mortgagee cannot agree to divert the money so received to the restoration of the destroyed buildings, without the consent of the remaindermen. *Connecticut Mut. L. Ins. Co. v. Scammon* (1886) 117 U. S. 634, 29 L. ed. 1007, 6 Sup. Ct. Rep. 889.

In *Bryant v. Charter Oak L. Ins. Co.* (1885) 24 Fed. 771, where the owner of property mortgaged the same and agreed to keep the premises insured, and subsequently conveyed a remainder estate to his children, the agreement between the mortgagor and the mortgagee that, upon a loss and the payment of the proceeds to the mortgagee, the mortgagor should erect new buildings on the premises with the insurance proceeds, was sustained as against the remainderman.

The proceeds of an insurance policy which was taken out by three members of a partnership, upon buildings mortgaged by them, cannot be diverted by the mortgagee, upon the occurrence of a loss subsequent to a dissolution of the partnership and the assumption of the partnership debt by two of the members, and the proceeds applied to other debts of the two members, without the assent of the retiring partner. *Burbank v. Buhler* (1902) 108 La. 39, 32 So. 201.

It has been held that the mortgagor cannot direct the application of proceeds of an insurance policy, but that the sum so received must be regarded as profits, to be accounted for by the mortgagee. *Larrabee v. Lumbert* (1850) 32 Me. 97. The court directed

the application of insurance money to the payment of the interest due on all the notes described in the mortgage, except one which had been collected, and the balance to the payment, pro tanto, of the principal of the unpaid notes first payable. W. A. E.

STOCKTON NATIONAL BANK, Appt.,
v.
HOME INSURANCE COMPANY OF NEW YORK.

Kansas Supreme Court—May 8, 1920.

(106 Kan. 789, 189 Pac. 913.)

Insurance — mortgaged property — right of purchaser at foreclosure.

1. Where property is insured by the mortgagor for his own benefit with a loss-payable clause in favor of the mortgagee, and the mortgagor defaults and the property is sold under foreclosure proceedings, and during the redemption period the property is destroyed by fire, it is held that the purchaser of the property at the foreclosure sale cannot maintain an action against the insurance company to recover the insurance, and that he has no claim to the proceeds of such insurance on the theory of assignment, or subrogation, or otherwise.

[See note on this question beginning on page 1308.]

— insurable interest of purchaser at foreclosure.

2. A purchaser at a sale under a mortgage foreclosure has, during the

redemption period, an insurable interest in the property.

[See 14 R. C. L. 912.]

Headnote 1 by DAWSON, J.

(Dawson, J., dissents.)

APPEAL by plaintiff from a judgment of the District Court for Rooks County (Sparks, J.) in favor of defendant in an action brought to recover the amount alleged to be due on a fire insurance policy. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. W. B. Ham, for appellant:

A foreclosure of a mortgage and sale to the mortgagee of insured realty is not such sale or assignment as voids the insurance because of a clause in the policy making it void if assigned without consent of the insurer.

Ft. Scott Bldg. & L. Asso. v. Palatine Ins. Co. 74 Kan. 272, 86 Pac. 142; *Dodge v. Hamburg-Bremen F. Ins. Co.* 4 Kan. App. 415, 46 Pac. 25; *Continental Ins. Co. v. Ward*, 50 Kan. 346, 31 Pac. 1079; *Citizens State Bank v. Shawnee F. Ins. Co.* 91 Kan. 18, 49 L.R.A.(N.S.) 972, 137 Pac. 78; *Stamey*

v. Royal Exch. Assur. Co. 93 Kan. 707, 150 Pac. 227; *Jones v. Phoenix Ins. Co.* 94 Kan. 235, 146 Pac. 354; *Whiting v. Burkhardt*, 178 Mass. 535, 52 L.R.A. 788, 86 Am. St. Rep. 503, 60 N. E. 1; *Fogg v. Middlesex Mut. F. Ins. Co.* 10 Cush. 337; *Phillips v. Merrimack Mut. F. Ins. Co.* 10 Cush. 350; *Mutual L. Ins. Co. v. Allen*, 138 Mass. 24, 52 Am. Rep. 245; *Merrill v. Colonial Mut. F. Ins. Co.* 169 Mass. 10, 61 Am. St. Rep. 268, 47 N. E. 439.

Plaintiff was subrogated to all securities held by Loomis.

Equitable Mortg. Co. v. Gray, 68 Kan. 100, 74 Pac. 614.

A provision requiring notice, on penalty that if no notice is given the assignment shall not be binding on the insurer, does not prevent an assignment valid in equity.

14 R. C. L. 1005; *Brierly v. Equitable Aid Union*, 170 Mass. 218, 64 Am. St. Rep. 297, 48 N. E. 1090; *Sheldon*, Subrogation, §§ 3, 4, 236; 24 Am. & Eng. Enc. Law, 253; 3 Pom. Eq. Jur. 2d ed. 1212; 25 R. C. L. 1346; *Muir v. Berkshire*, 52 Ind. 149; *Connecticut Mut. L. Ins. Co. v. Cornwell*, 72 Hun, 199, 25 N. Y. Supp. 348.

Messrs. *Fyke, Snider, & Hume* and *O. O. Osborne*, for appellee:

The policy does not pass with the insured property to a new owner without consent of the insured, and such consent is required to keep it alive in the hands, or for the benefit, of a new owner.

Lett v. Guardian F. Ins. Co. 125 N. Y. 82, 25 N. E. 1038; 1 *Joyce*, Ins. 23; 2 *Joyce*, Ins. 890; *Deming Invest. Co. v. Dickerman*, 63 Kan. 728, 88 Am. St. Rep. 265, 66 Pac. 1029.

Dawson, J., delivered the opinion of the court:

This was an action to recover on a fire insurance policy.

The late *Henry Cooley* of *Rooks* county purchased a policy of fire insurance upon his farmhouse and barn, and also upon his household goods. The farm was subject to a first mortgage in favor of *J. R. Loomis*, and with the insurance company's consent the insurance on the farmhouse was to be payable to the mortgagee as his interest might appear. The plaintiff, the *Stockton National Bank*, held a second mortgage on the farm. *Cooley* died, and *Loomis* brought suit to foreclose his mortgage. The bank, as junior mortgagee, was impleaded, and its second mortgage was also foreclosed. The sum of the two mortgages was about all that the farm was worth, and to protect its lien the bank bought the farm at the foreclosure sale. During the redemption period the farmhouse and its contents were burned. The widow of *Cooley*, his administratrix, collected the insurance on the household goods, and the bank, as purchaser at the foreclosure sale, claimed to be

subrogated to the interest of *Loomis*, the first mortgagee, and demanded payment of the insurance on the farmhouse. The insurance company denied liability. Action was begun, issues were joined, and the trial court gave judgment for defendant on the pleadings and upon the opening statement of counsel for the bank. Hence this appeal.

A majority of this court hold that the judgment of the trial court was correct. The purchaser of the insured property at the sheriff's sale had no legal claim upon the insurance policy which covered the property for the benefit of the mortgagor and mortgagee, nor was it subrogated to the rights of the mortgagee in the proceeds of the insurance.

Insurance—
mortgaged
property—right
of purchaser at
foreclosure.

An insurance policy is a personal obligation between the insurance company and those with whom it chooses to bargain. It was willing to carry the risk for *Cooley* and his original creditor, and bound itself to do so; but it never did obligate itself to carry the fire risk on the property for any purchaser of the property at sheriff's sale, if the owner of it became so indifferent in regard to the property as to permit it to be sold under mortgage foreclosure. An insurance company may be perfectly willing to carry insurance on a mortgaged property and also willing to protect the interest of the mortgagee, where the mortgagor is diligently caring for the property, keeping the interest paid up on the mortgage, keeping the taxes paid, and the property in repair; but the insurance hazard is or may be much different and much greater when the mortgagor has so far defaulted as to permit the property to be sold by the sheriff under foreclosure proceedings. The insurance company is not bound to carry such a risk without expressly consenting thereto, and without the payment of a larger premium rate for the possibly greater moral hazard involved. The purchaser at the

sheriff's sale, although that sale was conditional and the property was subject to redemption, had an insurable interest which he himself might have protected by insurance (*Deming Invest. Co. v. Dickerman*, 63 Kan. 728, 88 Am. St. Rep. 265, 66 Pac. 1029; 2 Joyce, Ins. 2d ed. § 981a); but that interest was not covered by the policy issued for the benefit of the mortgagor and the original mortgagee. Note in 6 L.R.A. (N.S.) 448; 2 Joyce, Ins. 2d ed. § 1046. The learned trial judge in this case delivered a written opinion, in which he noted that our reports had no precedent to govern this precise question. He was guided by the analogy and doctrine which he drew from the case of *Lett v. Guardian F. Ins. Co.* 125 N. Y. 82, 25 N. E. 1088, part of the syllabus of which reads:

"A policy of fire insurance is a personal contract by which the insurer undertakes to indemnify the assured against loss, in a manner and subject to conditions therein described. The obligation does not pass with the insured property to an assignee or purchaser thereof without the consent of the insurer, and such consent alone can, in case of a transfer, keep in life the agreement.

"Defendant issued a policy of insurance to B upon his property, loss being made payable to A, as mortgagee. B subsequently conveyed the property subject to the mortgage, and his grantee conveyed to plaintiff. At the time of such conveyance, B executed to plaintiff an assignment of his interest in the policy. No consent to the change of title was indorsed by defendant upon the policy, although such consent was made by the policy a condition of its continuance in force. On application of plaintiff for a consent, he was told by an officer of plaintiff that the policy had been canceled. This was not, in fact, true. Thereupon plaintiff took out a policy for the same amount in another company, and demanded from B a return of the allowance for premium

made to him upon the transfer of the policy. In an action upon the policy, held, that it was invalidated by the failure to obtain defendant's consent to the change of title, and that there was nothing from which such consent, or a waiver of the condition, could be inferred; also, that defendant acquired no interest by his assignment from B, as the latter had no interest at that time in the policy, it having become void by his act."

The judgment of the trial court is affirmed.

Dawson, J., dissenting:

With the general doctrine that an insurance policy is a personal contract, and that the insurance company is not bound where it has not contracted to be bound, nor beyond the scope of its obligation, I agree. My objection to this decision is that I think it overlooks the long road which the courts, even this court, have already traveled away from the primitive theory of personal contract touching the liability of insurance companies, in considering the interest of mortgagees of insured property and their assignees. In *Ft. Scott Bldg. & L. Asso. v. Palatine Ins. Co.* 74 Kan. 272, 86 Pac. 142, the owner of a house in Ft. Scott mortgaged it to a loan association, and took out a fire insurance policy to protect himself and the mortgagee. Later the mortgagor assigned his interest in the insurance policy to a trustee, the insurance company assenting. The property was injured by fire. The trustee declined to make proof of loss, and conveyed the property to the mortgagee. The insurance company resisted payment of insurance to the mortgagee, on the ground, among others, that there was a change of ownership to which it had not assented. This court said:

"The liability of the insurance company is in no way affected thereby; it remains the same as if the mortgagor had retained the title to the land. The deed was taken by the association simply as security

for the debt of the mortgagor, and this was one step toward a realization thereof.

"As to the claim that the loan association was bound by the mortgage clause to inform the insurance company of all changes in the ownership of the property, it is sufficient to say that in this state it has been held that the acquisition of the legal title to insured property by the mortgagee is not such a change of ownership as is contemplated by the provisions of this mortgage clause (*Dodge v. Hamburg-Bremen F. Ins. Co.* 4 Kan. App. 415, 46 Pac. 25; *Continental Ins. Co. v. Ward*, 50 Kan. 346, 31 Pac. 1079; *Lancashire Ins. Co. v. Boardman*, 58 Kan. 339, 62 Am. St. Rep. 621, 49 Pac. 92), and therefore the omission is not material" (74 Kan. 277, 278).

This court has held that the foreclosure and sale of insured property to the mortgagee is not such a sale or assignment as will avoid the insurance because of want of the express consent of the insurance company. The right of the mortgagee, whether before sale or after sale, but before the expiration of the redemption period, has been declared to be "an equitable lien upon the proceeds of the policy" where a loss occurs. *Chipman v. Carroll*, 53 Kan. 163, 25 L.R.A. 305, 35 Pac. 1109.

Part of the syllabus in *Citizens State Bank v. Shawnee F. Ins. Co.* 91 Kan. 18, 49 L.R.A. (N.S.) 972, 137 Pac. 78, reads: "A mortgage clause that the loss, if any, shall be payable to the mortgagee as his interest may appear, 'subject, however, to all the terms and conditions of this policy,' does not relieve the insurer from liability upon a policy containing a condition that it shall be avoided by proceedings to foreclose any mortgage on the property—the insuring of a mortgage lien being sufficient indication that the company must have contemplated a possible or probable foreclosure." Syl. ¶ 3.

In *Jones v. Phoenix Ins. Co.* 94 Kan. 235, 146 Pac. 354, it was held

that the commencement of foreclosure proceedings did not avoid an insurance policy purchased by the mortgagor for his own benefit and that of his mortgagee. Mr. Justice Marshall, speaking for the court, said: "Of what use is insurance held by a mortgagee on mortgaged property, if the commencement of foreclosure proceedings vitiates the policy? An insurance policy held by a mortgagee, under a mortgage clause, as above set out, contemplates that there may be a foreclosure of the mortgage." (p. 236.)

To that observation it could pertinently be added that the insurance company must have contemplated that somebody, not necessarily the mortgagee, would become the purchaser at the foreclosure sale.

In *Whiting v. Burkhardt*, 178 Mass. 535, 52 L.R.A. 788, 86 Am. St. Rep. 503, 60 N. E. 1, it was held that the assignment of a mortgage on property covered by insurance, under a loss-payable clause, conveyed to the assignee an assignment of the proceeds of the insurance policy. It was held that such assignment was not a transfer of the policy in violation of the contract, which stipulated that the policy should be void if assigned without the assent of the insurance company in writing, but merely an assignment of the right to receive the proceeds as security for the mortgage debt. One section of the syllabus reads: "One to whom an insurance policy is payable as 'mortgagee, as his interest may appear,' may assign to the assignee of the mortgage the right to receive on the same terms the proceeds of the policy."

See also note in 25 L.R.A. 305; 19 R. C. L. 406, 407.

The purchaser of mortgaged property at a foreclosure sale, where the mortgagor has eighteen months to redeem, is in effect, during that redemption period, but a mere assignee or subrogee of the mortgagee, and as such he is equitably entitled to everything the original mortgagee would get. It is not a matter of

substantial concern to the insurance company who may be the purchaser at the foreclosure sale; at least, where there is no change of possession of the property. The hazard that the mortgagor might default, and that the insured property

might be subjected to foreclosure sale, was one which the insurance company was bound to take into account when it consented to carry the risk for the mortgagee, "as his interest might appear."

I therefore dissent.

ANNOTATION.

Right to proceeds of insurance where loss occurs after mortgage foreclosure sale, but during redemption period.

- I. Preliminary statement; rights of purchaser in general, 1308.
- II. Rights of owner or mortgagor, 1309.
- III. Rights in general of mortgagee who has purchased at foreclosure sale, 1310.
- IV. Rights of mortgagee or purchaser who has insured his own interest, 1313.
- V. Miscellaneous, 1314.

I. Preliminary statement; rights of purchaser in general.

Generally, as to the application of insurance money received by mortgagee, see annotation following *Sisk v. Rapuano*, ante, 1291. The question under annotation presupposes that the insurance has not been avoided by the foreclosure sale by virtue of the provisions of the policy, and the annotation is not concerned with the question whether the foreclosure sale violates the provision commonly found in policies against change of title or interest, or more specific provisions.

On the subject under discussion no general rule can, apparently, be laid down. The question as to who is entitled to insurance money, where property is damaged or destroyed after foreclosure sale and before the expiration of the period for redemption, involves various considerations, depending partly on the provisions of the policy, and partly on the answer to such queries as who procured the insurance and whose interest was insured, and the nature and effect of the foreclosure sale according to the decisions in the particular jurisdiction. In final conclusions the courts are not agreed. There are many cases supporting the general doctrine of the personal nature of insurance con-

tracts. And it seems that, under this doctrine, a purchaser at a foreclosure sale, if a third party with no right to claim insurance money except such as might arise from his purchase, should not be entitled to recover from the insurance company on a policy taken out by the former owner, or others interested in the property, for a loss occurring during the redemption period. In the reported case (*STOCKTON NAT. BANK v. HOME INS. CO.* ante, 1304), the principle of the personal nature of insurance contracts was applied, where property was insured by the mortgagor for his own benefit, with a loss-payable clause in favor of the mortgagee, and the property was sold under foreclosure proceedings, it being held that the purchaser at the foreclosure sale, who was a second mortgagee but was apparently regarded as standing in the same position as any other purchaser, could not maintain an action against the insurance company to recover the insurance, and had no claim to the proceeds thereof, on the theory of assignment, or subrogation, or otherwise.

It is obvious that the view which denies the rights of a purchaser other than the mortgagee to the benefit of the insurance taken by the mortgagor or owner, in case of a loss during the redemption period, is supported a fortiori by *Reynolds v. London & L. F. Ins. Co.* (1900) 128 Cal. 16, 79 Am. St. Rep. 17, 60 Pac. 467, and *Rawson v. Bethesda Baptist Church* (1906) 221 Ill. 216, 6 L.R.A.(N.S.) 448, 77 N. E. 560, *infra*, III. which deny the right of the mortgagee who himself becomes purchaser. And it will be observed that *Carlson v. Presbyterian Bd. of*

Relief (1897) 67 Minn. 436, 70 N. W. 3, *infra*, III. which upholds the right of the mortgagee who becomes the purchaser, concedes that it is otherwise as to a purchaser other than the mortgagee.

As to the rights of a purchaser at a judicial sale who has insured his own interest in the property, where a loss occurs during the period of redemption, see *infra*, IV.

II. *Rights of owner or mortgagor.*

If the policy does not provide for payment of the loss, if any, to the mortgagee, and there is no agreement between the parties with respect to insurance, there is authority, which appears sound, to the effect that the mortgagor who has taken out insurance to protect himself is entitled to the proceeds arising under the policy for a loss occurring after foreclosure and during the period of redemption, his insurable interest not ceasing at the time of the sale.

Thus, it was held in *Stephens v. Illinois Mut. F. Ins. Co.* (1867) 43 Ill. 327, where the mortgagor insured the property in his own name and for his own benefit, and the insured buildings were destroyed by fire during the redemption period after the mortgagee had bid in the property on foreclosure proceedings, that the mortgagor could recover for the loss by fire from the insurance company, as he had an insurable interest in the property until his right of redemption was cut off. The court pointed out that the right of redemption in the present instance was a valuable estate, as the record showed that at the time of the fire the property was worth from fourteen to sixteen thousand dollars, while it would only require about five thousand dollars to redeem. It was said: "In this state, the purchaser under a sheriff's sale, upon judgment and execution, or at a master's sale, on foreclosure of a mortgage, acquires by his purchase no new title to the premises until the period of redemption has passed and he is entitled to a deed. His deed will relate back, it is true, to the beginning of his lien, in order to cut off intervening encumbrances, but

it will not carry back the absolute divestiture of title, as is evident from the fact that neither judgment debtor nor mortgagor can be called to account for rents and profits. His title becomes absolute only when his right to a deed accrues. If it is a sale under a decree of foreclosure, the mortgagor still has the estate of a mortgagor, with this qualification: that the amount and time of redemption have become absolutely fixed by the decree and sale, and his estate will be absolutely divested if he fails to redeem within the allotted time. . . . At the time, then, of the destruction of this mill, Stephens was a mortgagor, and it is the settled law that a mortgagor may insure to the full value of the property, and recover the sum insured, if he had a right of redemption at the time of the loss, even though the premises have been taken out of his hands by the mortgagee."

And it will be observed that in *Rawson v. Bethesda Baptist Church* (Ill.) *infra*, III., the right of the mortgagor to the proceeds of the insurance was recognized, notwithstanding that there was a mortgagee clause.

So, in *Loy v. Home Ins. Co.* (1877) 24 Minn. 315, 31 Am. Rep. 346, the court, having held that the foreclosure sale did not avoid the policy under the terms thereof, held, or at least assumed, that the mortgagor was entitled to recover from the insurer for a loss occurring during the redemption period. And there are similar cases upholding the right of the insured to recover for a loss during the period of redemption from an execution sale. See, for instance, *Hammel v. Queen's Ins. Co.* (1882) 54 Wis. 72, 41 Am. Rep. 1, 11 N. W. 349; *Wood v. American F. Ins. Co.* (1896) 149 N. Y. 382, 52 Am. St. Rep. 733, 44 N. E. 80; *Chamberlain v. Insurance Co. of N. A.* (1889) 20 N. Y. S. R. 548, 3 N. Y. Supp. 701.

But in *McLaren v. Hartford F. Ins. Co.* (1851) 5 N. Y. 151, it was held that the mortgagor could not recover for a loss occurring after a foreclosure sale, but pending the enrolment of the decree and the execution of the master's deed, as he had no insurable

interest in the property, the whole right and interest passing immediately on the sale to the purchaser. It was said: "The insurance in question was made by McLaren as owner. By the sale he was foreclosed and divested of every right in or to the premises, except the formal legal title. He had no interest in them, and consequently could claim no indemnity for their loss."

And it was held in *Bacon v. Insurance Co. of N. A.* (1914) Rap. Jud. Quebec 47 C. S. 74, that one whose property was sold at sheriff's sale ceased to have an insurable interest therein at the moment of the adjudication to a purchaser as the highest bidder, although the completion of the sale was suspended, pending payment of the purchase price and fulfilment of the conditions, and that, therefore, the former owner could not recover on an insurance policy which he had taken out before the sale, for a loss occurring after the sale, but before payment of the purchase price.

Where, after the equity of the mortgagor had been seized on execution, he obtained insurance on the property, which, after a sale on the execution, was destroyed by fire during the period allowed for redemption, it was held in *Strong v. Manufacturers' Ins. Co.* (1830) 10 Pick. (Mass.) 40, 20 Am. Dec. 507, that the mortgagor, who had subsequently redeemed the property, had an insurable interest both at the time the policy was effected and at the time of the loss, and was entitled to recover from the insurance company for the entire damage, not exceeding the amount of the insurance.

In *Cone v. Niagara F. Ins. Co.* (1875) 60 N. Y. 619, the property subject to the mortgage was not sold under the mortgage, but upon execution under a judgment; and it was held that the mortgagor had an insurable interest, the loss having occurred after the expiration of the time for him to redeem, but before the expiration of the time for his judgment creditors to redeem, and therefore the mortgagee could recover on the policy.

The effect of an unauthorized sale on the right to proceeds of insurance

was presented in *Richland County Mut. Ins. Co. v. Sampson* (1883) 38 Ohio St. 672, it being held that where an order confirming a sale made under a decree of foreclosure, to a mortgagee who was a party, was at the same term vacated and the sale set aside for want of notice as required by statute, the insurable interest of the mortgagor in possession was the same in the property as if such sale and confirmation had not been made; and that where a loss of the property covered by insurance in favor of the mortgagor occurred after such confirmation, and before the order was vacated and the sale set aside, the insurable interest of the mortgagor was not divested by the unauthorized sale and confirmation, but he could recover on the policy.

As to the rights of the mortgagor where a third party purchases at foreclosure sale, see *Carlson v. Presbyterian Bd. of Relief* (Minn.) *infra*, III.

III. Rights in general of mortgagee who has purchased at foreclosure sale.

As to rights of second mortgagee who has purchased the property at a judicial sale, against the insurance company, see the reported case—(*STOCKTON NAT. BANK v. HOME INS. CO. ante*, 1304).

Where the insurance policy provides for payment of the loss, if any, to the mortgagee, and the latter purchases the property on foreclosure, the question arises as to the rights of the mortgagee under the policy, after his purchase, but during the redemption period. Are his rights as mortgagee, within the meaning of the policy, extinguished by the sale? Upon this question different conclusions have been reached, partly, at least, because of differences in the different jurisdictions regarding the effect of the foreclosure sale.

In California, where a statute provided that the insurance was deemed to be upon the interest of the mortgagor, in case of insurance by the mortgagor in his own name with a provision for payment of the loss to the mortgagee, it was held in *Reynolds v. London & L. F. Ins. Co.* (1900) 128

Cal. 16, 79 Am. St. Rep. 17, 60 Pac. 467, that the foreclosure sale extinguished the rights of the mortgagee as such, and also his rights as a creditor, and that whatever interest he had in the insurance policy was extinguished by the sale; so that he could not recover from the insurance company for a loss occurring during the period of redemption. In this case, the mortgagee had bid in the property for the full amount due, including interest and costs. The policy provided that the loss, if any, was payable to the mortgagee. After the redemption period expired, the mortgagee had received a deed under the foreclosure sale. The court cited decisions in that state to the effect that by a foreclosure sale the title passes; that the subsequent deed is merely evidence that the title has become absolute; that if a redemption is made by the mortgagor, it is not from the lien of the mortgage, but from the sale under the judgment, and that the amount which he is required to pay on the redemption is not the amount of the mortgage, but the amount for which the property was sold. It was said: "In the case at bar, if Porter [the mortgagor] had extinguished the mortgage debt by paying it, no one would claim that there was any cause of action left to plaintiff against the defendant upon the policy in question. But by the foreclosure proceedings and the purchase of the mortgaged premises by the plaintiff for the full amount of the debt and judgment, the debt was fully extinguished, and plaintiff was no longer a creditor or mortgagee of Porter. There was no longer any debt which could be enforced in any way. Plaintiff was then substantially the owner of the property; and Porter had the mere statutory right of redemption, which could be exercised within the statutory period, not by paying the former and extinct debt, but by paying the purchase price bid for the property, together with certain statutory percentages and costs. . . . Of course, a foreclosure, in the sense of a perfect extinguishment of the mortgagor's equity of redemption, may be said not to be complete until after

the expiration of the statutory period for redemption; but that consideration has no bearing upon the proposition that the sale extinguishes the debt. . . . We are not concerned with the question whether or not, under the circumstances, Porter could have recovered anything of defendant on the policy; although, if Porter suffered no loss, then certainly plaintiff could not have recovered, because Porter was the party insured and only through his losses could plaintiff's security have been efficacious. Neither are we concerned with the class of cases where the mortgagee himself procures a policy on buildings situated on the mortgaged premises, where he is the party insured, and where it has been held that he may take the policy on his interest in the property itself. In the case at bar, under our law, the plaintiff was not the party insured, and his interest in the buildings mortgaged was not insured; the interest in the property which was insured was that of Porter, the mortgagor, and it was only the indebtedness of Porter to plaintiff which gave the latter any interest in the policy. After he changed his position from creditor to purchaser he could, in the latter capacity, have procured a policy on the buildings and thus insured his interest in the property itself; but whatever interest he had in the old policy ceased with the extinguishment of the indebtedness."

The above decision seems in accord with the view of the court in *Rawson v. Bethesda Baptist Church* (1906) 221 Ill. 216, 6 L.R.A. (N.S.) 448, 77 N. E. 560, in which a trust deed was foreclosed, the property being sold to the complainant in the foreclosure suit, for an amount less than the sum due. The insurance policy contained a clause making the loss, if any, payable to the trustee. But the court, in holding that the mortgagor could recover from the trustee the insurance money which the latter had collected pending the redemption period, said: "Appellant had ceased to be trustee, and could not receive the insurance money in that capacity, but could only receive it as agent of appellee. The

rights and liabilities of the parties had been fixed by the decree, which became the basis of title, and the trust deed had expended its force, so that the property was no longer subject to its provisions and stipulations. By the sale a new relation had been created, not depending in any way upon privity of contract between appellee and the purchaser, and the rights of such purchaser were not different in any respect from what the rights of any other person would have been if he had purchased at the sale." It was unsuccessfully contended by counsel for the trustee in this case that the insurable interest of the mortgagor "was dependent upon its exercising its right of redemption from the sale, and, having failed to exercise such right, it had no right to the insurance money when the suit was brought."

But a different view was taken by the Minnesota court in *Carlson v. Presbyterian Bd. of Relief* (1897) 67 Minn. 436, 70 N. W. 3, it being held that the mortgagee's interest under the policy was not extinguished by the sale. The policy provided that the loss, if any, should be payable to the mortgagee as his interest might appear, and was procured and paid for by the mortgagor. The mortgagee foreclosed the mortgage, and bid in the premises at the sale for the full amount of the mortgage debt and costs. Afterwards, during the redemption period, the dwelling covered by the mortgage and policy was injured by fire, and the insurance company paid the loss to the mortgagee. No redemption was made from the sale. In an action brought by the mortgagor's assignee to recover the insurance from the mortgagee, the court held that the plaintiff could not recover; although it was said that, had he redeemed, he would have been entitled to have the amount applied pro tanto on the redemption. The court distinguished between purchases by a third party and by the mortgagee, and stated their rights under the policy, after foreclosure, as follows: "It must be conceded, as claimed by the plaintiff, that if a third party had purchased the lot at the foreclosure sale

for a sum equal to the defendant's debt and costs, and there had been no assignment of the interest of the defendant in the policy to the purchaser, the money paid on the policy to the defendant would belong to the mortgagor, because the defendant in such case would have no interest in the property destroyed. . . . If the mortgagee is the purchaser at the foreclosure sale, his debt, as between him and the mortgagor, is paid, but it is not true that either his mortgage, as a muniment of title, or his interest in the mortgaged premises, is discharged or extinguished. Where the mortgagee is the purchaser at the foreclosure sale, he simply receives a conditional conveyance of the premises for the payment of his debt, and continues to have a lien on the premises for the amount of the purchase price, which was applied in payment of his debt. His interest in the premises is practically the same after the sale as before, except the purchase price must be repaid to him by the mortgagor, with interest, within the year, or his title under his mortgage becomes absolute. Until the time to redeem expires, he has a lien on the premises, and holds them for the security of his bid. . . . The plaintiff, relying upon some general statements in former decisions of this court to the effect that, where the mortgagee is the purchaser at the foreclosure sale, he stands in the precise condition of a third party purchasing at such sale, and that his debt and mortgage are extinguished to the extent of his bid, claims that the defendant in this case, when it bid in the premises for the full amount of its debt, ceased to be a mortgagee, and had no longer any rights as such in the insurance policy. . . . The statements referred to are correct, in the connection in which they were used; but they afford no support for the proposition of the plaintiff that, by the purchase of the premises at the foreclosure sale, the defendant ceased to have any further interest in the insurance policy, because the defendant technically had ceased to be a mortgagee. The defendant after the fore-

closure had the same interest in the dwelling house insured as before, and it still held the insurance policy which insured, not its debt, but its interest in the house mortgaged. It is wholly immaterial whether the defendant, after the foreclosure, was technically a purchaser and not a mortgagee, and that its lien and claim on and to the house secured its bid and not its debt; for it continued to have an insurable interest in the house, by virtue of its mortgage, precisely as it had before the foreclosure. It was this interest that was insured by the policy payable in case of loss to the defendant as its interest might appear, and, a loss having occurred while the policy was in force and the interest still in existence, the insurance money was rightly paid to the defendant, subject to the equity of the mortgagor to have the amount thereof applied pro tanto in redemption of the premises." In this connection, see *Deming Invest. Co. v. Dickerman* (Kan.) *infra*, IV., where the policy was taken out by the purchaser at foreclosure sale, and it was held that upon redemption, he was not required to account to the redemptioner for the proceeds of the insurance.

And in *Uhlfelder v. Palatine Ins. Co.* (1906) 111 App. Div. 57, 97 N. Y. Supp. 499, where the policy provided that the loss, if any, should be payable to the mortgagee as his interest might appear, and the loss took place between the sale and the delivery of the deed, the court held that the mortgagee, who had bid in the property at the sale, was entitled to recover from the insurance company to the extent of the damage to his interest in the property. The view was taken that the mortgagee's interest, as such, continued until the formal delivery of the deed; that his interest as mortgagee was not merged or destroyed at the time of the loss; that the damage before he acquired title was a direct damage to his interest as mortgagee, since it reduced the value of the property which he had been required to take in satisfaction of the mortgage; and that therefore he could recover, to the extent of his interest, from the insurer.

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ance company. The court was of the opinion, however, that if the sale had been to a third party, so that the only interest which the mortgagee had under it was that the purchaser who had agreed to pay for the property should accept a deed from the referee, the plaintiff, as mortgagee, would have sustained no damage, and could not have recovered.

Also in *Haight v. Continental Ins. Co.* (1883) 92 N. Y. 51, it was held that the mortgagee, to whom the loss, if any, was payable, could recover from the insurance company for loss occurring between the sale and the delivery of the deed. The defense in this case, however, was that there had been a change of title in violation of the provisions of the policy.

Reynolds v. London & L. F. Ins. Co. (1900) 128 Cal. 16, 79 Am. St. Rep. 17, 60 Pac. 467, *supra*, overrules, so far as it is inconsistent therewith, *National Bank v. Union Ins. Co.* (1891) 88 Cal. 497, 22 Am. St. Rep. 324, 26 Pac. 509, which reached a different conclusion because the court took a different view of the effect of the foreclosure sale. In this case, where the loss, which was payable to the mortgagee, occurred after the foreclosure sale, but before the period of redemption had expired, the property having been bid in by the mortgagee, the court held that the mortgagee might recover the entire loss, since, until the right of redemption was cut off, the mortgage could not be regarded as foreclosed and there was no payment pro tanto by the mortgagor.

IV. Rights of mortgagee or purchaser who has insured his own interest.

The question discussed in this subdivision presupposes that the mortgagee or purchaser had collected the insurance, or was, at least, entitled thereto as against the insurer.

In accord with the general rule which denies the mortgagor or owner of the equity of redemption the benefit of the insurance taken out by the mortgagee upon his own interest (see note to *Sisk v. Rapuano*, ante, 1295), the courts deny the mortgagor, or other person entitled to redeem, the bene-

fit of the insurance taken out by the purchaser or mortgagee on his own interest, in the event of a loss during the redemption period.

Thus, where a purchaser at foreclosure sale, subject to redemption, procured and paid for insurance on the property to which he held a certificate of purchase, it was held in *Deming Invest. Co. v. Dickerman* (1901) 63 Kan. 728, 88 Am. St. Rep. 265, 66 Pac. 1029, that the contract of insurance was personal between the purchaser and the insurance company, and did not inure to the benefit of the person entitled to redeem; so that, where the property was totally destroyed by fire during the period of redemption, the purchaser at the foreclosure sale, upon redemption, was not required to account to the redemption-tioner for the money received from the insurance company on the property. See, in this connection, *Carlson v. Presbyterian Bd. of Relief* (Minn.) *supra*, III. where the mortgagor procured and paid for the insurance.

And in *White v. Brown* (1848) 2 Cush. (Mass.) 412, where the mortgagee had taken possession for condition broken, and had effected insurance for his own benefit, it was held that, in the absence of any agreement with respect thereto between him and the mortgagor, he was not liable to account to the latter, in a suit to redeem, for the amount of insurance money collected under the policy. The question arose in this instance as to whether the amount of insurance money should be taken into consideration in adjusting the account of the mortgagee for repairs, it being held that the mortgagee was exclusively entitled to the insurance money, and that his right to insurance was entirely distinct and independent of any claim which he had against the mortgagor.

The same principle is supported by *Russel v. Robertson* (1860) 6 Can. L. J. 143, holding that in the absence of any agreement between the parties, where a mortgagee for his own benefit insures the mortgaged premises, and during the redemption period receives the amount of the policy, that amount should not be taken into ac-

count and allowed to the mortgagor.

And the doctrine that one having a right to redeem property on which the person having the legal title has effected insurance, and paid the premium, does not have the right to the insurance money, is supported also by such cases as *McIntire v. Plaisted* (1878) 68 Me. 363, although there was no foreclosure in this case, but only a right to repurchase the property, or, as the court stated it, a right to redeem. The court, considering the plaintiff's right to repurchase or redeem as substantially that of a mortgagor, stated that it was well settled that the mortgagor could not require a mortgagee to account to him for money received for insurance, where there was no contract between them to that effect, and the insurance was procured by the mortgagee for his own benefit, and the premium paid by him. See also *Gillespie v. Scottish Union & Nat. Ins. Co.* (1906) 61 W. Va. 169, 11 L.R.A. (N.S.) 143, 56 S. E. 213, which lays down the proposition that "a mortgagor has no interest in the proceeds of a policy insuring the mortgagee, taken out by the mortgagee to protect his own interest, or in which the interest of the mortgagor has been forfeited, leaving that of the mortgagee still in force."

V. Miscellaneous.

Although not directly within the scope of the note, because the statutory period for redemption expired before the loss occurred, attention is called to *Pope v. Glenn Falls Ins. Co.* (1902) 136 Ala. 670, 34 So. 29, holding that under these circumstances there could be no recovery on a policy obtained by the mortgagor, on a showing merely that a cestui que trust had expressed a willingness to accept the debt due, notwithstanding the time for redemption had expired, since this was not a valid contract, and gave the former mortgagor no insurable interest at the time of the loss.

A somewhat similar case is *Essex Sav. Bank v. Meriden F. Ins. Co.* (1889) 57 Conn. 335, 4 L.R.A. 759, 17 Atl. 930, 18 Atl. 324, where the loss of the property by fire occurred after the

expiration of the time allowed for redemption from a decree of strict foreclosure, but within the time during which the mortgagee, who had obtained a decree, had voluntarily promised to allow the mortgagor to redeem. The insurance had been effected by the mortgagor after decree of foreclosure, but before expiration of the time for redemption, and it was held that, although the mortgagor had an insurable interest in the property at the time he took out the insurance, the policy ceased to be valid when the title became absolute in the mortgagee on the expiration of the time allowed for redemption, and that the promise made by the mortgagee after the time for redemption had expired was without consideration, and did not convey an interest to the mortgagor which would keep the policy in force.

In *Chipman v. Carroll* (1894) 53 Kan. 163, 25 L.R.A. 305, 35 Pac. 1109, where the loss occurred after recovery of a judgment on the mortgage, but before a sale thereunder, and the

mortgagor, who had agreed to keep the premises insured for the benefit of the mortgagee, took out, after the judgment, a policy of insurance in his own name, it was held that the mortgagee was entitled to recover the loss, as the judgment did not extinguish his debt.

Although not strictly in point in the note, attention is called also to the case of *Eddy v. London Assur. Corp.* (1894) 143 N. Y. 311, 25 L.R.A. 686, 38 N. E. 307, holding that the mortgagee might properly proceed to judgment and sale in a foreclosure suit which was pending when a loss by fire occurred, unless payment of his mortgage debt was made, under a policy stipulating that his interest in the insurance should not be invalidated by foreclosure, although it also provided for subrogation of the insurer to his rights under the mortgage, with a proviso that it should not impair his right to recover the full amount of his claim.

R. E. H.

J. R. JONES, Plff. in Err.,

v.

J. R. HICKS, JR., Sheriff, et al.

Georgia Supreme Court — November 11, 1920.

(— Ga. —, 104 S. E. 771.)

Intoxicating Liquor — Federal law — effect on state law.

The 18th Amendment to the Constitution of the United States, and the "National Prohibition Act," popularly known as the Volstead Act, do not supersede or abrogate the existing state law known as the Prohibition Act, approved March 28, 1917 (Act Ex. Sess. 1917, p. 7). The court did not err, therefore, in refusing to release on writ of habeas corpus one held in custody by virtue of a warrant based on an accusation in a city court, charging the petitioner with violation of said state prohibition law.

[See note on this question beginning on page 1320.]

Headnote by GILBERT, J.

ERROR to the City Court of Macon (Guerry, J.) to review a judgment refusing to release petitioner in a habeas corpus proceeding to secure his release from custody to which he had been committed for violation of the Prohibition Law. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. Early W. Butler for plaintiff in error.

Mr. Will Gunn for defendants in error.

Gilbert, J., delivered the opinion of the court:

Jones was arrested under a bench warrant issued by the judge of the city court of Macon, based upon an accusation charging him with violating the Prohibition Law of this state on January 21, 1920. He filed a petition for the writ of habeas corpus, based upon the ground that the 18th Amendment to the Constitution of the United States, which was ratified on January 16, 1920, and the "National Prohibition Act," known as the Volstead Act (41 Stat. at L. 305, chap. 83), superseded and abrogated all state laws on the subject covered by said 18th Amendment, and that therefore, at the time this defendant is alleged to have committed the criminal offense charged in the accusation, there was no valid state law in existence. The court refused to release the petitioner, and that judgment is excepted to.

The 1st section of the 18th Amendment to the Federal Constitution prohibits "the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes." The 2d section of that Amendment, as proposed to the states and ratified, provides that "the Congress and the several states shall have concurrent power to enforce this article by appropriate legislation."

Three views as to the proper construction of the second section have been generally discussed: (1) That concurrent power means joint power; (2) that the power is given to each, the legislation of either Congress or the states being of equal force with the other; and (3) that the power is in each, but that the legislation of Congress, as the supreme law of the land, will super-

sede any inconsistent state legislation.

"Concurrent power" does not mean "concurrent legislation," and concurrent "power" to enforce is quite a different thing from "concurrent enforcement." "The words 'concurrent power' in that section do not mean 'joint power,' or require that legislation thereunder by Congress, to be effective, shall be approved or sanctioned by the several states or any of them; nor do they mean that the power to enforce is divided between Congress and the several states along the lines which separate or distinguish foreign and interstate commerce from intrastate affairs." "Appropriate legislation" by the Congress or the states, as employed in § 2, must be "to enforce," and not to "defeat or thwart." National Prohibition Cases (*Rhode Island v. Palmer*) 253 U. S. 350, 64 L. ed. 946, 40 Sup. Ct. Rep. 486. The use of the word "several" before the word "states," and the nonuse of the word "joint," would seem to be significant in determining the intent. Had "joint" enforcement been desired, the simple and effective method would have been to specifically provide that the Congress and the states shall have power to "jointly enforce" this article by appropriate legislation.

The Supreme Court of the United States having adversely disposed of the contention that "concurrent power" means joint power, there remain two other views to be considered. Similar, but not identical, questions have been discussed heretofore by courts of several states and by the Supreme Court of the United States. None of these involve construction of delegated powers to be exercised concurrently. They are cited here for comparison, and not as controlling. Among the questions involved were whether the states possessed the power, under the United States Constitution, of punishing persons guilty of counterfeiting; whether the United States was vested with exclusive jurisdiction over land ceded to it for public

purposes; whether state laws in regard to the reclamation of fugitive slaves were in contravention of the Constitution of the United States; and whether, under the Constitution, the United States had the power to incorporate a bank, and the like. As early as 1843 it was said by the supreme court of Michigan: "In the eighty-second number of the *Federalist*, it is stated that the state governments would clearly retain all their original rights of sovereignty, which were not, by that Constitution, exclusively delegated to the Union. The alienation of state power or sovereignty would exist only in three cases: First, when the Constitution in express terms granted an exclusive authority to the Union; secondly, when it granted in one instance an authority to the Union, and in another prohibited the states from exercising the like authority; and thirdly, when it granted an authority to the Union to which a similar authority in the states would be absolutely and totally contradictory and repugnant. This early exposition of the Constitution has been repeatedly and uniformly approved by subsequent writers on the subject of constitutional law. 1 Kent, Com. 387; *Calder v. Bull*, 3 Dall. 386, 1 L. ed. 648; *Sturges v. Crowninshield*, 4 Wheat. 193, 4 L. ed. 548; *Houston v. Moore*, 5 Wheat. 1, 5 L. ed. 19; 3 Story, Const. 619; *Sergeant, Const. L.* 275. And it is affirmed, by the same authorities, that a mere grant of power in affirmative terms, does not, per se, transfer an exclusive sovereignty on such subjects to the Union. In all cases not falling within either of the classes already mentioned, the states retain either the sole power, or a power which they may exercise concurrently with Congress. This results not only from the general principles on which the Union is founded, but is within the letter of the 10th article of the Amendments to the Constitution, which declares that 'the powers not delegated to the United States by the Constitution, nor prohibited by

it to the states, are reserved to the states respectively or to the people.'" *Harlan v. People*, 1 Dougl. (Mich.) 210.

In this case it was held that the several states, concurrently with Congress, may exercise the power of punishing counterfeiting of the current coin of the United States. The ruling has been followed in a number of other cases. *State v. Pitman*, 3 S. C. L. (1 Brev.) 32, 2 Am. Dec. 645; *State v. Antonio*, 5 S. C. L. (3 Brev.) 562; *Re Truman*, 44 Mo. 181, where, in an earlier decision to the contrary, *Mattison v. State*, 3 Mo. 421, was overruled; *Fox v. Ohio*, 5 How. 410, 12 L. ed. 213; *Cross v. North Carolina*, 132 U. S. 131, 33 L. ed. 287, 10 Sup. Ct. Rep. 47. Contra: *Rouse v. State*, 4 Ga. 136; *State v. Brown*, 2 Or. 221. It has been held that a state ceding to the United States exclusive jurisdiction over a tract of land within its limits reserves to itself the right to take private property therein; if the United States do not dissent, their acceptance of the grant with the reservation will be presumed. *Ft. Leavenworth R. Co. v. Lowe*, 114 U. S. 525, 29 L. ed. 264, 5 Sup. Ct. Rep. 995. It is not unusual for states to cede territory within their limits to the United States, reserving concurrent jurisdiction over such territory to enforce the criminal laws of the states. An interesting discussion of the relative powers of the states and the Federal government will be found in *Prigg v. Pennsylvania*, 16 Pet. 611, 662, 663, 10 L. ed. 1087, 1106, 1107, and *Moore v. Illinois*, 14 How. 13, 14 L. ed. 306. In the former case, which involves the construction of the Federal Constitution in regard to the reclamation of fugitive slaves, and whether that provision was exclusive or concurrent with the states, Mr. Justice M'Lean, in dissenting, said: "How a power exercised by one sovereignty can be called concurrent, which may be abrogated by another, I cannot comprehend. A concurrent power, from its nature, I had supposed must be equal. If the Federal

government, by legislating on the subject, annuls all state legislation on the same subject, it must follow that the power is in the Federal government, and not in the state. Taxation is a power common to a state and the general government, and it is exercised by each, independently of the other; and this must be the character of all concurrent powers. . . . The powers which belong to a state are exercised independently. In its sphere of sovereignty, it stands on an equality with the Federal government, and is not subject to its control. It would be as dangerous, as humiliating, to the rights of a state, to hold that its legislative powers were exercised, to any extent and under any circumstances, subject to the paramount action of Congress. Such a doctrine would lead to serious and dangerous conflicts of power."

The expression is also credited to this learned jurist that "concurrent power excludes the idea of a dependent power."

In the case of *M'Culloch v. Maryland*, 4 Wheat. 405, 406, 410, 429, 4 L. ed. 601, 602, 607, where the court was discussing the power of the Congress to incorporate a bank and the power of a state to tax the same, it was said by Chief Justice Marshall: "If any one proposition could command the universal assent of mankind, we might expect it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action." "The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the Constitution, form the supreme law of the land." "The creation of a corporation, it is said, appertains to sovereignty. This is admitted. But to what portion of sovereignty does it appertain? Does it belong to one more than to another? In America, the powers of sovereignty are divided between the government of the Union, and those of the states. They are each sovereign with respect to the objects committed to it,

and neither sovereign with respect to the objects committed to the other." "If we measure the power of taxation residing in a state, by the extent of sovereignty which the people of a single state possess, and can confer on its government, we have an intelligible standard, applicable to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and property of a state unimpaired, which leaves to a state the command of all its resources, and which places beyond its reach all those powers which are conferred by the people of the United States on the government of the Union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the states and safe for the Union. We are relieved, as we ought to be, from clashing sovereignty; from interfering powers; from a repugnancy between a right in one government to pull down what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy what there is a right in another to preserve."

The sphere, therefore, in which the Congress, under the 18th Amendment, may legislate for the enforcement of prohibition, is limited to the precise terms stated in the Amendment, to wit, "concurrent enforcement." "No court of justice can be authorized so to construe any clause of the Constitution as to defeat its obvious ends, when another construction, equally accordant with the words and sense thereof, will enforce and protect them." *Prigg v. Pennsylvania*, *supra*. The intent of the 18th Amendment is obvious. There can be no confusion or difference of opinion as to what Congress proposed to the states, and what the states understood when they ratified the proposal as a part of the Constitution of the United States. We know, as a matter of current history, that the subject had undergone elaborate discussions in the press

and in the deliberations of the Congress. As the proposal originally passed the Senate, it provided that "the Congress shall have power to enforce this article by appropriate legislation." When it was considered in the House of Representatives, at the threshold of its discussion an amendment was proposed by the judiciary committee of the House, providing that "the Congress and the several states shall have concurrent power to enforce this article by appropriate legislation." After thorough debate developing that subject and its importance, the amendment proposed in the House was adopted and subsequently was concurred in by the Senate, and as amended it is now a part of the Constitution of the United States. During the debate in the House the crime of counterfeiting and similar questions were mentioned, and the question was propounded by Mr. De-
walt to Mr. Webb, chairman of the judiciary committee having the measure in charge: "Suppose that [state] law was not in conformance with the regulations as passed by Congress for the enforcement of this provision, having, as you say, for this clause, concurrent power. Which of the two powers would be supreme, if any?"

To which Mr. Webb replied: "The one getting jurisdiction first, because both powers would be supreme, and one supreme power would have no right to take the case away from another supreme power. . . . Both powers are supreme to enforce this article, and the first getting jurisdiction would enforce it." 56 Congressional Record, pt. 1, p. 424.

Mr. Cannon, of Illinois, propounded the further question: "If the gentlemen will allow me, under the police powers of the state every state can prohibit within its boundaries the manufacture and sale."

To which Mr. Webb replied: "Indeed, within its boundaries. And that is what we want to permit them to continue to do. We do not want 10,000 Federal officers, with all the

expense of salaries, going over the country enforcing these laws, when the states have their own officers to do so and are willing to do so."

Mr. Graham, the leader of the opposition, said: "I call your attention to § 2 of the article, which says that the United States and the states shall have concurrent jurisdiction—two sovereign powers to be exercised in company. The state may pass its legislation, may attempt to enforce the law in its way, and the United States in another way." *Id.* p. 464.

For interesting discussions, see 8 Cal. L. Rev. 207; 33 Harvard L. Rev. 968; 91 Cent. L. J. 1; 91 Cent. L. J. 205.

It may be suggested that concurrent power to enforce may result in one being twice put in jeopardy for the same offense; and that, if each of the forty-eight states retain the sovereign power to enforce the Amendment, a lack of uniformity in the punishments may result. These questions likewise were thoroughly considered by the Congress, as shown by the debates. The constitutional inhibition against being twice put in jeopardy for the same offense was also considered in *State v. Antonio*, supra, and, as suggested by the deliberations in Congress, it was said that the plea of *autrefois acquit* and *autrefois convict* would doubtless be applicable. We are not, however, confronted with that question at present. The lack of uniformity, it may be suggested, will be no greater than did obtain throughout all of the states prior to the ratification of the 18th Amendment, where prohibition as to intoxicating liquors existed. Indeed, it may be said that this lack of uniformity obtains in the same state, as scarcely any two judges agreed exactly on a schedule of punishments; the statute having allowed a wide margin within which legal punishment might be inflicted. Under the terms of the 10th Amendment to the Constitution of the United States, as universally construed, the states, prior to the ratification of

the 18th Amendment, possessed the exclusive power over this subject; therefore, when they delegated to the United States the "concurrent power" to enforce the Amendment, they delegated only a part of their sovereign power over the subject. They parted with none of their own power "to enforce" prohibition within their own sphere of action. The Amendment and legislation

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thereunder by the Congress do not impair the integrity of any existing state statute to enforce prohibition, nor can it interfere with the enactment of any future legislation by the states for that purpose. From a consideration of the question as above presented, we reject the view that the legislation of Congress will supersede and abrogate the laws of the state which are appropriate for the enforcement of the Amendment. We conclude that the power of Congress and of the state is equal and may be exercised by the several states for the purpose of enforcement, concurrently within their legitimate constitutional spheres. *Ex parte Guerra*, — Vt. —, 10 A.L.R. 1560, 110 Atl. 224, and authorities cited. The first section of the Amendment is in no way affected or qualified by the words "concurrent

power," found in the second section. The court did not err in rendering a judgment refusing to release the petitioner on writ of habeas corpus.

Judgment affirmed.

All the Justices concur.

Fish, Ch. J., concurs in the judgment.

Atkinson, J., concurs in the judgment, but not in all that is said in the opinion. It is alleged in the petition for habeas corpus that the petitioner is held by the respondent, an officer, under an accusation in the city court, charging him with having in his possession, custody, and control certain intoxicating liquors. For a person to have in his possession, custody, or control any intoxicating liquors in this state is an offense under the state law. It is not an offense under the 18th Amendment to the United States Constitution and the act of Congress designed to carry that provision of the Constitution into effect. Under no view could it be said that the Amendment to the Federal Constitution, and the act of Congress referred to, had the effect of superseding or in any wise changing so much of the state statute as made it an offense for a person to have intoxicating liquors in his possession, custody, or control.

ANNOTATION.

Federal constitutional or legislative provisions as to intoxicating liquors, as affecting state legislation.

The earlier cases upon this question are discussed in the annotation in 10 A.L.R. 1587. The cases decided since the date of that annotation bear out the construction as to the effect of the 18th Amendment and the act of Congress commonly known as the Volstead Act, given by the earlier cases, to the effect that the Amendment and the act of Congress do not invalidate all state legislation, but only such as conflicts therewith. *Shreveport v. Marx* (1920) — La. —, 86 So. 602; *State v. Fore* (1920) — N. C. —, 105 S. E. 334.

The effect of the Amendment and the act of Congress might be otherwise, according to the court in *Shreveport v. Marx*, were it not for the provision in the Amendment as to concurrent power. That court says: "It is contended by defendant that, inasmuch as Congress under the 18th Amendment has dealt in detail with the manufacture, sale, transportation, importation, and exportation of intoxicating liquors, all state legislation and municipal ordinances passed prior to such legislation have been repealed or superseded by the Federal law. In

view of the apparent purpose of Congress to deal with the whole subject of prohibition, this would doubtless be true if it were not for the fact that the very Amendment itself gives or reserves to the states concurrent power to enforce it by appropriate legislation. . . . It follows that, unless there be some conflict in the act of Congress with that of the state, the article in question itself affords a complete answer to the contention, since state legislation would only have to yield to that of Congress, because of the paramount authority of the latter in enforcing the Federal Constitution. The purpose, both of the Amendment and of the Volstead Act, was and is the enforcing of prohibition, and only such legislation as might tend to defeat that purpose would produce such a conflict; while, on the other hand, any law which had

the effect of aiding in its accomplishment could not be said to impede either Amendment or statute, although the state statute might provide additional or identical means to the common end; otherwise the clause giving concurrent power to the states to enforce the Amendment would be meaningless."

It was held in *State v. Fore* (N. C.) *supra*, that a statute making it a crime to have liquor in one's possession for the purpose of sale was not superseded by the 18th Amendment and the Volstead Act, since such a statute "is in aid of and carries out the purpose of both." The prosecution, in *Shreveport v. Marx* (La.) *supra*, was for operating a blind tiger, and apparently the state statute involved related to this offense; but the provisions thereof are not set out in the opinion. W. A. E.

NORWICH UNION FIRE INSURANCE COMPANY, Appt.,
v.
STANDARD DRUG COMPANY.

Mississippi Supreme Court (In Banc) — February 23, 1920.

(121 Miss. 510, 83 So. 676.)

Judge — disqualification — relationship to attorney — contingent fee.

A judge is not disqualified by the fact that his kinsman is retained by a party to the suit on a contingent fee, where the statute disqualifies him if a party to the suit shall be connected with him by affinity or consanguinity.

[See note on this question beginning on page 1325.]

APPEAL by defendant from an order of the Chancery Court for Lauderdale County (Tann, Ch.) overruling a motion of suggestion of disqualification of the Chancellor because of kinship to an attorney employed in the case. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. R. L. McLaurin, J. R. Byrd, and Baskin & Wilbourne, for appellant:

The chancellor erred in refusing to recuse.

Yazoo & M. Valley R. Co. v. Kirk, 102 Miss. 41, 42 L.R.A. (N.S.) 1172, 58 So. 710, 834, Ann. Cas. 1914C, 968; *Dodd v. Kelly*, 107 Miss. 471, 65 So.

561; *Nimocks v. McGehee*, 97 Miss. 321, 52 So. 626; *Brown v. Brown*, 103 Kan. 53, L.R.A. 1918F, 1033, 172 Pac. 1005; *State ex rel. Mayo v. Pitchford*, 43 Okla. 105, 141 Pac. 433.

Messrs. Amis & Dunn, for appellee:

Under the terms of his contract of employment Judge Byrd has no interest or share in the subject-matter of

this suit, nor will he have any interest or share in the proceeds of any judgment that may be rendered therein, therefore he is not, in any sense of the term, a party to the suit; and since he is not a party to the suit his relationship to Chancellor Tann is not a ground of disqualification of the chancellor to try the same.

Patton v. Collier, 90 Tex. 115, 37 S. W. 413; Winston v. Masterson, 87 Tex. 200, 27 S. W. 768; Dunbar v. Wallace, 84 Ark. 231, 105 S. W. 257; Young v. Harris, 146 Ga. 333, 91 S. E. 37; Hughes v. Jones, 116 N. Y. 67, 5 L.R.A. 632, 15 Am. St. Rep. 386, 22 N. E. 446; United States use of Edward Hines Lumber Co. v. Henderlong, 102 Fed. 2; Hunt v. Haven, 52 N. H. 162; Robbins v. Chicago, 4 Wall. 657, 672, 18 L. ed. 427, 430; Green v. Bogue, 158 U. S. 479, 39 L. ed. 1061, 15 Sup. Ct. Rep. 975; Theller v. Hershey, 89 Fed. 575; Hodde v. Susan, 58 Tex. 389; Haney v. Brown, — Tex. Civ. App. —, 46 S. W. 55.

Ethridge, J., delivered the opinion of the court:

The Standard Drug Company filed a suit in the chancery court of Lauderdale county against certain insurance companies, among which was the appellant company, for violating the Anti-trust Laws of the state and for injuries resulting to the complainant by reason of such violations of the statute. The appellant demurred to the bill filed against it, the demurrer was overruled, the cause was appealed to this court, and was affirmed and remanded, as shown in *Norwich Union F. Ins. Co. v. Standard Drug Co.* 117 Miss. 429, 78 So. 353. After the case was remanded appellant was granted leave to amend or plead further. Subsequent to the decision of this court above referred to, a relative of the chancery judge was employed as counsel by the insurance company upon a contingent fee basis; that is, the said attorney was to be paid \$50 in cash and \$450 additional, provided the defendant won all the suits filed by the appellee. Thereafter the defendant in the chancery court filed a suggestion of disqualification of the chancery judge because of his relationship or

kinship to the attorney employed upon the contingent fee basis, as above stated. The complainant contested the suggestion for disqualification, and the chancellor declined to recuse himself, but granted an interlocutory appeal to settle the principles of the case. The attorney so employed on the contingent fee basis was a first cousin of the chancellor, and the sole point presented for decision is whether the chancellor was disqualified by reason of his kinship to the said attorney so employed on the contingent fee basis.

The statutes involved are § 995, Code of 1906 (§ 715, Hemingway's Code), which reads as follows: "Judge Not to Sit When Interested or Related.—The judge of a court shall not preside on the trial of any cause where the parties, or either of them, shall be connected with him by affinity or consanguinity, or where he may be interested in the same, or wherein he may have been of counsel, except by the consent of the judge and of the parties," and § 165 of the state Constitution, which reads as follows: "No judge of any court shall preside on the trial of any cause where the parties or either of them shall be connected with him by affinity or consanguinity, or where he may be interested in the same, except by the consent of the judge and of the parties. Whenever any judge of the supreme court or the judge or chancellor of any district in this state, shall, for any reason, be unable or disqualified to preside at any term of court, or in any case where the attorneys engaged therein shall not agree upon a member of the bar to preside in his place, the governor may commission another, or others, of law knowledge to preside at such term or during such disability or disqualification in the place of the judge or judges so disqualified. Where either party shall desire, the supreme court, for the trial of any cause, shall be composed of three judges. No judgment or decree shall be affirmed by disagreement of two judges constituting a quorum."

This court in the case of Yazoo & M. Valley R. Co. v. Kirk, 102 Miss. 41, 42 L.R.A. (N.S.) 1172, 58 So. 710, 834, Ann. Cas. 1914C, 970, in construing this provision disqualifying judges, held that the trial judge was disqualified to sit in a case where the fee of plaintiff's attorneys, who were brother-in-law and son, respectively, of the trial judge, was to be a percentage of the amount recovered in the action. The agreement in that case reads as follows: "It is agreed in this case that there was no assignment in writing to the attorneys, but that it was agreed with the plaintiff, Kirk, that they were to be paid a certain percentage of the recovery as compensation for their services, that this fact was not known to the attorneys for the defendant until after the trial, and that the circuit judge knew nothing of what the agreement between the plaintiff and his attorneys was until the matter was presented on this motion."

It was also admitted that the attorneys were so related to the circuit judge. This court in that case, in construing the statute above set out, adopted that line of authorities which hold that if the attorney who is interested in the subject-matter of the litigation, though not a formal party to the record, is related to the judge, his relationship to the trial judge disqualifies the trial judge in such case,—the court citing with approval, in that opinion, *Crook v. Newborg*, 124 Ala. 479, 82 Am. St. Rep. 190, 27 So. 432; *Hodde v. Susan*, 58 Tex. 394; *Moses v. Julian*, 45 N. H. 52, 84 Am. Dec. 114; *Roberts v. Roberts*, 115 Ga. 259, 90 Am. St. Rep. 108, 41 S. E. 616; *Johnson v. State*, 87 Ark. 45, 18 L.R.A. (N.S.) 619, 112 S. W. 143, 15 Ann. Cas. 531.

We are asked in the present case to extend the rule so as to make the word "parties" in the above statute include an attorney for the defendant, related as above stated, whose fee is a contingent one, even though he has no contingent interest in the subject-matter of the suit or in the

judgment to be entered. An extensive examination of the authorities fails to disclose any case where an attorney for the defendant on a mere contingent fee disqualifies a judge related to such attorney under a statute similar to the provision of our statute set out. It is relationship to the parties, or either of them, to the suit, that disqualifies a judge, and not his relationship to an attorney in the cause. We have gone farther than the majority of the courts in making an attorney related to the judge and having an interest in a suit a disqualification to a judge, as being a party within the meaning of the law. We adhere to the rule announced in the *Kirk Case*, but decline to extend it further. We believe that the further extension of the meaning of this term, even if we had the power to enlarge upon the statute, would result in greater mischief than good. It is, of course, important that the trial judge be fair and impartial and removed from any improper influences in passing upon the rights of litigants, but to hold with the contention of the appellants would disorganize the judicial system of this state and result in practically unlimited special judges. The word "party," referring to judicial practice, is defined in *Words and Phrases*, 1st series, vol. 6, as follows:

"A party to an action or suit is one who is directly interested in the subject-matter in issue; who has a right to make a defense, control the proceedings, or appeal from the judgment [citing authorities]. . . .

"Though, technically speaking, persons to whose use a suit is pending are not plaintiffs, yet in common parlance they might with propriety be both said to be parties, where such use appears in the suit. . . .

"A party is ordinarily one who has or claims an interest in the subject of an action or proceeding instituted to afford some relief to the one who sets the law in motion against another person or persons. Interest or the claim of interest is the test as to the right to be a party to legal

proceedings, almost without exception."

In the case of *Young v. Harris*, 146 Ga. 333, 91 S. E. 37, the Georgia court, one of the states which we followed in the *Kirk Case*, had a case analogous to the present before it for consideration, and it was held that an attorney whose contract with his client provides that he is to be paid a certain sum in all events and a larger sum if the attorney's client is successful has no such interest in the subject-matter of the litigation as to disqualify the judge, who is a brother of the attorney, from presiding in the case. The court said at page 334 of 146 Ga.: "A judge is not disqualified to preside in a case because his brother is the attorney for one of the parties, and the size of his fee is dependent on his success in the case. There is no statute or canon of law which disqualifies a judge on the ground of relationship to the attorney of one of the parties to a cause. Such disqualification must result only when he has a pecuniary interest in the subject-matter of the litigation."

And on page 335 of 146 Ga., of the same case it is said: "In the instant case the attorney has no interest in the res; he can recover nothing from the adversary party by virtue of his contract with his client, which is altogether outside of the subject-matter of the litigation. Such a contract gives the attorney no more interest in the litigation than if his contract were that his fee should be one sum, should the trial occur at the first term and a different sum should the trial take place at a later term. Were the rule otherwise, it would be impossible for a judge to ever preside in a case where one of the attorneys is a kinsman within the fourth degree of consanguinity or affinity."

If the court should hold that a mere contingent fee, not rooted in the res, paid or agreed to be paid to

a relative of the judge, would disqualify the judge, it would be within the power of the litigant to bring about the disqualification of the judge, even in this court, and even in criminal cases, and a litigant would never have to go to trial so long as he had means to employ attorneys related to the judge on a contingent fee. If this rule were established a man indicted for murder, or other felony, who did not want to stand trial, could wait until the case was called for trial, then employ on a contingent basis some attorney related to the trial judge by blood or marriage, suggest the disqualification of the trial judge, brought about by himself, and refuse to agree to a judge to try the case, and delay the case until a special judge was appointed by the governor and qualified, and then might employ an attorney related to the special judge on similar conditions, and thus disorganize the judicial administration of justice to such degree and to such extent as to produce infinitely more mischief than mere relationship to the trial judge could possibly produce.

We have examined all of the authorities referred to by counsel, and we find no case which warrants us in extending the disqualifications of the judges related to the attorney for the parties on a mere contingent fee. So far as ascertainable from the reports, all cases holding judges disqualified for relationship to attorneys employed on a contingent fee are cases where the attorney's fee was a part of the judgment recovered, or where his fee had to be fixed by the official action of the judge, rather than by the parties employing such attorney. The Chancellor having reached the same conclusion that we have reached, the judgment will be affirmed, and the cause remanded to be proceeded with.

Judge—
disqualification
—relationship
to attorney—
contingent fee.

ANNOTATION.

Relationship to attorney in case as disqualifying judge.

A general rule seems to be that statutes which merely disqualify for relationship to a party do not prevent the judge from sitting in the case if he is related to an attorney in the case.

Colorado.—Patrick v. Crowe (1890) 15 Colo. 543, 25 Pac. 985.

Connecticut.—Casmento v. Barlow Bros. Co. (1910) 83 Conn. 180, 76 Atl. 361.

Georgia.—Adams v. Adams (1920) — Ga. —, 103 S. E. 812.

Michigan.—Maclean v. Scripps (1883) 52 Mich. 214, 17 N. W. 815, 18 N. W. 209; People v. Whitney (1895) 105 Mich. 622, 63 N. W. 765.

Minnesota.—Bryant v. Livermore (1874) 20 Minn. 313, Gil. 271.

New York.—People v. Patrick (1905) 183 N. Y. 53, 75 N. E. 963; Zambetti v. Garton (1908) 113 N. Y. Supp. 804.

Texas.—Patton v. Collier (1896) 90 Tex. 115, 37 S. W. 413.

In *People v. Whitney* (Mich.) *supra*, the attorney, who was related to the judge, was the prosecuting attorney who filed the information, but the court said he was not a party to the suit within the meaning of the statute.

That counsel for plaintiff in a divorce suit is brother-in-law of the presiding judge does not disqualify the judge, if the counsel has no pecuniary interest in the judgment. *Adams v. Adams* (Ga.) *supra*. So it is no ground for a rehearing that a relationship existed between a judge of the appellate court and an attorney who instigated the cause in the lower court, where the record disclosed that other attorneys presented the case. *Maclean v. Scripps* (Mich.) *supra*. And in *People v. Patrick* (N. Y.) *supra*, it was held that there was no impropriety, so as to warrant a rehearing, where the judge who wrote the prevailing opinion was related to an assistant district attorney who appeared at one stage of the proceedings in the lower court.

It does not appear from the report in the case of *Patrick v. Crowe* (Colo.) *supra*, just what the statutory provision was, but the court, in disposing of the contention of prejudice because the brother of the judge was attorney in the case, says that, as such attorney, he might have an influence upon the determination of the case, may be admitted, and yet this influence might arise only from his skill in conducting the defense as an attorney, and be wholly proper. It was, however, suggested that, in the event of another trial, another judge be called in to try the case.

That the judge and one of the attorneys in the case married sisters does not bring them within the provision of a statute disqualifying the judge if he is related by affinity to a party to the controversy within the sixth degree. But the court ordered a new trial in the case, because a doubt existed as to the matter of burden of proof, and it was desirable to avoid any suspicion that the relationship influenced the determination of the case. *Zambetti v. Garton* (N. Y.) *supra*.

Some of the statutes provide for disqualification if the judge is interested in the determination of the case, and it may be argued that he is interested if his relative is attorney in the case, who will, in all probability, benefit by a favorable decision. But the courts have held that if the attorney is employed in such a way that his fee is not contingent on the result of the action, the judge cannot be said to be interested in the determination of the suit, within the meaning of the statute. *Sjoberg v. Nordin* (1880) 26 Minn. 501, 5 N. W. 677; *State v. Ledbetter* (1910) 111 Minn. 110, 126 N. W. 477.

In *Sjoberg v. Nordin* (Minn.) *supra*, the court says a pecuniary interest in the event of the action is the cause of disqualification intended to be raised by the statute, and not a mere bias resulting in partiality or

prejudice in favor of or against either of the parties.

And the court, in the case of *State v. Ledbetter* (Minn.) *supra*, held that the amendment of the statute so as to disqualify the judge so that he may be excluded "for bias," from acting as a judge, does not effect a change in the rule.

The real difficulty in the question arises when the judge will be required to fix the fee of a relative who is attorney in the case, or the attorney has been employed upon a contingent fee so that the pay of the relative depends upon his success in the litigation.

If the attorney for plaintiff in a divorce case applies to the court for allowance of a counsel fee, he becomes a party in interest within the meaning of the statute disqualifying the judge, when he is related to either of the parties, and therefore, if the attorney is related to the judge, the judge becomes disqualified. *Brown v. Brown* (1918) 103 Kan. 53, L.R.A.1918F, 1033, 172 Pac. 1005.

And in *Cavanagh v. District Ct.* (1913) 163 Iowa, 76, 144 N. W. 25, where the matter was only collaterally involved, it was stated that a statute disqualifying a judge from action in any case where he is related to either party within a certain degree prevents a probate judge from making an order directing the payment of a certain fee to counsel, whose associate was the son of the judge, such counsel having agreed with such associate to divide fees with him.

The majority of the cases hold that relationship to an attorney employed upon a contingent fee disqualifies the judge.

Arkansas.—*Johnson v. State* (1908) 87 Ark. 45, 18 L.R.A.(N.S.) 619, 112 S. W. 143, 15 Ann. Cas. 531.

California.—*Howell v. Budd* (1891) 91 Cal. 342, 27 Pac. 747.

Georgia.—*Roberts v. Roberts* (1902) 115 Ga. 259, 90 Am. St. Rep. 108, 41 S. E. 616; *Shuford v. Shuford* (1914) 141 Ga. 407, 81 S. E. 115.

Louisiana.—*White v. McClanahan* (1913) 133 La. 396, 47 L.R.A.(N.S.) 448, 63 So. 61.

Mississippi.—*Yazoo & M. Valley R. Co. v. Kirk* (1912) 102 Miss. 41, 42 L.R.A.(N.S.) 1172, 58 So. 710, 834, Ann. Cas. 1914C, 968.

Oklahoma.—*State ex rel. Mayo v. Pitchford* (1914) 43 Okla. 105, 141 Pac. 433.

South Dakota.—*Re Taber* (1900) 13 S. D. 62, 82 N. W. 398.

In *Re Taber* (S. D.) *supra*, the court stated that the judge became disqualified when his son contracted to prosecute the claims of certain alleged heirs to property involved in the case for a contingent fee, as a basis for determining whether or not the fact rendered the judgment void or merely voidable.

Under a constitutional provision disqualifying a judge where either of the parties is connected with him by affinity or consanguinity, the judge is disqualified if his son is an attorney under an employment calling for a contingent fee. *Yazoo & M. Valley R. Co. v. Kirk* (Miss.) *supra*.

In *White v. McClanahan* (La.) *supra*, it was held that a statute declaring that one of the causes for which a judge shall be recused is his being related to one of the parties in a certain degree applies to a case where the son of the judge was one of the plaintiff's counsel, who were employed upon a purely contingent fee, the court stating that counsel so situated might, in effect, make themselves parties of record, by filing their contracts.

Similarly, in *State ex rel. Mayo v. Pitchford* (Okla.) *supra*, it was held that a statute disqualifying a judge when he is related to any party within a certain degree applies where one of the plaintiff's attorneys of record was the judge's son, and was prosecuting the suit under a contract for a contingent fee, the court pointing out that, under the statute providing for contingent fees, an attorney so acting has, at least, an equitable interest in his client's cause of action.

In *Howell v. Budd* (Cal.) *supra*, it was held that a judge was disqualified from hearing a proceeding to revoke letters of administration, the determination of which would be conclusive as to distribution, by virtue of a stat-

ute disqualifying a judge from hearing a cause when he is related to either party within a certain degree, or is a party, or is interested, where attorneys in the cause were related to the judge within the specified degree, and were in effect equitable owners of a portion of the estate, since the administrator had contracted to convey a portion of the estate to them, conditional upon the outcome of the proceedings.

And by virtue of a constitutional provision disqualifying a judge related within a certain degree to a "party," relationship within such degree to an attorney employed by one of the parties upon a contingent fee is held to disqualify the judge, in *Johnson v. State* (Ark.) *supra*.

So, it was held, in *Vine v. Jones* (1900) 18 S. D. 54, 82 N. W. 82, under a statute requiring a county judge, when he is a party to or personally interested in any proceeding in any probate matter therein, or related to any person so interested within a specified degree, to certify to the circuit court such fact, that he must make such certificate when he is related, within the degree provided by statute, to an attorney who is prosecuting a cause on a contingent fee. Where, under a Code provision, a judge is prohibited from hearing a cause in which he was related to a party within a certain degree, without the consent of all the parties in interest, it was held in *Roberts v. Roberts* (1902) 115 Ga. 259, 90 Am. St. Rep. 108, 41 S. E. 616, that a judge was disqualified from hearing an application for alimony and counsel fees, since he was related to attorneys for the applicant within the specified degree, although certain attorneys' fees had been determined regardless of the outcome of the application. And the court said: "It is the pecuniary interest of the attorney in the result of the case which disqualifies the judge. If the applicant did not ask any allowance of counsel fees, of course, the fact that her counsel was related to the judge, no matter how closely, would not have the effect to disqualify the judge from presiding. The mo-

ment the applicant asks for counsel fees, her counsel becomes pecuniarily interested in the result of the suit, and, so far as these fees are concerned, the counsel are as much parties to the case as if they were parties to the record."

That case was followed in *Shuford v. Shuford* (1914) 141 Ga. 407, 81 S. E. 115, holding that, under a statute disqualifying a judge related to either party within a certain degree, a judge may not sit in a claim case, where one of the counsel, employed upon a contingent fee, is related to the judge within the specified degree.

But there are cases holding under similar statutes, as in the reported case (*NORWICH UNION F. INS. Co. v. STANDARD DRUG Co.* ante, 1821), that the judge is not disqualified because his relative is employed as an attorney in the case upon a contingent fee. *Hundley v. State* (1904) 47 Fla. 172, 36 So. 362; *Young v. Harris* (1916) 146 Ga. 333, 91 S. E. 37; *Allison v. Southern R. Co.* (1901) 129 N. C. 336, 40 S. E. 91; *Winston v. Masterson* (1894) 87 Tex. 200, 27 S. W. 768; *Missouri, K. & T. R. Co. v. Mitcham* (1909) 57 Tex. Civ. App. 134, 121 S. W. 871.

The son-in-law of the trial judge, who is employed for a contingent fee, is not a party to the action within the meaning of a statute disqualifying for relationship to a party within the third degree, and the refusal of the judge to recognize disqualification in such case does not deprive the objecting party of his property without due process of law, nor does it deprive him of the equal protection of the laws. *Missouri, K. & T. R. Co. v. Mitcham* (Tex.) *supra*.

So, under a statute providing that a judge shall not preside over a cause in which he is interested, or is related to a "party" within such degree as to exclude him from jury service, it was held in *Hundley v. State* (Fla.) *supra*, that a judge so related to an attorney employed upon a contingent fee was not disqualified from hearing the cause.

So, under a statute or constitutional provision disqualifying a judge from hearing a cause in which he is in-

terested, or is related within a certain degree to a "party," relationship within such degree to an attorney employed upon a contingent fee is held in some cases not to disqualify the judge.

So, in *Allison v. Southern R. Co.* (1901) 129 N. C. 336, 40 S. E. 91, there is a dictum to the effect that a judge would not be disqualified to preside at a case in which his son was attorney, although he knows the latter is employed on a contingent fee.

But in *Young v. Harris* (1916) 146 Ga. 333, 91 S. E. 37, it was held, in an action by citizen taxpayers to enjoin a county from executing contracts for the building of a courthouse, that a judge was not disqualified because he was related to one of plaintiffs' counsel, who was to receive a certain fee in any event, and more if his clients were successful. The court distinguished *Roberts v. Roberts* (Ga.) *supra*, on the ground that there the attorney was interested in the res, while here he was not.

In *Kirkland v. Kirkland* (1916) 146 Ga. 347, 91 S. E. 119, a mortgage provided for attorney's fees of 10 per cent, if the claim were placed in the hands of an attorney for collection, and the claim was placed in the hands of an attorney for collection, under a special employment whereby he was to be paid a fee by the plaintiffs, not conditioned upon the collection of the fees specified in the mortgage. In a suit brought to enjoin the sale under the mortgage, it was held that the judge was not disqualified by relationship to such attorney.

Of course, if the statute disqualifies for relationship to the attorney, that is conclusive, and in *People v. Ebey* (1907) 6 Cal. App. 769, 93 Pac. 379, it was held that disqualification by relationship to an attorney for a defendant extends to arraignment of prisoners and entry of plea, under a statute disqualifying a judge to sit or act as such in any action or proceeding where he is related within a specified degree to any attorney of either party.

Dunbar v. Wallace (1907) 84 Ark. 231, 105 S. W. 257, merely held that mandamus did not lie to compel a judge to permit the filing of a suggestion of his disqualification to hear a case because the fee of an attorney related to him was contingent. The court says it is not proper nor right to call upon a judge to start an investigation into the fees of attorneys who may be kinsmen of his, in order to find out from such investigation whether there may be disqualification. But the court intimated that a different conclusion might have obtained had an allegation been filed that such attorney had a direct pecuniary interest in such matter of litigation.

Knickerbocker v. Worthing (1904) 138 Mich. 224, 101 N. W. 540, held that where the existence of a contract for a contingent fee by an attorney in the case who was related to the trial judge became known after the beginning of the trial, but the contract was abrogated, it was unnecessary to decide whether or not a disqualification existed within the meaning of the statute.

H. P. F.

J. B. LEE et al., Respts.,
v.

L. W. BOYKIN, Appt.

South Carolina Supreme Court—July 26, 1920.

(— S. C. —, 103 S. E. 777.)

Bills and notes — contribution between joint makers.

1. Persons placing their names on the back of a promissory note before negotiation as joint makers are bound to contribute equally towards its payment.

[See note on this question beginning on page 1332.]

— signers on back — makers.

2. Persons placing their names on the back of a negotiable note before its negotiation, at one time and as part of the same transaction, are joint makers.

[See 3 R. C. L. 1123-1133.]

— contract for contribution.

3. Indorsers of a promissory note

may bind themselves by contract to contribute towards its payment.

[See 3 R. C. L. 1135; 6 R. C. L. 1052.]

— assumption as to intention of indorsers.

4. Stockholders of a corporation who indorse its notes before maturity to raise money necessary for its purposes will be held to have intended to assume a pro rata share of the liability thereon.

APPEAL by defendant from a judgment of the Common Pleas Circuit Court for Kershaw County (Moore, J.) in favor of plaintiffs in an action brought to recover contribution upon certain notes paid by them. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Kirkland & Kirkland for appellant.

Messrs. L. W. Perrin and L. A. Wittkowsky, for respondents:

Plaintiffs and defendant were co-makers or cosureties of the ten notes, and defendant is liable to contribute.

Strasburger v. Myer Strasburger & Co. 167 App. Div. 198, 152 N. Y. Supp. 757; Sloan v. Gibbes, 56 S. C. 480, 76 Am. St. Rep. 559, 35 S. E. 408; Whitley, Bills, Notes, & Checks, 207-211; Russ v. Sadler, 197 Pa. 51, 46 Atl. 903; Wolf v. Hostetter, 182 Pa. 292, 37 Atl. 988; George v. Bacon, 138 App. Div. 208, 123 N. Y. Supp. 103; Weeks v. Parsons, 176 Mass. 570, 58 N. E. 157; Hagerthy v. Phillips, 83 Me. 336, 22 Atl. 223; Cook v. Brown, 62 Mich. 473, 4 Am. St. Rep. 870, 29 N. W. 46; Trego v. Cunningham, 267 Ill. 378, 108 N. E. 350; Re McCord, 174 Fed. 72; McCarty v. Roots, 21 How. 432, 16 L. ed. 162; Kelly v. Burroughs, 102 N. Y. 98, 6 N. E. 109; Egbert v. Hanson, 34 Misc. 596, 70 N. Y. Supp. 383; Easterly v. Barber, 66 N. Y. 433; Guild v. Butler, 127 Mass. 386; Cady v. Shepard, 12 Wis. 640; Witherow v. Slayback, 158 N. Y. 649, 70 Am. St. Rep. 507, 53 N. E. 681; Haddock, B. & Co. v. Haddock, 192 N. Y. 513, 19 L.R.A. (N.S.) 136, 85 N. E. 682; Noble v. Beeman-Spaulding-Woodard Co. 65 Or. 93, 46 L.R.A. (N.S.) 162, 131 Pac. 1006; Owens v. Blackburn, 161 App. Div. 830, 146 N. Y. Supp. 969; Rindskopf v. Simmer, 88 Misc. 28, 150 N. Y. Supp. 73; Yore v. Yore, 240 Mo. 451, 144 S. W. 847; Chandler v. Brainard, 14 Pick. 285; Kimball v. Williams, 51 App. Div. 616, 65 N. Y. Supp. 69; Hardy v. Colby, 42 Me. 381; Mateer v. Cockrill, 18 Tex. Civ. App. 391, 45 S. W. 751; Wilks v. Vaughan, 73 Ark. 174, 83 S. W. 913; 11 A.L.R.—84.

Whitworth v. Howard, 7 Ky. L. Rep. 884; Sexton v. Sexton, 35 Ind. 88; Judd v. Small, 107 Ind. 398, 8 N. E. 284; Goodall v. Wentworth, 20 Me. 322; 9 Cyc. 798.

Gage, J., delivered the opinion of the court:

The plaintiffs and the defendant wrote their names in succession on the back of ten notes, and the question at issue is their relationship one to another thereabout. We shall refer to them as the signers, for "indorser" has a technical meaning.

The plaintiffs paid the notes. The defendant refuses to pay because his name was last written on the note; and he now refuses to contribute, to which end this action was brought. The transaction was had before the enactment of the statute governing negotiable instruments. The master found the facts for the plaintiffs, but the law for the defendant. The circuit court concluded the law for the plaintiffs, having first adopted the master's conclusion of fact. The defendant has appealed by fourteen exceptions, but the controlling ones are directed to three points: (1) That as to each other the signers are indorsers and not makers; (2) that the signers, even if makers, are yet indorsers betwixt themselves, and therefore not liable to contribute unless there was an agreement aforetime to do so; and (3) that there is no proof of any such agreement. The first postulate depends on the testimony and the law; the second is an issue of

law; the third depends upon the testimony and the law too.

The master and the circuit court both concluded that the signers were makers and not indorsers. The testimony sustains that view. The notes were signed before they were floated; the signing was one and the same transaction; it was not done in different time and under different circumstances and with different intent. That

Bills and notes—signers on back—makers. ent intent. That constituted the signers makers of one and the same contract. *Johnston v. McDonald*, 41 S. C. 83, 19 S. E. 65. The later case of *Carolina Sav. Bank v. Florence Tobacco Co.* 45 S. C. 373, 23 S. E. 139, is not to the contrary.

It is true that the lay witnesses referred to the signers as indorsers, but the word "indorser" has a legal and a grammatical meaning; and because the witnesses characterized the signing as an indorsement in law so much did not make it so.

On the second issue the master thought that if the signers were makers of a single contract, as he held they were, then there was "no sound basis" to hold that as between themselves they were not makers, but, on the contrary, were technical indorsers. He, however, yielded his opinion thereabouts to that of a foreign jurisdiction. *Porter v. Huie*, 94 Ark. 333, 28 L.R.A. (N.S.) 1039, 126 S. W. 1069. In that the master was mistaken. The case cited relies up-

—contribution between joint makers. on three authorities, none of which are to the point. The leading authority so cited is *M'Donald v. Magruder*, 3 Pet. 470, 7 L. ed. 744, opinion by Marshall, Ch. J. The facts of that case made the law of it. The first indorser there was suing the second indorser for contribution; "no intercourse had taken place between the indorsers; no contract, express or implied, existed between them;" there was, therefore, no ground to hold the second indorser liable to the first indorser. Not so here; on the contrary, there was a contract betwixt all the signers, so made, as we have held, in

time and circumstance, as to constitute it a single and joint contract; and it had, then, all the incidents of such, one of which was that each signer had a like obligation to the other signers, to the holder, and to each other. The decree of the circuit court thereabout is right.

Coming to the third and last issue, if the signers are makers, and if they bear that relationship to one another, then whether there was any contract betwixt them to occupy that relationship so as to contribute to a common loss fades away. But even though they bear to each other the relationship of technical indorsers, so that each is only liable in his turn, yet each is liable to the other so as to contribute if there was **—contract for contribution.** a contract to that end. The master and the circuit court found that there was such a contract, and that it was evidenced not by words, but by the mute circumstances of the case. And so much is a fact.

It is true that the witnesses made a poor out to prove the contract; but witnesses often do that when it comes to proving a technical point about which a layman is not versed.

It is a matter of common professional knowledge that most witnesses cannot comprehend the difference betwixt a man's reputation and the witnesses' opinion of the man.

When Mr. Lee was on the stand these were the questions on cross-examination and the answers:

Q. Well, you spoke of your understanding about these notes and your liability on them. How did you arrive at that understanding? Whom did you have that understanding with?

A. I never signed a note, but I know I have it to pay if the others do not. I know that, on any paper I indorse.

Q. You had no understanding of your liability, except what you derived from signing them?

A. That was all.

Mr. McKissick testified thus on the same issue:

Q. Mr. McKissick, was there any special personal agreement between the indorsers of these notes that you are aware of, in regard to the payment of these notes?

A. I realized when I indorsed those notes that I was liable for my proportionate part of those notes.

Q. But you did not do that under any particular specific agreement?

A. Not that I know of.

Q. Did you have an understanding that you would be liable in proportion to the amount of stock you held in the company?

A. No, sir; I was a small stockholder, but when I signed the note I found that I was obligated to the extent of any other signers.

Mr. White testified about the same matter as follows: "I considered my liability on these notes to be my pro rata. I expected to pay my part, if demanded by the company or the holders. I have no recollection of any discussion among the signers of these notes as to what part each should pay when the notes matured. No understanding that one should be liable more than another. No understanding as to the way the names appeared on the note."

Mr. Smith testified:

Q. Was there any positive actual agreement between him (Mr. Boykin) and the other parties, as to what the liability of each would be?

A. We had several meetings, and discussed the matter generally that we had these notes, and we came to the conclusion that we had better settle up and relieve the company of that much indebtedness, and for that reason we just paid up, and when we went to pay up we found Mr. Boykin would not pay his part.

So that, literally, these laymen were unable to testify about a "special personal agreement," and a "positive actual agreement," when they were asked about those relationships. But they did testify that

they thought "each signer would pay his pro rata part," and "there was no understanding that one would be liable more than another," and "when I signed the note I found that I was obligated to the extent of any other signer," and "I considered my liability on these notes to be my pro rata."

Another controlling circumstance of the case is this: These seven gentlemen signed the notes to get money to promote their common enterprise; the admitted understanding of all of them, save Boykin, was that each man should be liable for his one seventh of the fund so raised; that was the sense of the matter, and Boykin must have been of the same mind; his name only happened to be last on the paper because he was not on the spot to sign. It is unreasonable to conclude that the signers intended that the first signer should be liable for the whole debt, which was created for the benefit of himself and six others. Three

other gentlemen, alike interested in the enterprise, but perhaps with more money in hand, paid at the outstart their pro rata in cash in the place of signing a note. That is a circumstance which points to the real character of the transaction. It is morally certain that Boykin knew of this exception, and that he understood the whole transaction to be as we have stated it to be. Therefore, while not a word may have been spoken by the signers to indicate what the liability of each one should be at the wind-up, yet the circumstances of the case indicate as certainly as words could do that which the signers intended thereabout; and that constitutes a contract.

The other issues are minor, and are drawn into these which we have decided.

The judgment is affirmed.

Gary, Ch. J., and Watts and Fraser, JJ., concur.

Hydrick, J., disqualified.

ANNOTATION.

Necessity of express agreement between indorsers to be jointly and not successively liable, in order to give a right of contribution as between themselves.

It is a rule generally recognized that, where a number of persons successively indorse a bill or note, the prima facie effect of the indorsement is to render the indorsers successively liable in the order in which they appear, and not to make them jointly liable; and this rule is applied in case of accommodation indorsements. 3 R. C. L. p. 1133, § 348; Dan. Neg. Inst. § 703 (8). The Negotiable Instruments Law provides that the indorsers are prima facie liable in the order in which they indorse, but evidence is admissible to show that as between themselves they agreed otherwise. That law thus expressly recognizes the right of the parties by agreement to vary this liability, and this right was recognized by the decisions prior to the law; the indorsers may by contract impose a joint instead of a several liability upon themselves, in which event contribution may be enforced as between them. 3 R. C. L. p. 1133, § 348; Dan. Neg. Inst. § 703 (8).

Assuming this to be the rule, the present note is concerned with an investigation of whether the contract that the parties shall be jointly liable, referred to in the rule, may be implied from circumstances, or whether an express agreement is necessary.

The present note has been confined to cases in which the parties were treated as indorsers. In some instances, accommodation parties who sign on the back of a note before its inception are held to be joint makers, and not indorsers. See *Keyser v. Warfield* (1904) 100 Md. 72, 59 Atl. 189, s. c. on subsequent appeal (1912) 119 Md. 158, 86 Atl. 152; *Logan v. Ogden* (1898) 101 Tenn. 392, 47 S. W. 489. At least, the order of signing in such case is held to raise no presumption of any obligation among themselves different from that which grows out of the other facts in the case. *Pitkin*

v. Flanagan (1851) 23 Vt. 160, 56 Am. Dec. 61. An exception to the general rule above stated has been held to exist where accommodation indorsers sign the note at the same time, one after the other, and at the same time that it is signed by the accommodated party, it being held in such case that the indorsers in fact become the sureties for the maker, and not indorsers in succession. *Weaver-Dowdy Co. v. Brewer* (1917) 127 Ark. 462, 192 S. W. 902. In such a case a surety who pays off the note is entitled to contribution from indorsers whose names appear prior to his own, but he is not entitled to recover the entire amount paid by him. The accommodation parties involved in this case were stockholders in the corporation which was the maker of the note, except the plaintiff, who formerly had been a stockholder, but who, upon retirement and sale of his stock to the other indorsers, expressly agreed to continue to indorse for the corporation, so long as it should need his indorsement, and especially until the indebtedness which was the subject-matter of the suit in question was paid off.

The language often used in stating the rule implies that an express agreement is necessary, but with the exception of *Re McCord* (1909) 174 Fed. 72, the cases which have considered the question support the rule that a contract such as will render the indorsers liable jointly and not successively may be inferred from circumstances. *Trego v. Cunningham* (1915) 267 Ill. 367, 108 N. E. 350 (decided under the Negotiable Instruments Law); *Weeks v. Parsons* (1900) 176 Mass. 570, 58 N. E. 157; *George v. Bacon* (1910) 138 App. Div. 208, 123 N. Y. Supp. 103; *Strasburger v. Myer Strasburger & Co.* (1915) 167 App. Div. 198, 152 N. Y. Supp. 757, and *Reeder v. Union Trust Co.* (1917) 26 Pa. Dist. R. 833 (decided under Negotiable

Instruments Law); *Plumley v. First Nat. Bank* (1915) 76 W. Va. 635, 87 S. E. 94; *Macdonald v. Whitfield* (1883) L. R. 8 App. Cas. 733, 52 L. J. P. C. N. S. 70, 49 L. T. N. S. 446, 32 Week. Rep. 730, 4 Eng. Rul. Cas. 531.

In addition to the foregoing cases, there are others in which the question was not fairly raised, but which impliedly support the above rule. In *Armstrong v. Cook* (1868) 30 Ind. 22, an action by the payee of a note against the maker and an indorser thereof, the indorser defended on the ground that he indorsed the note with the distinct understanding that the payee would also indorse it, for the purpose of having it discounted to raise money for the benefit of the maker. The court states that if this had been done there would have been created between the indorser and the payee the relation of cosureties with the liability of contribution if either should be obliged to pay the debt. A finding that the indorsers were jointly liable and thus liable to contribution was sustained in *Hagerthy v. Phillips* (1891) 83 Me. 336, 22 Atl. 223, where a person desiring the indorsement of the parties saw them separately, and asked each if he would indorse the note, provided the others would, and all consented to do so, nothing being said by him or them in relation to the order of indorsement, and the indorsements being afterwards obtained just as he happened to find the parties, without design as to who should sign first or last. This court, in sustaining the finding of the jury that the indorsers assumed the joint liability, after referring to the above facts and to the additional fact that not a word was spoken by any indorser to another during the negotiation, continues: "Each promised to sign if others would. If the act done was the act promised to be done, the order of signing was immaterial, because it was not a qualification of the promise. Each indorser made precisely the same promise. Either was as much entitled to sign last as the other. The first and second signers required assurance that the third would sign, a useless formality if their risk was not

lessened thereby. They understood that the indorsers were to be holden alike, basing their conclusion on precisely the same facts that were presented to the defendant [the last indorser] to induce him to sign. The request of Mason was that the defendant would indorse for him, not for others. The idea was to divide the risk among his friends. The defendant's promise was not to indorse last, but to indorse. He was not to do an act alone,—the three were to do the act. The three did it, sharing obligation and risk alike. If the defendant be let out, the result would be that he did not assist his friend. Others furnished the assistance, who were sufficiently responsible to make the note good without defendant's name." A finding of fact that the accommodation indorsers of a note were jointly liable seems to have been based upon the circumstances in *Preston v. Gould* (1884) 64 Iowa, 44, 19 N. W. 834. The question does not seem to have been fairly raised in *Middleton v. McCartee* (1883) 2 Mackey (D. C.) 420, although in that case the court holds that, where the directors of a corporation indorse a corporate note in pursuance of a corporate resolution to make the note, the parties are jointly liable so that the last indorser who has paid the note can recover only a proportionate share from the prior indorser. The contention of the prior indorser in this case, however, was that there was an agreement that he should not be liable at all.

There are also other cases which arrive at the conclusion that the indorsers are jointly liable, but which reach this conclusion, not on the theory that the circumstances implied a contract which took the cases out of the general rule above stated, but that under the circumstances the parties were prima facie jointly, and not successively, liable. This difference, however, amounts only to a difference in expression. *Slaymaker v. Gundacker* (1823) 10 Serg. & R. (Pa.) 75; *Marquardt's Estate* (1915) 251 Pa. 73, 95 Atl. 917. See *infra*, for further discussion of these cases.

In holding that circumstances are

sufficient to show a contract to be jointly and not successively liable, the court in *Trego v. Cunningham* (1915) 267 Ill. 367, 108 N. E. 350, says: "Of course, it is not essential that a verbal agreement that the indorsers should be equally liable should be proved, but an inference of such an agreement may be otherwise established. The understanding of the parties in that regard may be proved like any other fact, by the circumstances surrounding them. In this case the indorsers constituted the entire body of stockholders of the corporation, of which they were also directors, and to keep the corporation running it was necessary for them to indorse notes. It would be quite unreasonable to say that there was any intention that their liability should be determined by the order in which they indorsed the notes, or that they expected to sue each other in that order. The notes were made for their benefit equally, to raise money for the corporation whose assets and property belonged to them." In holding that the corporate directors who signed a note for the accommodation of the corporation were jointly liable thereon, the court, in *Weeks v. Parsons* (1900) 176 Mass. 570, 58 N. E. 157, says: "It was not necessary that there should be a contract in so many words to sign as cosureties. It was sufficient if it appeared, taking all of the circumstances into account, that that was the nature of the liability which, as between themselves, the parties intended to assume, and did assume." The prima facie presumption that the indorsers are liable in the order in which they indorse, prescribed by the Negotiable Instruments Law, disappears if there is sufficient evidence to justify a finding that the parties otherwise agreed among themselves. It is not necessary that there should be proof of an actual formal contract in so many words. It is sufficient if the surrounding circumstances indicate that the indorsements were made upon the understanding that all the indorsers should participate in the liability. *George v. Bacon* (1910) 138 App. Div. 208, 123 N. Y. Supp. 103.

A leading case upon this question is *Macdonald v. Whitfield* (1883) L. R. 8 App. Oas. 733, 4 Eng. Rul. Cas. 530. In that case a note given for the accommodation of the corporation was made payable to the president, who indorsed it, followed by the indorsement of other directors; one of the subsequent indorsers attempted to relieve himself of liability upon the theory that the prior indorser was liable for the whole amount; the prior indorser did not attempt to establish an independent collateral agreement by the other indorsers to contribute equally with him and the other indorsers in the event of the company's failure to make payment of the note in question, but relied upon the facts proved with respect to the making and issuing of the notes as sufficient in themselves to create the legal inference. All the directors of the company put their signatures upon the notes in pursuance of a mutual agreement to be cosureties for the company. The court concludes that this "is the proper legal inference to be derived from the circumstances of the present case." The court further says: "The respondent insists, and the court below seems to have held, that in determining the rights and liabilities inter se of these indorsers for the accommodation of the company, regard must be had, not to the contract in pursuance of which they became indorsers, but to the order of their indorsement as evidencing the terms of their contract. That doctrine appears to their lordships to be at variance with the principles of the English law. In a case like the present, the signing of their names on the note by way of indorsement in order to induce the bank to discount it to the promisor is not, as between the indorsers, *pars contractus*, but is merely the performance by them of an antecedent agreement. The terms of that previous contract must settle their liabilities inter se, irrespective altogether of the rules of the law merchant, which will, nevertheless, be binding upon them in any question with parties to the note who were not likewise parties to the agreement." That the previous agreement

settles the liability is the theory of the court in *Bank of United States v. Beirne* (1844) 1 Gratt. (Va.) 234, 42 Am. Dec. 551, where the court states that when two or more persons are sureties for another, the law implies a promise from each to the other to contribute equally toward any loss which may be occasioned thereby; but that, if they become sureties by successive indorsements on mercantile paper, the law presumes that they intended to become successively liable. It is then stated that, "if there was a previous communication between them which resulted in an agreement to become indorsers for the accommodation of the drawer, the latter presumption is removed [the presumption that they were successively liable] and the original one restored [the presumption that they were to contribute equally]." The indorsement was made in *Macdonald v. Whitfield*, after the directors of the corporation had been notified that the bank required their personal indorsements upon the corporate note, and the directors agreed to give the indorsements.

It has not been attempted in the present note to make an exhaustive investigation of the facts and circumstances sufficient to raise an agreement that the parties are to be jointly and not successively liable. A circumstance from which an agreement to be jointly liable has been inferred is that the indorsers were stockholders in a corporation which was the maker of the note, and the note was given to raise money for corporate purposes. *Trego v. Cunningham* (1915) 267 Ill. 367, 108 N. E. 350; *Weeks v. Parsons* (1900) 176 Mass. 570, 58 N. E. 157; *Strasburger v. Myer Strasburger & Co.* (1915) 167 App. Div. 198, 152 N. Y. Supp. 757; *George v. Bacon* (1910) 138 App. Div. 208, 123 N. Y. Supp. 103; *Plumley v. First Nat. Bank* (1915) 76 W. Va. 635, 87 S. E. 94; *Macdonald v. Whitfield* (1883) L. R. 8 App. Cas. 733, 52 L. J. P. C. N. S. 70, 49 L. T. N. S. 446, 32 Week. Rep. 730, 4 Eng. Rul. Cas. 531. In *George v. Bacon* (1910) 138 App. Div. 208, 123 N. Y. Supp. 103, the note was that of an incorporated company, and the indorsers were of-

ficers of the corporation and the wife of an officer.

A case of considerable interest in this connection is *Strasburger v. Myer Strasburger & Co.* (1915) 167 App. Div. 198, 152 N. Y. Supp. 757. In that case a corporation note was indorsed for accommodation by its president, vice president, and secretary and treasurer; the vice president took no active interest in the management of the corporation; the circumstances under which the indorsement was made were as follows: The president and secretary and treasurer took the corporate note to a bank and presented it for discount; the discount was refused unless the individual indorsements of the officers, as above stated, were obtained, whereupon the president and secretary and treasurer indorsed the note individually, and then presented it to the vice president, who indorsed it after the names of the secretary and treasurer; there was no evidence of any express agreement with respect to the indorsement, or with respect to whether any information was communicated to the vice president other than the presentation of the note for indorsement; the note was then discounted, and, upon dishonor at maturity, paid by the vice president, who brought the action against the prior indorser, attempting to recover the full amount thus paid. In holding that the vice president was entitled only to contribution, the court states that the common interest of the parties as owners in separate shares of the entire capital stock of the corporation "doubtless impelled them thus to become accommodation indorsers, with a view to protecting their financial interests, and in such circumstances the presumption arising from the order in which the names of the indorsers appear, if not overcome as matter of law, is sufficiently overcome, at least, to raise a question of fact as to whether it was not the intention of the parties to become jointly liable as sureties for the corporation, and not liable to one another according to the order of their respective indorsements." There is a strong dissenting opinion from this decision

by Ingraham, P. J. He argues as follows: "There is absolutely no evidence, so far as I can see, that would justify a jury in finding that there was any agreement that the indorsers on this promissory note should be jointly liable as sureties for the corporation. In the prevailing opinion it is assumed that the plaintiff and her son and the appellant were doubtlessly impelled to become accommodation indorsers with a view to protecting their financial interests. This is pure assumption, merely based upon the fact that the plaintiff owned some capital stock in the corporation for whose accommodation the note was given. The plaintiff had nothing to do with the actual management of the business of the corporation. She indorsed the notes after the other individual indorsers, and I think was entitled to the benefit of § 118 of the Negotiable Instruments Law (Consol. Laws, chap. 38, Laws 1909, chap. 43), which provides: 'As respects one another, indorsers are liable prima facie in the order in which they indorse; but evidence is admissible to show that, as between or among themselves, they have agreed otherwise. . . .'

To justify the court in disregarding this express provision of law, there must be evidence to show that as between themselves they have agreed otherwise. It is conceded that there was no such evidence except a presumption which arises because of the fact that the plaintiff had owned stock in the corporation. This seems to me to be utterly insufficient to justify the presumption of an agreement to be jointly liable as sureties for the corporation. It is not, as I view it, the intention of the parties that controls, but to justify a reversal of this judgment there must be evidence of an agreement between the indorsers. *George v. Bacon* (N. Y.) *supra*, relied upon by the appellant, presented an entirely different state of facts. There, there was evidence that, the court held, justified the inference of an express agreement. In this case there is no such evidence except the mere fact that the plaintiff was the owner of stock of the corporation, and the

mere fact that the plaintiff was the owner of stock of the corporation for whose accommodation the note was given is not evidence to sustain a finding of such an agreement."

An agreement that the directors of a corporation who indorsed the corporate notes should be jointly liable was held to be necessarily implied in *Reeder v. Union Trust Co.* (1917) 26 Pa. Dist. R. 833, from the fact that the indorsers were directors of the corporation and equally interested in the success of the enterprise, that the money raised by the sale of the notes was for the purposes of the corporation, and was given to and used by it in the conduct of its business, although nothing was said as to the order of the indorsements, either on the note in question or any previous one, from the time the money was borrowed, but each one indorsed, as the note was presented to him. On three of the notes given in renewal of the original one, the name of the plaintiff appeared as the last indorser, twice as the third indorser, and twice as the second indorser. The court states that he thus three times gave up the position that made the others liable to him, if there was no implied agreement that they were all to be equally liable for the payment of the note, and that the other indorsers did the same thing on the different notes.

That the indorsees are jointly liable in such a situation is recognized in *Marquardt's Estate* (1915) 251 Pa. 73, 95 Atl. 917, where, in order to obtain corporate funds, the directors indorsed a corporate note. The court, after stating that to apply the law of merchants to such a note would give to any indorser who might be compelled to pay, recourse upon all prior indorsers who, in their turn, might pass the ultimate liability upon a drawer who was without other interest in the transaction that was common to all, expresses an opinion that this was not the understanding of the parties, as follows: "Certainly the note was not given with the understanding that the liability of the several parties was to be measured by any such rule. It will not be pre-

tended for a moment that mutual responsibility did not here exist in case of loss." This case, however, seems rather to deny the existence of the rule in such a situation than to raise an implied agreement that creates an exception to the rule. The earlier case of *Slaymaker v. Gundacker* (1823) 10 Serg. & R. (Pa.) 75, is relied upon. In that case, the court, in discussing the relation between the maker and indorsers of a note, says: "In considering these questions it is always to be kept in view that the money was borrowed for the use of the turnpike company, and applied to the payment of its debts. The maker and indorsers of the note of November, 1813, therefore, were, with respect to each other, in the nature of sureties for the company, and as such there can be no doubt, in the absence of all special agreement, there existed between them a mutual responsibility in case of loss. The principle of contribution arose from the nature of their situation."

The only dissent from the theory above discussed is found in *Re McCord* (1909) 174 Fed. 72, reversed on other grounds in (1909) 98 C. C. A. 623, 174 Fed. 820. In that case, the court requires a "specific" or "ex-

press" agreement, in order to change the character of liability from successive to joint. The question is discussed there as follows: "I do not understand that from the mere facts that indorsers are accommodation indorsers, and known to each other to be so, is sufficient, without proof of an express agreement, to change the general rule of law that prior indorsers are liable in solido to subsequent indorsers who have paid a note. There must be, as I understand the rule, a specific agreement as between the various indorsers that they shall only be liable ratably. If there is no such agreement the law fixes their liability in accordance with the order of the names on the paper." The court concluded that "under the fundamental principles governing the law of mercantile paper, and the express provisions of the Negotiable Instruments Law, §§ 55, 114, 118" (N. Y. Law), the last indorser was entitled to reimbursement in full by the prior indorsers. In this case, the indorsements were for the accommodation of certain corporations. The relation of the indorsers to the corporations does not appear.

W. A. E.

ANNA JOHNSON
v.
CITY OF HUNTINGTON.

West Virginia Supreme Court of Appeals — April 3, 1917.

(80 W. Va. 178, 92 S. E. 344.)

Highway — obstruction — liability of city.

1. If the act which a city licenses a person to commit in a street within its limits is not unlawful or inherently dangerous, so as to become a public nuisance, and injury flows merely in consequence of the negligent manner in which the act is performed, the city is not liable.

[See note on this question beginning on page 1343.]

— injury — liability of municipality.

2. Although § 56a49, chap. 43, Code 1913 (§ 1815), makes absolute the duty of a municipal corporation to keep and maintain its streets in a reasonably safe condition for the public use there-

by intended, it does not necessarily follow that a municipality is liable for injuries inflicted on the highway by persons using it in a lawful and proper manner.

[See 13 R. C. L. 385, 386.]

Headnotes by LYNCH, P.

— liability of abutting owner.

3. If the injury is caused by the negligence of the owner of property in the process of improvement by the construction of a building thereon adjacent to the sidewalk, or by the contractor engaged in making the improvement, the owner or contractor generally is liable primarily for the consequences of the negligent act, although in some circumstances the municipality may also be liable.

— joint liability.

4. Where it is equally the duty of such municipality and the owner of abutting property to keep and maintain a sidewalk in repair and reasonably safe, it will be liable jointly or severally with such owner to one who is injured in consequence of his neglect to do so.

[See 13 R. C. L. 493.]

— obstruction — nuisance.

5. Not every obstruction to the free use of a public street, whether authorized or unauthorized by a municipal corporation, irrespective of its character or purpose, constitutes a nuisance or is actionable in damages. The right of the public to the free and unobstructed use of the highway is subject to reasonable and necessary limitations and restrictions.

[See 13 R. C. L. 210.]

— permitted obstruction.

6. In case of necessity, as the erection or repair of buildings upon adjacent, private property, a municipality may permit a temporary obstruction of a street or sidewalk, but is bound to take proper precaution to warn the public of the danger occasioned by the obstruction.

[See 13 R. C. L. 435.]

— effect on liability.

7. The mere grant of permission so to occupy such a street or sidewalk when necessity requires does not necessarily impose liability upon the municipality for the negligent exercise of the authority granted, unless it suffered the street or sidewalk to remain in such condition as actually to endanger the safety of persons lawfully using the easement.

— absence of barricades — liability.

8. But a city is liable to a person injured while lawfully using a street, where it fails to provide, or cause to be provided, barricades, barriers, or lights, or other appropriate means to safeguard the traveling public from injuries due to a temporary obstruction, lawfully permitted in the erection of a building on private property under the principle of necessity.

[See 13 R. C. L. 435, 436.]

CERTIFICATION by the Circuit Court for Cabell County for determination by the Supreme Court of Appeals after the overruling of a demurrer to the declaration of an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Marcum & Shepherd and J. W. Perry for plaintiff.

Mr. F. M. Livezey, for defendant:

As a matter of law, a municipal corporation is not liable for injuries sustained by a pedestrian from timbers falling from a building or scaffolding in the course of erection adjacent to a street.

Holmquist v. C. L. Gray Constr. Co. 169 Iowa, 502, 151 N. W. 828, 9 N. C. C. A. 208; Post v. Clarksburg, 74 W. Va. 48, 52 L.R.A.(N.S.) 773, 81 S. E. 562.

Lynch, P., delivered the opinion of the court:

In an action of trespass on the case by Anna Johnson against the

city of Huntington, for personal injuries sustained from an alleged defective and unsafe condition of one of its sidewalks, the circuit court overruled a demurrer to the declaration; and the propriety of that ruling has been duly certified to this court for determination, as allowed by § 1, chap. 135, Code (§ 4981). Whether or not the pleading states a cause of action is the sole question presented for consideration.

The declaration, consisting of one count, sufficiently avers the public character of the sidewalk, and the duty of defendant to keep it in good order and repair, and free and safe

"from dangers, hurts, and injuries from projections, obstructions, and structures maintained and hanging over, across, and above it." These averments are not assailed. But the demurrer does challenge the sufficiency of that part of the declaration which attempts to assign an actionable breach of the duty averred, principally because of uncertainty in the allegations descriptive of the cause of injury. Plaintiff charges that on the day of the accident "there was being constructed on the east side of Ninth street, and binding on the east side of the sidewalk aforesaid, a certain building," and defendant then and there negligently "allowed, permitted, and caused to be built and erected and maintained a certain scaffold of planks and timbers" over and along the sidewalk, for the purpose of protecting persons lawfully using the same from dangers and injuries incident to the construction of the building, and certain timbers and planks then and there negligently and injuriously were caused, allowed, and permitted by defendant to be, remain, project, and hang over, above, across, and along the sidewalk, and which said scaffold and timbers and planks then and there were erected and maintained so negligently as to be unsafe and inadequate to afford protection to such persons from injuries and dangers arising from the erection of the said building, and from the said scaffold, planks, boards, and timbers themselves, by reason and means whereof the sidewalk negligently and carelessly was caused, allowed, and permitted to become and remain in bad order and out of repair and dangerous and unsafe for persons using the same, "whereby, while plaintiff was, on the day and year aforesaid, at the place aforesaid, lawfully using said street and passing along and over the same and under the scaffold, planks, and timbers aforesaid, and was then and there in the exercise of ordinary care, and was without warning or knowledge of

the danger to which she was then and there exposed, a certain large beam, plank, or piece of timber, the exact size and dimensions and name of which are to the plaintiff unknown, fell upon the plaintiff from a great distance, to wit, the distance of 12 to 20 feet, and struck her on the head," and caused the injury of which she complains.

The criticism directed against the last allegation is that neither the place from which the piece of timber producing the injury, nor the one immediately causing the negligent act averred, is definitely pointed out; it being contended that the city would in no wise be liable for the mere negligent act of a workman in permitting timber to fall from the building itself during the process of construction, if such was the fact, as well it may have been so far as the allegations of the declaration are concerned. For aught that appears, this indefiniteness may have been intentional on the part of the draftsman, on the theory that the city would be responsible in damages for injury resulting either from the defective condition of the scaffold or from the negligent casting of timber from the building into the street.

It must be assumed that in describing the source or cause of injury, the draftsman, in preparing the pleading, advisedly chose the term "scaffold" to designate the structure through the negligent construction and maintenance or use of which the injury complained of was occasioned, and that by that designation he meant to describe what builders and contractors usually term a scaffold, intending thereby to signify a single, temporary, horizontal platform, or a combination of several successive like platforms of different heights above the surface of the street, and supported by perpendicular poles, scantlings, or ladders, as generally constructed, or suspended by ropes or chains, as sometimes done, and designed to serve as supports for workmen while engaged in the performance

of the service rendered in the erection, repair, or decoration of buildings, and as a place for the deposit of the materials used by them while so employed. This assumption seems unavoidable, because by no authoritative definition of the term "scaffold" does such a structure comprehend within its meaning a covering or an inclosure of the sidewalk in the form of a barricade, or shed, intended to provide against the infliction of injuries by timbers or other material falling therefrom upon pedestrians using the street in the usual manner for ordinary purposes. As so defined, a scaffold does not and its purpose is not to afford such protection. Yet by averment the declaration may, and by a forced construction in this instance does, show an intention to enlarge the meaning of that term so as to include an inclosure, or structure, the purpose of which was to prevent the infliction of injuries on pedestrians during the progress of the improvement described. The pleader may have had in mind, and intended to describe, a covered or inclosed passageway along and over the pavement adjacent to the lot on which the building was in process of erection, the use and purpose thereof, by whatever technical name known to builders and contractors, being the prevention of injuries by the falling of such timbers or material as that stated in the declaration.

Although, by our statute, upon a municipal corporation devolves an absolute liability for the defective maintenance of its public thoroughfares, it does not necessarily follow that a municipality is liable for injuries done by persons using its streets in a lawful and proper manner.

If the injury is caused by the negligence of the owner of the property improved, or by the contractor engaged in making the improvement, or by the employees of either of them, the contractor or

owner generally is chargeable primarily with the consequences of the negligent act, although in some circumstances or conditions the municipality may also be liable therefor. This rule is laid down by 4 Dillon on Mun. Corp. 5th ed. § 1725, note, in this language: "Where it is equally the duty of the city and of the owner to keep the sidewalk in front of the premises in repair, both will be liable, jointly or severally, to one who is injured in consequence of their neglect to do so."

And in § 1727 the author adds: "If the person injured fail in his action against the municipality, this is no bar to an action by him against the author of the nuisance."

Besides, not every obstruction, whether authorized or unauthorized by a municipality, constitutes a nuisance, or is actionable in damages, irrespective of its character or purpose. "On the contrary, the right of the public to the free and unobstructed use of the street or way is subject to reasonable and necessary limitations and restrictions." 3 Dill. Mun. Corp. § 1168. While the carriage and delivery of fuel, grain, and goods, or the deposit of building material in a street, may effect a temporary impediment to the right of public transit or travel, they are legitimate uses of the highway, notwithstanding its primary purpose is for public use. The same result may arise from necessary improvements in the street itself, or the improvement of abutting lots by excavations for cellars and for the foundations of buildings, the erection of buildings, and similar private uses. These render necessary or unavoidable the occupation of parts of the streets and sidewalks; and such impediments do not necessarily constitute encroachments upon the public easement. They are merely incidents or limitations upon its use. Because such improvements are necessary, the material required

Highway—
injury—liability
of municipality.

—liability of
abutting owner.

—obstruction
—nuisance.

therefor, and scaffolds, and other convenient instrumentalities right-ly may be placed in the street, if properly done and not unreasonably continued. But when occupied for these purposes, whether with or without the permission of the municipality, the duty devolves upon it to see that the licensee or owner exercises due care in the erection or maintenance of such structures or obstructions to prevent injury to persons using the street in a lawful and proper manner, either by inclosing the street or that part of it so occupied by barriers, or giving warning by lights, or in some other reasonable manner calling attention to the existing danger. Or, as stated in *Stanton v. Parkersburg*, 66 W. Va. 393, 66 S. E. 514: "In case of necessity, such city or town may permit a temporary obstruction of any of its public

—permitted
obstruction.

streets or sidewalks, but it is bound to take proper precaution to warn the public of the danger occasioned by the obstruction." *Arthur v. Charleston*, 51 W. Va. 132, 41 S. E. 171.

The declaration, as contended, does not in express terms, or by necessary implication, point out the source from which, or the agency by which, was produced the negligent causal act resulting injuriously to the plaintiff. As to these matters it is vague and indefinite. It does charge that defendant "allowed, permitted, and caused" the scaffold to be built and maintained in the sidewalk as a protection against injury to pedestrians, and that, by reason of its negligent omissions as regards the safety of the sidewalk, the beam or plank fell and injured the plaintiff. But the causal connection between the construction or maintenance of the scaffold and the falling of the timber, at best, is obscure. The allegation that defendant permitted and caused the erection of the scaffold, when coupled with other averments of the pleading, it may reasonably be assumed, means only that the city granted to the

owner of the lot to be improved, or to his contractor for him, a permit therefor, and for this purpose to use so much of the sidewalk as reasonably was necessary to prosecute such work. If so, the permission does not warrant an implication that the city actually participated in the performance of that labor.

The mere grant of such a permit clearly does not involve the liability of the municipality for the negligent exercise of the authority granted, or the negligence of workmen engaged in the construction of the building itself, unless it suffered the structure to remain upon the pavement in such condition as actually to endanger the safety of persons lawfully using the easement. *Copeland v. Seattle*, 33 Wash. 415, 65 L.R.A. 333, 74 Pac. 582. But hardly is it to be supposed that the owner or builder, either by himself or his agents, would be so grossly negligent as knowingly to permit a beam or other heavy piece of timber to fall from the scaffold into the street, if such were the fact, whether injury resulted therefrom or not. "If the act which

the city licenses a person to commit

—obstruction—
liability of city.

within its limits is not unlawful in itself or inherently dangerous, so as to become a public nuisance, and injury flows therefrom merely in consequence of the manner in which the act is performed, then the city will not be liable." 5 *Thomp. Neg.* § 5805. But it is liable, according to the same author (§ 6015), where it fails to exercise reasonable care to require barriers, lights, or other appropriate means to safeguard the traveling public against

—absence of
barricades—
liability.

temporary obstructions lawfully permitted in the erection of buildings under the principle of necessity. *Warsaw v. Dunlap*, 112 Ind. 576, 11 N. E. 623, 14 N. E. 568; *Grant v. Stillwater*, 35 Minn. 242, 28 N. W. 660; *Seneca Falls v. Zaluski*, 8 Hun, 571. The use of a

street for such purposes is as legitimate as its use for travel; but the right must be exercised in a reasonable manner, and with due regard for the safety and convenience of the traveling public, and due care demands of the owner of the property improved the exercise of the same degree of diligence in providing warnings by visible signals at night and barriers or barricades whenever necessary to prevent injury to persons lawfully upon the highway. He is not exonerated from the duty to furnish these means of protection by the grant of a permit to occupy part of the street in aid of his building operations. *Blocher v. Dieco*, 30 Ky. L. Rep. 689, 99 S. W. 606; *Christman v. Meierhoffer*, 116 Mo. App. 46, 92 S. W. 141. Nor does the grant suspend the duty of the city to exercise like care to keep the street so occupied in a reasonably safe condition for public use during the operation. Its duty is not discharged merely by keeping the surface of its streets and sidewalks in safe condition. For the same rule of liability applies with equal force to all dangerous defects or obstructions, whether overhead or at grade. 4 Dill. Mun. Corp. § 1705; note to *Elam v. Mt. Sterling*, 20 L.R.A. (N.S.) 506. Some authorities have, as they concede, carried this liability to its extreme limit in holding municipalities liable for injuries caused by the falling of ice and snow from the roofs of buildings adjacent to the street, or of cornices from such buildings, or of awnings, signs, or similar structures. This liability they impose upon the theory that as by statutes similar to ours, considered in connection with special charters granted by the legislature, there is conferred upon the municipality

the power of taxation for general purposes, including the maintenance of their public highways, coupled with the duty to keep them in a reasonably safe condition, the power and the duty are commensurate, and that the negligent breach of the duty is sufficient to warrant liability in damages for a resulting injury.

But, as peculiarly applicable here, this court said in *Post v. Clarksburg*, 74 W. Va. 48, 52 L.R.A. (N.S.) 773, 81 S. E. 562. "The statute imposing absolute duty upon municipal corporations to keep their streets and sidewalks reasonably safe for use by the general public does not make them liable for injuries negligently inflicted, by persons lawfully using such public ways, upon one another,"—and in the opinion at page 53 of 74 W. Va.: "Clearly the statutory duty of a municipal corporation to keep its streets reasonably safe for use, though absolute, . . . does not extend to the prevention of persons lawfully using the streets from injuring one another in the exercise of their rights."

So that the facts averred in the declaration, devoid of precision as the allegations are, state a cause of action for which the owner of the building, or the contractor engaged to construct it, exclusively or ultimately, may be liable because of the injury of which plaintiff complains.

The reasons that we have assigned lead us to the conclusion that the demurrer to the declaration should have been sustained, with leave to plaintiff to amend so as to render the averments of that pleading more specific in the description of the cause of action on which she seeks recovery against the defendant; and such will be the order entered here, together with the award of costs against her.

ANNOTATION.

Liability of a municipal corporation for injuries caused by the unsafe condition of a street resulting from or incidental to work performed under a permit authorizing the construction, alteration, repair, or demolishing of a building or its appurtenances.

I. In general:

- § 1. Corporation not liable unless it has notice of the unsafe conditions which caused the injury in question, 1343.
- § 2. Other controlling rules, 1349.
- § 3. Inconsistent findings and judgments, 1350.
- § 4. Liability of corporation in respect of work undertaken without a formal permit, 1351.

II. Illustrative cases:

- § 5. Injuries caused by collision of pedestrians, vehicles, and horses with building materials deposited in street, 1352.

I. In general.

§ 1. Corporation not liable unless it has notice of the unsafe conditions which caused the injury in question.

On a subsequent appeal [(1918) 82 W. Va. 458, 95 S. E. 1044] in the reported case (*JOHNSON v. HUNTINGTON*), ante, 1337, it was held that a demurrer to petition, as amended after the judgment here reported had been rendered, was properly overruled. The court said: "The former decision, in effect, is that the right of the public to the unobstructed use of the streets is subject to reasonable and necessary restrictions and limitations, and that where the necessity therefor exists, as in case of the erection of a building upon a lot abutting on a street, the city has the right and power to grant to the builder permission to obstruct the street or sidewalk temporarily, without thereby necessarily rendering itself liable; that the grant of such permission is not in itself unlawful, provided, however, the city takes proper precaution to warn those lawfully using the street of the danger, or protects them therefrom. This obligation

II.—continued.

- § 6. Injuries occasioned to children by building materials, 1362.
- § 7. Injuries caused by collisions with barriers inclosing portions of streets, 1363.
- § 8. Injuries caused by the fall of heavy objects piled in streets, 1364.
- § 9. Injuries caused by fall of heavy objects from buildings, 1365.
- § 10. Injuries caused by collapse of temporary bridges, 1368.
- § 11. Injury caused by explosion of boiler under sidewalk, 1369.
- § 12. Injuries caused by excavations in or adjacent to streets, 1371.

upon the city to warn or protect is imperative, and applies as well to dangers overhead as to those on the surface of the street. 4 Dill. Mun. Corp. 5th ed. § 1705. It is common practice, when buildings are to be erected along the line of a street, for the municipal authorities to grant the builder permission to erect a temporary covering over the sidewalk, in order that pedestrians may use the sidewalk without being endangered by falling materials while the building is in process of construction, which often requires many months, and the grant of such license is not, per se, an unlawful exercise of municipal authority. But it is the imperative duty of the city to see that such covering or overhead shelter is securely built so as not to fall of its own weight, and to see that it is constructed of material of sufficient strength to arrest the fall of such pieces of timber, boards, bricks, and other material as might reasonably be expected will be thrown or allowed to fall upon it by the workmen on the building. Such temporary covering is generally not intended as a warning against danger, but rather as an as-

surance to the public that the sidewalk may be used with safety, and the city is bound to know that such structure is erected with such material and in such manner as to answer the purpose for which it was intended, and it is liable for injury to one lawfully using the sidewalk, caused by the neglect of its duty in respect thereof. Barnes's Code 1918, § 154, chap. 43, and 4 Dill. Mun. Corp. § 1705." The language thus used leaves it somewhat doubtful whether the court intended to abandon or modify the theory adopted in the reported case (*JOHNSON v. HUNTINGTON*, ante, 1337) with respect to the nonliability of a municipal corporation for injuries caused by the negligent manner in which the authorized work is performed by the licensee, or his employees. As a precedent, the *Copeland Case* (1903) 33 Wash. 415, 65 L.R.A.

333, 74 Pac. 582, which was cited in support of that theory, does not seem to be of much weight. See § 9, *infra*. The fact that the statement quoted from 5 Thomp. Neg. § 5805, is not based on any specific rulings, renders it equally unsatisfactory as an authority. A large number of the cases reviewed in the annotation are essentially inconsistent with the doctrine propounded by the learned author. The fundamental rule with reference to the right of action for an injury of the description specified in the title of this annotation is that a municipal corporation cannot be held liable for the negligence of the person to whom the permit was issued, unless it had knowledge, actual or constructive, of the existence of the unsafe conditions produced by that negligence.¹ Such knowledge may be inferred from the

¹ The authorities with regard to the general question, What officers of a municipal corporation are its agents in such a sense that notice to them constitutes notice to it, are discussed in *Shearm. & Redf. Neg. § 360*.

In cases reviewed elsewhere it has been held that no corporation is chargeable with the knowledge—

—of a building inspector, *Parks v. New York* (1906) 111 App. Div. 836, 98 N. Y. Supp. 94, affirmed without opinion in (1907) 187 N. Y. 555, 80 N. E. 1115 (temporary footbridge); *Beall v. Seattle* (1902) 28 Wash. 593, 61 L.R.A. 583, 92 Am. St. Rep. 892, 69 Pac. 12;

—of a superintendent of streets, *Shook v. Cohoes* (1888) 108 N. Y. 648, 15 N. E. 531;

—of a street commissioner, *Pace v. Webster City* (1908) 138 Iowa, 107, 115 N. W. 888; *Sutton v. Snohomish* (1895) 11 Wash. 24, 48 Am. St. Rep. 847, 39 Pac. 273 (excavation);

—of the chairman of a committee on streets, *Keyes v. Cedar Falls* (1899) 107 Iowa, 509, 78 N. W. 227;

—of a street commissioner, city marshal, city engineer, and at least one member of the city council, *Rowell v. Williams* (1870) 29 Iowa, 214.

In *Rehberg v. New York* (1883) 91 N. Y. 137, 43 Am. Rep. 657, the defendant city was held to be chargeable with the knowledge which a policeman presumably possessed that a pile of bricks deposited in a street, without

permission, by a contractor for the demolition of a building, exceeded in respect of height the legal limit of safety. This decision was not referred to in two later cases in which the supreme court held that the defendant was not chargeable with the knowledge of such a functionary regarding the unguarded condition of an excavation (*Taylor v. Mt. Vernon* (1890) 58 Hun, 384, 34 N. Y. S. R. 640, 12 N. Y. Supp. 25, affirmed in (1891) 129 N. Y. 651, 29 N. E. 1032), or regarding the defective construction of an authorized footbridge (*Parks v. New York* (N. Y.) *supra*).

That a corporation is not chargeable with the knowledge of a policeman regarding the existence of an obstruction of a sidewalk created by building material is held in *Columbus v. Penrod* (1906) 73 Ohio St. 209, 3 L.R.A.(N.S.) 386, 112 Am. St. Rep. 716, 76 N. E. 826, 20 Am. Neg. Rep. 169.

In *Wilson v. Troy* (1892) 135 N. Y. 96, 18 L.R.A. 449, 31 Am. St. Rep. 817, 32 N. E. 44, affirming (1891) 60 Hun. 183, 14 N. Y. Supp. 721, where the plaintiff's horse was injured by falling into an unlighted and unguarded trench dug for a water pipe without the permission of the municipal authorities, the liability of the corporation was predicated on the ground that the actual work of excavation had, at the request of the plumber engaged to lay the pipe, been done by men regu-

length of time during which the defect has existed, from the central position and publicity of the place where it exists, and any other circumstances which tend to show its notoriety.² But there is a conflict of opinion regarding the extent to which the operation of the rule is affected by the element of the issuance of the permit. A comparison of the decisions cited under the following paragraphs shows that they are not harmonious, even in the same jurisdiction.³

It is probable, however, that the inconsistency which the reports disclose

larly in the employment of the corporation, and that the evidence showed that they still remained under the control of its officers while the work was being performed. The doctrine as to actual or implied notice was declared to have no application under such circumstances.

² *Donaldson v. Boston* (1860) 16 Gray (Mass.) 509.

"No certain duration of a dangerous condition of a public highway operates of itself as a notice. The law does not require impossibilities of any person, natural or artificial, and it is impossible that all parts of all the streets should be under constant inspection. Consequently, it could not be maintained that at the instant an accident happens to a highway the authorities are charged with notice, and held liable therefor if they do not put it instantly in repair. Every such case must be determined by its peculiar circumstances." *District of Columbia v. Woodbury* (1890) 136 U. S. 450, 34 L. ed. 472, 10 Sup. Ct. Rep. 990.

³ A brief memorandum, showing the nature of the conditions involved, is appended to the cases cited in the following notes for the purpose of enabling the reader to follow them up readily in the later sections in which they are reviewed.

⁴ *United States*.—*Cleveland v. King* (1889) 132 U. S. 295, 33 L. ed. 334, 10 Sup. Ct. Rep. 90 (building materials). See, however, note 8, *infra*.

Connecticut.—*Fitch v. Hartford* (1918) 92 Conn. 365, 102 Atl. 768.

District of Columbia.—*Herfurth v. Washington* (1868) 6 D. C. 289 (excavation); *Harrison v. Davis Constr. Co.* (1914) 42 App. D. C. 255 (building materials).

Illinois.—*Sterling v. Thomas* (1871) 11 A.L.R.—85.

is partly due to the circumstance that, in many of the cases cited under the following paragraph, the attention of the court was not directed at all to the doctrine referred to in paragraph (b).

(a) In some cases the right of the claimant to maintain the action was regarded as being dependent on his ability to prove affirmatively, by evidence extraneous to the fact of the issuance of the permit, that the corporation was chargeable with notice of the existence of the particular unsafe conditions which caused the injury complained of.⁴

60 Ill. 264 (excavation). But see note 8, *infra*.

Indiana.—*Warsaw v. Dunlap* (1887). 112 Ind. 576, 11 N. E. 623, 14 N. E. 568 (building materials); *Senhenn v. Evansville* (1895) 140 Ind. 677, 40 N. E. 69 (pile of lumber fell). Compare *Dooley v. Sullivan* (1887) 112 Ind. 451, 2 Am. St. Rep. 209, 14 N. E. 566 (excavation made for sidewalk). But see note 8, *infra*.

Iowa.—*Rowell v. Williams* (1870) 29 Iowa, 210 (excavation); *Keyes v. Cedar Falls* (1899) 107 Iowa, 509, 78 N. W. 227 (same); *Bender v. Minden* (1904) 124 Iowa, 685, 100 N. W. 352 (planks removed from sidewalk); *Pace v. Webster City* (1908) 138 Iowa, 107, 115 N. W. 888 (excavation).

Kansas.—*Kansas City v. Birmingham* (1891) 45 Kan. 212, 25 Pac. 569 (excavation). But see note 8, *infra*.

Kentucky.—*Covington v. Johnson* (1902) 24 Ky. L. Rep. 602, 69 S. W. 703, 12 Am. Neg. Rep. 286 (obstruction on sidewalk); *Harrodsburg v. Sallee* (1911) 142 Ky. 829, 135 S. W. 405 (dirt deposited on sidewalk). But see note 8, *infra*.

Massachusetts.—*Leonard v. Boston* (1903) 183 Mass. 68, 66 N. E. 596 (building materials). But see note 8, *infra*.

Minnesota.—*Cleveland v. St. Paul* (1872) 18 Minn. 286, Gil. 255; *Grant v. Stillwater* (1886) 35 Minn. 242, 28 N. W. 660; *Killeen v. St. Cloud* (1917) 136 Minn. 66, 161 N. W. 260.

New York.—*Masterton v. Mt. Vernon* (1874) 58 N. Y. 391 (excavation); *Breil v. Buffalo* (1894) 144 N. Y. 163, 38 N. E. 977, reversing (1893) 68 Hun, 219, 22 N. Y. Supp. 845 (building materials); *Magee v. Troy* (1888) 48 Hun, 383, 1 N. Y. Supp. 24, affirmed in (1890) 119 N. Y. 640, 23 N. E. 1148

Under this theory the duty of the corporation to see that appropriate precautions are taken for the purpose of protecting travelers is regarded as having become an absolute obligation from the time when it was affected with notice of those conditions. Its obligation, however, does not extend to "keeping a constant watch" over the persons engaged in the performance of the authorized work. "Its officers had a right, within reasonable limits, to presume that men engaged in a lawful work would do it in a lawful manner. They are not bound to anticipate negligence on the part of the men thus engaged."⁵

The position has been taken in one of the jurisdictions belonging to this category that affirmative proof of antecedent notice is not a condition

precedent to recovery, where the permit expressly provides that the specified work shall be performed under the direction of some designated municipal agent.⁶

Under such circumstances the city is considered to be a "joint actor" with the licensor corporation,⁷ the position has also been taken that the responsibility of the corporation for the negligence of the licensee is absolute, when the work is intrinsically dangerous.⁸

(b) The theory upon which other cases proceed is that, as a result of issuing a permit, the city becomes chargeable with constructive notice of any unsafe conditions which will be created by the authorized work, and of the particular dangers to which persons using the street will be subjected by these conditions.⁹

(same); *O'Hara v. Buffalo* (1899) 39 App. Div. 443, 57 N. Y. Supp. 367 (excavation); *Blakeslee v. Geneva* (1901) 61 App. Div. 42, 69 N. Y. Supp. 1122 (same); *Friedman v. New York* (1909; Sup. Ct. App. T.) 63 Misc. 310, 116 N. Y. Supp. 750 (building materials); *Scanlon v. New York* (1883) 12 Daly, 81 (excavation). But see note 8, *infra*.

North Carolina.—*Gregg v. Wilmington* (1911) 155 N. C. 18, 70 S. E. 1070 (pile of bricks fell). But see note 8, *infra*.

Ohio.—*Columbus v. Penrod* (1906) 73 Ohio St. 209, 3 L.R.A.(N.S.) 386, 112 Am. St. Rep. 716, 76 N. E. 826, 20 Am. Neg. Rep. 169 (excavation).

Pennsylvania.—*Koch v. Williamsport* (1900) 195 Pa. 488, 46 Atl. 67, 7 Am. Neg. Rep. 663 (building materials).

Tennessee.—*Knoxville v. Bell* (1883) 12 Lea, 157.

Virginia.—*McCoull v. Manchester* (1888) 85 Va. 579, 2 L.R.A. 691, 8 S. E. 379 (building materials); *Richmond v. Leaker* (1900) 99 Va. 1, 37 S. E. 348 (same).

Washington.—*Beall v. Seattle* (1902) 28 Wash. 593, 61 L.R.A. 583, 92 Am. St. Rep. 892, 69 Pac. 12 (explosion of boiler under sidewalk). But see note 8, *infra*.

⁵ *Warsaw v. Dunlap* (1887) 112 Ind. 582, 14 N. E. 568.

⁶ Having regard to the doctrinal position of the New York court of appeals, as indicated by other cases decided during the same period, it would

seem that the element of a reserved right in respect of direction was the actual rationale of the imputation of liability in *Dolan v. Brooklyn* (1870) 1 Alb. L. J. (N. Y.) 815, and *Wendell v. Troy* (1868) 4 Keyes (N. Y.) 261. But the following unqualified remarks in the latter case might, on their face, be construed as importing an adoption of the theory illustrated by the cases cited *infra*, footnote 9: "However true it may be that the corporate authorities are not under any such responsibility, as insurers of the safe condition of the streets, that they become instantly liable for defects the moment they occur, and although they are caused by the act of a wrongdoer, and without any previous notice to them calling their power and duty to provide for their safe condition into exercise, it is clear, I think, that, when they consent that the public street may be excavated and a drain introduced, they have notice that an act is to be done which directly invokes their power and duty, and calls for their exercise in behalf of the public, to see to it that the property of those who have a right to pass and repass is not endangered."

⁷ This expression was used in *Tabor v. Buffalo* (1910) 136 App. Div. 258, 120 N. Y. Supp. 1089.

⁸ *Warsaw v. Dunlap* (1887) 112 Ind. 578, 11 N. E. 623, 14 N. E. 568.

⁹ **United States.**—*District of Columbia v. Woodbury* (1890) 136 U. S. 450, 34 L. ed. 472, 10 Sup. Ct. Rep. 990. But see note 4, *supra*.

In this point of view the licensing corporation is regarded as assuming

an absolute duty to see that reasonable care is exercised by the licensee for

Colorado. — See *Denver v. Aaron* (1895) 6 Colo. App. 232, 40 Pac. 587, a case which, strictly speaking, does not fall within the scope of this annotation, as it involves the negligence of a water company.

Georgia. — *Savannah v. Donnelly* (1883) 71 Ga. 258 (excavation); *Augusta v. Cone* (1893) 91 Ga. 714, 17 S. E. 1005 (same).

Illinois. — *Springfield v. Scheevers* (1886) 21 Ill. App. 203. But see note 4, *supra*.

Indiana. — *Evansville v. Behme* (1912) 49 Ind. App. 448, 97 N. E. 565 (excavation). But see note 4, *supra*.

Kansas.—*Kansas City v. McDonald* (1899) 60 Kan. 481, 45 L.R.A. 429, 57 Pac. 123, 6 Am. Neg. Rep. 67 (building materials). But see note 4, *supra*.

Kentucky. — *Louisville v. Keher* (1904) 117 Ky. 841, 79 S. W. 270; *Blocher v. Dieco* (1907) 30 Ky. L. Rep. 689, 99 S. W. 606 (building materials); *De Garmo v. Vogt* (1913) 151 Ky. 847, 152 S. W. 969 (same); *Gnau v. Ackerman* (1915) 166 Ky. 258, 179 S. W. 217 (child fell into mortar bed). But see note 4, *supra*.

Maryland. — *Baltimore v. Beck* (1903) 96 Md. 183, 53 Atl. 976, 13 Am. Neg. Rep. 813 (building materials). The court seems to have regarded the defendant's liability as being predicable, irrespective of whether it was chargeable with notice. But as the dangerous conditions had existed for several days, the existence of notice may have been assumed for the purposes of the decision.

Massachusetts.—*Blessington v. Boston* (1891) 153 Mass. 409, 26 N. E. 1113 (excavation); *Hyde v. Boston* (1904) 186 Mass. 115, 71 N. E. 118 (same); *Bennett v. Everett* (1906) 191 Mass. 364, 77 N. E. 886 (same).

Michigan.—*Monje v. Grand Rapids* (1900) 122 Mich. 645, 81 N. W. 574 (excavation); *Repperd v. Chapin* (1916) 190 Mich. 199, 155 N. W. 706.

Missouri. — *Russell v. Columbia* (1881) 74 Mo. 480, 41 Am. Rep. 325 (excavation); *Stephens v. Macon* (1884) 83 Mo. 345 (same); *Lindsay v. Kansas City* (1906) 195 Mo. 166, 93 S. W. 273 (same); *Buttrou v. Bridell* (1910) 228 Mo. 622, 129 S. W. 12 (child fell into lime pit). Compare also *Haniford v. Kansas City* (1890)

103 Mo. 172, 15 S. W. 753. (Pedestrian fell into unguarded and unlighted open excavation made for cable railway; to be used merely as to doctrine of imputed notice. It made no distinction between cases in which an independent contractor was employed by city and those in which employment was by licensor.)

New York.—*Seneca Falls v. Zalinski* (1876) 8 Hun, 571 (building materials; apparently an authority for the doctrine under discussion, but the precise position of the court is obscure); *Parks v. New York* (1906) 111 App. Div. 836, 98 N. Y. Supp. 94, affirmed in (1907) 187 N. Y. 555, 80 N. E. 1115. The precedents relied upon in the latter case were: *Cohen v. New York* (1889) 113 N. Y. 532, 4 L.R.A. 406, 10 Am. St. Rep. 506, 21 N. E. 700 (tradesman's wagon permitted to stand on street); *Speir v. Brooklyn* (1893) 139 N. Y. 6, 21 L.R.A. 641, 36 Am. St. Rep. 664, 34 N. E. 727 (permit for discharge of fireworks); *Landau v. New York* (1904) 180 N. Y. 48, 105 Am. St. Rep. 709, 72 N. E. 631, 17 Am. Neg. Rep. 331 (similar permit). In *Godfrey v. New York* (1905) 104 App. Div. 357, 93 N. Y. Supp. 899, affirmed without opinion in (1906) 185 N. Y. 563, 77 N. E. 1187, where the injury complained of was caused by the collision of a vehicle with a pile of stones deposited by a paving contractor engaged by the defendant, it was stated that these three cases "establish a proposition that where a municipal corporation gives a permit to obstruct a street, an absolute duty is imposed upon the corporation to see to it that the obstruction is so protected and guarded that a person using the street, and entitled to rely upon the presumption that it is safe for use, will be warned of the danger in time to avoid injury. By giving the permit it thereby becomes a joint actor with the licensee in creating the obstruction, and the city thereby becomes responsible for any neglect or default of the licensee in properly guarding, so that persons using the street will not be exposed to unnecessary danger." As the cases thus explained are all of later date than those cited under the head of New York, in note 4, *supra*, the inference that the doctrine adopted in the earlier ones has been abandoned may ap-

the protection of travelers against those dangers.¹⁰

It will be observed that the obligation thus incurred is similar to that of an employer who engages an independent contractor to perform work with regard to which the employer is subject to a nondelegable duty as respects third persons. Cases involving independent contractors have in fact been sometimes relied upon as authorities for the imputation of an absolute liability to a licensing municipality.¹¹ That they are for this purpose in-

fluent by way of analogy may be conceded. But it seems reasonably clear that the parallelism between the situations thus assimilated is not sufficiently perfect to justify the treatment of decisions concerning independent contractors as precise precedents in point, with reference to cases of the type reviewed in the present annotation. There is an obvious and very substantial difference between the position of a person who hires an independent contractor to perform work which is to his own advantage, and the position

parently be drawn. There seems to be no basis upon which the two groups of decisions can be reconciled except that of an assumed distinction predicated with respect to the diversity of the subject-matter of the permits involved in each group. But such an assumption is manifestly unsatisfactory in a logical point of view. Until the essential inconsistency has been judicially recognized and discussed, the doctrinal position of the courts in this state will remain more or less uncertain. In none of the cases cited above was there any allusion to the other group of decisions.

North Carolina.—*Kinsey v. Kinston* (1907) 145 N. C. 106, 58 S. E. 912. But see note 4, *supra*.

South Dakota.—*Rowe v. Richards* (1913) 32 S. D. 66, L.R.A.1915E, 1069, 142 N. W. 664 (wall collapsed).

Washington.—*Sutton v. Snohomish* (1895) 11 Wash. 24, 48 Am. St. Rep. 847, 39 Pac. 273. Other cases which exemplify the same theory, but do not come within the scope of this annotation are: *Lasityr v. Olympia* (1911) 61 Wash. 651, 112 Pac. 752; *Seattle v. Shorrock* (1918) 100 Wash. 234, 170 Pac. 590. But see note 4, *supra*.

¹⁰ "If a permit is granted, . . . the fact is noticed to the authorities, that the work is in progress, and then they are charged with the duty of seeing that it is properly conducted." *District of Columbia v. Woodbury* (1890) 136 U. S. 450, 34 L. ed. 472, 10 Sup. Ct. Rep. 990.

"The fact that the city authorized and gave express permission to Masters to open a ditch across the street in the city, to connect the water pipes of a private person with waterworks belonging to the city; was in effect opening the ditch by the city itself.

It was the act of the city; and it was liable for any damages which might accrue to any person by reason of the careless and negligent manner in which the work was done. It was the duty of the city to have superintended and overlooked the work which it permitted to be done on its streets, and to have seen to it that the work was done in such a manner that no injury should come to anyone passing along the street from any defect in the work. The question of notice, for these reasons, is not in this case." *Savannah v. Donnelly* (1883) 71 Ga. 258.

When a city "grants permission to another party to place an obstruction in its streets, it must take notice of the nature and character of the obstruction so placed and the manner in which it is maintained, and see to it that it does not make the street unsafe for use by the public." *Gnau v. Ackerman* (1915) 166 Ky. 258, 179 S. W. 217.

"The city had granted a permit to the owners of the property to erect the wall, and therefore must be charged with knowledge that it was in course of construction. *Indianapolis v. Doherty* (1880) 71 Ind. 5. This imposed upon the city the duty of placing proper guards or obstructions across the sidewalk." *Rowe v. Richards* (S. D.) *supra*.

¹¹ For instances of such citations, see *Denver v. Aaron* (1895) 6 Colo. App. 232, 40 Pac. 587; *Evansville v. Behme* (1912) 49 Ind. App. 448, 97 N. E. 565; *Lindsay v. Kansas City* (1906) 195 Mo. 166, 93 S. W. 273; *Ball v. Independence* (1890) 41 Mo. App. 469; *Gable v. Toledo* (1895) 9 Ohio C. D. 63; *Sutton v. Snohomish* (1895) 11 Wash. 30, 48 Am. St. Rep. 847, 39 Pac. 273.

of a municipality which merely licenses the performance of work beneficial only to the licensee.

§ 2. *Other controlling rules.*

Other rules upon which the liability of the licensing corporation depends are the following:

The issuance of a permit does not suspend the duty of the municipality to exercise reasonable care in respect to safeguarding travelers upon that street.¹

The fact that a permit expressly requires the licensee to take such precautions as the nature of the authorized work indicates as being appropriate does not relieve the municipality "of the duty of exercising such reasonable diligence as the circumstances require to prevent the street from being occupied by those parties [the licensee] in such a way as to endanger passers-by in their use of it in all proper ways."²

A municipal corporation is not an insurer as respects the safe condition of the streets.³ The scope and significance of this rule are, it is clear, materially different, according as it is

applied by a court which treats affirmative proof of notice of the unsafe condition as a prerequisite to the imputation of liability to the corporation, or by a court which takes the position that the mere issuance of a permit renders it chargeable with such notice. With relation to the former of these theories, the rule imports that the duty of the corporation is limited to the safeguarding of travelers against unsafe conditions of which it has notice.⁴ With relation to the latter theory, it imports that the corporation, although precluded from relying on the absence of notice, is not under an absolute obligation to respond for every accident a man may suffer in its streets. It is simply bound to practise due care and diligence in the exercise of its powers and in the application of its resources towards the objects named.⁵

An action cannot be maintained against the licensing corporation, if, as a matter of fact, the conditions which caused the injury complained of were not dangerous to persons using the highway in the ordinary manner.⁶ Or if the precautions taken for

¹ This rule was taken for granted in all cases cited in the following sections. It was explicitly affirmed in *Senhenn v. Evansville* (1895) 140 Ind. 678, 40 N. E. 69; *Laporte v. Henry* (1908) 41 Ind. App. 197, 83 N. E. 655; *Grant v. Stillwater* (1886) 35 Minn. 242, 28 N. W. 660; *Magee v. Troy* (1888) 48 Hun, 383, 1 N. Y. Supp. 24, affirmed in (1890) 119 N. Y. 640, 23 N. E. 1148; *McCoull v. Manchester* (1888) 85 Va. 579, 2 L.R.A. 691, 8 S. E. 879.

² *Cleveland v. King* (1889) 132 U. S. 295, 33 L. ed. 334, 10 Sup. Ct. Rep. 90 (protection of building materials by lights). The court in this case said: "He was also permitted, against the defendant's objection, to read in evidence two permits given by the city through its board of improvements, one to E. Rosenfeld, dated July 16, 1879, and the other to Frank Kosterling, dated September 19, 1879, each permit authorizing the person named therein to occupy one half of the sidewalk and one third in width of the street in front of the premises owned by Rosenfeld, during a period of sixty days from the date of the permit, for

the purpose of placing building materials thereon, subject, however, to the provisions of the ordinance requiring that such materials be protected 'with a sufficient number of lights from dusk until daylight, during every day that the same shall remain,' and to the condition that the person neglecting that duty should be liable to the penalty imposed by the ordinance, and for all damages to person or property growing out of such neglect." Compare also *Louisville v. Keher* (1904) 117 Ky. 841, 79 S. W. 270, where the same doctrine was taken for granted with reference to an ordinance regulating the same matter.

³ *Dill. Mun. Corp.* 5th ed. § 1711.

⁴ For a case illustrating this point of view, see *Warsaw v. Dunlap* (1887) 112 Ind. 576, 11 N. E. 623, 14 N. E. 568.

⁵ *District of Columbia v. Woodbury* (1890) 136 U. S. 450, 34 L. ed. 472, 10 Sup. Ct. Rep. 990.

⁶ *McCord v. Ossining* (1887 Sup. Ct. Gen. T.) 10 N. Y. S. R. 407, affirmed in (1890) 118 N. Y. 686, 23 N. E. 1151 (action based on the theory that plaintiff's horse took fright at stones deposited on the side of the highway for

the protection of travelers were sufficient.⁷

The duty to which the issuance of a permit subjects a corporation with regard to the protection of travelers against injury from unsafe conditions arising from, or incidental to, the performance of the authorized work, inures to the benefit of children, as well as of adults.⁸

If the liability of the corporation is otherwise predicable, the fact that the authorized work was being performed by an independent contractor does not constitute a defense.⁹

The corporation cannot in any event be held liable unless it appears that the conditions created by the party acting under its permit were the proximate cause of the injury complained of.¹⁰

the purpose of building a wall); *Winters v. New York* (1888) 15 Daly, 102, 2 N. Y. Supp. 695 (plank, placed across sidewalk for convenience of workmen who had to carry materials from the carriageway to a house under construction, turned under the foot of one of them, and threw him against a spike that stood in the carriageway).

⁷*District of Columbia v. Woodbury* (1890) 136 U. S. 450, 464, 34 L. ed. 472, 477, 10 Sup. Ct. Rep. 990; *Kansas City v. Birmingham* (1891) 45 Kan. 212, 25 Pac. 569; *Stephens v. Macon* (1884) 83 Mo. 352; *Carlson v. New York* (1912) 150 App. Div. 264, 134 N. Y. Supp. 661 (building materials sufficiently guarded by light).

⁸*Gnau v. Ackerman* (1915) 166 Ky. 258, 179 S. W. 217.

⁹For an explicit affirmation of this doctrine, see *Pace v. Webster City* (1908) 138 Iowa, 107, 115 N. W. 888; *Kinsey v. Kinston* (1907) 145 N. C. 108, 58 S. E. 912. It was taken for granted in many of the cases in §§ 5 to 12, *infra*.

¹⁰Liability affirmed: *Moore v. Townsend* (1899) 76 Minn. 64, 78 N. W. 880, 6 Am. Neg. Rep. 95; *Bassett v. St. Joseph* (1873) 53 Mo. 290, 14 Am. Rep. 446 (city liable if its negligence was one of two concurrent causes of the injury complained of); *Daneschocky v. Sieble* (1917) 195 Mo. App. 470, 193 S. W. 966 (same point).

Liability denied: *Youngblood v. Mason City* (1914) 165 Iowa, 488, 146 N. W. 20; *Beetz v. Brooklyn* (1896) 10

A duty on the part of the municipality to take proper measures to protect the public against the dangers created by the unauthorized work arises as soon as it has notice, actual or constructive, that the work is in progress.¹¹

§ 3. Inconsistent findings and judgments.

The right of a complainant to hold the corporation liable for an injury caused by unsafe conditions is manifestly dependent upon whether the existence of those conditions imports negligence on the part of the person to whom the permit was issued. Accordingly, in an action brought against both the corporation and the licensee, a judgment absolving the latter and imposing liability upon the former is fundamentally erroneous.¹

App. Div. 382, 75 N. Y. S. R. 1376, 41 N. Y. Supp. 1009; *Storey v. New York* (1898) 29 App. Div. 316, 51 N. Y. Supp. 580; *Von Lengerke v. New York* (1912) 150 App. Div. 98, 134 N. Y. Supp. 832; *Koch v. Williamsport* (1900) 195 Pa. 488, 46 Atl. 67, 7 Am. Neg. Rep. 663.

¹¹*Badgley v. St. Louis* (1899) 149 Mo. 122, 50 S. W. 817 (verdict set aside on the ground merely of error as regards form of instruction); *Weed v. Ballston Spa* (1879) 76 N. Y. 329; *Boyle v. Hazleton* (1895) 171 Pa. 167, 33 Atl. 142 (where the work was illegal, because not authorized by a competent official); *Myers v. Philadelphia* (1907) 217 Pa. 159, 10 L.R.A. (N.S.) 678, 66 Atl. 251.

In the *Boyle Case* (Pa.) *supra*, the court said: "The cases cited to sustain the borough's contention that it is not liable to the plaintiff for the injury she received in consequence of the work done by Rausch are not applicable to the facts of this case. They are cases in which the work was done under a contract with or license from the municipality, while in this case the work was done without its permission and in violation of its laws. We see no occasion, and we are not disposed, to go a hair's breadth beyond them in relaxing the supervision by a municipality of the streets within it."

¹In *Gregg v. Wilmington* (1911) 155 N. C. 18, 70 S. E. 1070, the bricks taken from a building which one W was employed to demolish were, with the per-

§ 4. Liability of corporation in respect of work undertaken without a formal permit.

It is well settled that where the work to which the unsafe conditions in question were incidental was not authorized by a permit, the corporation cannot be held liable unless its

mission of the authorities, piled upon the sidewalk and the roadway adjacent to the building. The jar of a passing street car caused the pile to topple over and fall upon the plaintiff's intestate, who happened to be then standing near it. In an action against W and the city, the plaintiff alleged negligence on the part of the former with respect to the manner in which the bricks were piled, and on the part of the latter with respect to permitting the bricks to remain in the street after it either knew, or could have known, its dangerous condition. The trial judge set aside a special finding to the effect the intestate had not been killed through the negligence of W, and gave judgment against the city on the other findings. Held, that this disposition of the case was improper, and that the entire verdict should have been set aside. The court said: "The negligence of Woolvin necessarily preceded that of the city, if there was any negligence at all, for the city is charged with negligence, not because it carelessly piled the bricks in the street, but because, Woolvin having so negligently piled them, it permitted them to remain so negligently piled in the street and thereby to become dangerous to the public. The negligence of the city, upon the admitted facts, is directly and necessarily dependent upon the negligence of Woolvin, and cannot exist without it. If Woolvin was not negligent, then the city is free from blame, for it is not alleged, nor is it suggested, that the intestate would have been killed or injured in any way if the bricks had been properly stacked and secured. . . . The verdict of the jury was, therefore, inconsistent. They could not, in law, discharge Woolvin and charge the other defendant. But it does not follow that because Woolvin is guilty the city is also, because, in order to charge the city with negligence, the jury must find not only that the bricks were neg-

knowledge, actual or constructive, of those conditions, is established by affirmative evidence.¹

This rule has also been treated as controlling in cases in which the element of the absence of a permit was not adverted to at all, and the liability of the corporation was discussed with reference to the doctrine which

ligently piled by Woolvin, but that the city, with actual or constructive knowledge of their dangerous condition, permitted them to remain so. . . . This is our case, and we think that the judge should have set aside the entire verdict, as it was the only course to adopt that would conduce to a fair trial and give to each of the parties an equal chance to be heard, without being fettered or hampered by a restricted trial. It will not prejudice the plaintiff, for if there was actionable negligence on the part of Woolvin, or if both defendants were guilty of such negligence, the plaintiff will recover against one or both, according to his right in law, but one or both of the defendants may suffer great detriment and wrong by the opposite course."

In *Raymond v. Keseberg* (1893) 84 Wis. 302, 19 L.R.A. 643, 54 N. W. 612, it was held that special findings to the effect that the corporation was, and that the licensee was not, guilty of negligence, were inconsistent and contradictory, and would not sustain a judgment against the former.

¹ *Lewis v. Atlanta* (1886) 77 Ga. 756, 4 Am. St. Rep. 108, distinguishing *Savannah v. Donnelly* (1883) 71 Ga. 258; *Jones v. Clinton* (1896) 100 Iowa, 333, 69 N. W. 418; *Abilene v. Cowperthwait* (1893) 52 Kan. 324, 34 Pac. 795; *Bragg v. Bangor* (1863) 51 Me. 532 (decided with reference to an express statutory provision limiting liability of city to cases in which it had "reasonable notice"); *Weed v. Ballston Spa* (1879) 76 N. Y. 329; *Rehberg v. New York* (1883) 91 N. Y. 137, 43 Am. Rep. 657; *Shook v. Cohoes* (1888) 108 N. Y. 648, 15 N. E. 531; *Bunch v. Edenton* (1884) 90 N. C. 431 (plaintiff held entitled to recover for injuries caused by falling into an excavation made for a cellar adjacent to the boundary line of a street, and left unguarded and unlighted for a month); *Bloor v. Delaware* (1887) 69 Wis. 276, 34 N. W. 115.

accords to abutters the right of making a temporary use of a highway for

purposes connected with the occupation of their premises.²

² In *Keyes v. Cedar Falls* (1899) 107 Iowa, 509, 78 N. W. 227, where an action was held to be maintainable by a person who had fallen at night into an unguarded excavation made for the area of a new building, then in course of construction for a firm of which one Olbrich, the chairman of the defendant's committee on streets, was a member, it was contended without success that, as Olbrich had no authority from the city to make the excavation, it was to his interest not to convey the knowledge he possessed to the city, and that the presumption of knowledge on the part of the city did not obtain." The court said: "In the case before us, Olbrich and the city were equally interested in having the excavation so guarded as that injury would not result, and there is every reason to suppose that an agent so interested would convey his knowledge to his principal. But it is argued that, as Clay & Olbrich had no permission to make the excavation, they became trespassers, and that it was to Olbrich's interest to keep from the city notice of the fact that he had dug the area for his window. It does not appear from the evidence that defendant required building permits or licenses to be issued to those who would build up to the street lines, and, in the absence of such requirements, builders had the right to temporarily use a reasonable portion of the street for building material and in excavating for foundations and cellars. *O'Linda v. Lothrop* (1839) 21 Pick. (Mass.) 297, 32 Am. Dec. 261; *Clark v. Fry* (1858) 8 Ohio St. 358, 72 Am. Dec. 590. . . . In this case it appears that the city knew that Clay & Olbrich were occupying the street and making excavations for their building, and they entered no protest against it. There is no evidence whatever that either Clay or Olbrich was attempting to gain any advantage of, or to perpetrate any fraud upon, the city; and there is no reason for supposing that concealment of the fact that they were making the excavation would have been to their advantage. Such a hole in the surface of the street would be apparent to the most casual observer, and there could have been no thought of concealment in the mind of Olbrich when he ordered the work done."

In *Miller v. Missouri Wrecking Co.*

(1916) — Mo. —, 187 S. W. 45, a verdict in favor of a city was set aside in an action brought by a girl of fourteen, who had been injured by the fall of a steel beam from a pile deposited next to the wall of a building which the codefendant of the city was wrecking. The case was held not to come within the scope of the rule which entitles abutters to make a temporary use of streets for the purpose of loading and unloading materials. The court relied on certain cases illustrating the rule that "cities are held liable for injuries resulting from their negligently suffering structures and excavations to exist on private property adjacent to a street. This rule is broad enough to include that portion of the street shown in this case to lie between the sidewalk and the property line." Evidence that the pile of beams had stood at the same place for seven or more weeks before the plaintiff was injured, was held to be sufficient "to take the question of constructive notice to the jury if the pile of beams in fact presented the appearance plaintiff's evidence tended to prove it did."

In *Loberg v. Amherst* (1894) 87 Wis. 634, 41 Am. St. Rep. 69, 58 N. W. 1048, the plaintiff's horse took fright at the mortar boxes required for the plastering of a house. The court said: "There was nothing in their mere presence there for such a purpose to operate either as constructive notice to the town authorities, or as actual notice to the overseer who merely saw them there the day before the accident, that Jensen was exceeding his prima facie rights as an abutter on the highway, or making an unreasonable and unlawful use of it."

II. Illustrative cases.

§ 5. Injuries caused by collision of pedestrians, vehicles, and horses with building materials deposited in street.

In *Cleveland v. King* (1889) 132 U. S. 295, 33 L. ed. 334, 10 Sup. Ct. Rep. 90, affirming (1885) 28 Fed. 835, the plaintiff was injured by being thrown out of her buggy, when it came into collision with a mortar box which, with other building materials, had been placed by licensees of the defendant city upon one of its streets. There was evidence tending to show that the obstructions were not indicated by

lights or signals, so as to give warning to persons passing in vehicles, and that a greater width of street was occupied by these building materials than was justified by the permits granted. A verdict in favor of the plaintiff was upheld for reasons thus stated: "If the obstruction in question was on Bank street unnecessarily, or for an unreasonable length of time, or was there without proper light or other guards to indicate its locality, and such condition of the street at the time the plaintiff was injured existed with the knowledge of the city, either actual or constructive, for a sufficient length of time to remedy it by the exercise of proper diligence, the liability of the city cannot be doubted, in view of the decisions of the supreme court of Ohio and of this court. . . . The fact that the permits to Rosenfeld and Kosterling only authorized them to occupy one half of the street for the purpose of depositing building materials thereon, and required them to indicate the locality of such materials by proper lights, during the whole of every night that they were left in the street, did not relieve the city of the duty of exercising such reasonable diligence as the circumstances required, to prevent the street from being occupied by those parties in such a way as to endanger passers-by in their use of it in all proper ways. Whether that degree of diligence was exercised by the city, through its agents; whether its officers had such notice or knowledge of the use of Bank street, in the locality mentioned, by the parties to whom the above permits were granted, as was inconsistent with the safety of passers-by using it with due diligence; whether, in fact, the materials and obstructions placed by Kosterling on the street were sufficiently indicated by signal lights or otherwise, during the nighttime; and whether the plaintiff was himself guilty of such negligence as contributed to his injury,—were questions fairly submitted to the jury, and are not open for consideration in this court." From this extract, as well as from the ruling that the allegations of the petition were sufficient, because broad enough to admit proof of notice on the part of the city, it is evident that the court must have proceeded upon the theory that the right of recovery was conditional upon the ability of the plaintiff to show by affirmative evidence that

such notice was imputable. That theory is different from the one subsequently applied in *District of Columbia v. Woodbury* (1890) 136 U. S. 450, 34 L. ed. 472, 10 Sup. Ct. Rep. 990, where the assurance of a permit was regarded as being in itself sufficient to affect the municipality with notice of any dangerous conditions which might result from the work. See § 12, *infra*.

In *Harrison v. Davis Constr. Co.* (1914) 42 App. D. C. 255, a bicyclist came into collision with some loose bricks remaining after the removal of a pile which had been deposited in the street by a contractor employed to improve a school building of the District of Columbia, one of the defendants. The evidence showed that warning lights had been displayed as long as the pile of brick was maintained in the street, but that the position of the loose bricks was not indicated by any such light. It was also shown that the pile could not have been removed earlier than during the day preceding the accident. The judgment of the trial judge, holding that the District was not affected with notice of the dangerous condition of the street at the time of the accident, was sustained.

In *Brown v. Chicago* (1907) 135 Ill. App. 126, the plaintiff, while taking a short cut across the roadway from the ordinary line of a sidewalk to the corner of a temporary footpath constructed round a fence erected in front of a building under construction, stumbled against a piece of scantling lying flat upon the surface of the street. Held, that as a portion of the street had been designated and prepared for the use of pedestrians, and as the scantling did not make the street dangerous for horsemen or vehicles, the defendant was not, as regards the plaintiff, guilty of actionable negligence in permitting the scantling to lie where it was. The court said: "It is to be inferred from the evidence that there was at the time of the accident sufficient light to enable appellant to see the projecting scantling, for he says he saw it after he fell. If he chose to use that portion of the street designated for vehicles instead of the portion designated for pedestrians, it was his duty to exercise sufficient care to avoid an obstacle of that character."

In *Indianapolis v. Doherty* (1880) 71 Ind. 5, a verdict for the plaintiff was sustained in an action brought to re-

cover injuries caused by the collision of his buggy with an unlighted pile of materials. The following instruction was approved: "When the city issues a building permit to use and obstruct a street, it is the duty of the corporate authorities to see to it that the persons whom she authorizes to use her streets shall properly guard and protect such obstructions; and, if she negligently fails to perform this duty, she is responsible to one who is injured while properly using such streets, and who is at the time exercising due care." The court said: "It is the duty of cities to keep their streets and sidewalks in a reasonably safe condition for travel in the ordinary modes, and, in default of doing so, they are liable in damages to persons injured by the neglect; and this liability cannot be escaped on the ground that the persons using a part of the street for building purposes may themselves be liable to persons injured by the obstruction. It is the duty of the city to see that such obstructions are kept in such condition, by barricades, lights, or such other means as may be necessary, as to render travel reasonably safe." The language thus used would seem to import that the defendant was regarded as being absolutely liable for the negligence of the licensee in failing to take appropriate precautions, irrespective of whether it was chargeable with notice, actual or constructive, of the unsafe conditions caused by that negligence. If so, the doctrinal standpoint was different from that indicated by the next case cited.

In *Warsaw v. Dunlap* (1887) 112 Ind. 576, 11 N. E. 623, 14 N. E. 568, the plaintiff, while walking along a street during the nighttime, was injured by a fall, which he alleged to have been caused by a plank projecting across the sidewalk from the wall of a building in course of erection. It was also shown by all witnesses who testified on the subject that a platform, or runway, was placed across the sidewalk on the preceding day, for the purpose of conveying bricks to the walls of the building; but they also asserted that the planks were all removed from the sidewalk when the work ceased late in the evening. There being no conflict of evidence with respect to the removal, the only fair inference from the opinion of the court was that the plank was placed across the sidewalk by some wrongdoer. But even if this

inference were not proper, it was considered that the city could not be held liable, because there was no evidence that it had actual notice of the conditions, and the time elapsing between the hour that the workmen removed the planks and that at which the accident happened was not sufficient to charge it with notice.

In *Laporte v. Henry* (1908) 41 Ind. App. 197, 83 N. E. 655, where the plaintiff's team collided with an unlighted pile of building materials, it was held that a demurrer to a paragraph of the answer of the city, which alleged that the obstructions were permitted in the street under a city ordinance, had been properly sustained, as the negligence complained of was not permitting the obstructions to remain in the street, but permitting them to remain unguarded and unprotected.

In *Kansas City v. McDonald* (1899) 60 Kan. 481, 45 L.R.A. 429, 57 Pac. 123, 6 Am. Neg. Rep. 67, the plaintiff's husband, while driving a hook and ladder wagon, was thrown off and killed when it came into collision with an unlighted pile of rocks deposited in front of some houses then in course of construction. There was then an ordinance in force, providing that persons engaged in the construction of any building might occupy so much of the street in front thereof as was necessary for the purpose of depositing material for use in its construction, not over one third of the width of the street so to be occupied. A judgment for the plaintiff was affirmed on grounds thus stated: "The ordinance permitting a use of a portion of the street for the deposit of building material thereon was not invalid. Dill. Mun. Corp. 4th ed. § 730. In the absence of such ordinance a license thus to encroach upon the street might be implied, and a temporary occupation be lawful, from the necessities of the case, when buildings fronting on the street were being erected. Yet, such use being exceptional and foreign to the purposes for which the thoroughfare was laid out and maintained, the duty devolved upon the city to exercise vigilance with respect to the rights of a traveler who might be harmed by such obstructions in his way. . . . The negligence of the city was clearly shown. It suffered one of its principal thoroughfares to be obstructed in a place likely to occasion injury to persons having a right to travel thereon, and permitted this

obstruction to remain unguarded and without lights or warnings to prevent accidents in the nighttime, in disregard of a lawful duty imposed upon it." This unqualified language, when taken in connection with the circumstance that, so far as appears, no affirmative evidence of notice was introduced, would seem to import that, for the purpose of its decision, the court must have proceeded upon the theory that the implied license, which was assumed to have been granted with respect to the deposit of the materials, had operated so as to cast upon the city an absolute duty, which rendered it responsible for the unsafe conditions in question, irrespective of whether it was shown, by affirmative evidence, to have had knowledge, actual or constructive, of the absence of precautionary signals at the time of the accident. If this was the position of the court, its doctrinal standpoint was different from that reflected in the earlier case of *Kansas City v. Birmingham* (1891) 45 Kan. 212, 25 Pac. 569. See § 12, *infra*.

In *Louisville v. Nicholls* (1914) 158 Ky. 516, 165 S. W. 660, the plaintiff city was held to be entitled to recover the amount which it had been compelled to pay as damages to a person who had been injured by stumbling over a stone upon the sidewalk in front of a newly erected building.

In *DeGarmo v. Vogt* (1913) 151 Ky. 847, 152 S. W. 969, where the plaintiff had come into collision with a pile of gravel, deposited by a contractor on a sidewalk for the purpose of refacing a house, a verdict for the abutter, the city, and the contractor was sustained, the evidence being conflicting with regard to the sufficiency of the means adopted for guarding the obstruction. The court agreed with the contention of counsel that one of the instructions submitting the question whether the city knew, or with the exercise of ordinary care could have known, of the dangerous condition of the sidewalk, "was erroneous, because the city was already charged with notice when it issued its permit and granted the right to use the sidewalk for building material; that it knew the sidewalk was to be used for that purpose, and it must therefore have taken means, without further notice, to protect the public from danger by reason of the obstruction contemplated in the permit." It was held that, under the cir-

cumstances, the error complained of was not prejudicial.

In *Covington v. Johnson* (1902) 24 Ky. L. Rep. 602, 69 S. W. 703, 12 Am. Neg. Rep. 286, where the plaintiff was injured at night by striking his foot against a plank laid as a covering over a hole made in a sidewalk (purpose not stated), a verdict against defendant city was held to be warranted by evidence showing that the defect had existed at least three days. It is not clear from the report whether a permit had been issued. In *Louisville v. Keher* (1904) 117 Ky. 841, 79 S. W. 270, where a verdict for the plaintiff was sustained, the injury complained of was caused by the collision of a bicycle with a pile of rocks placed by contractors round a mortar bed in front of a house which they were building. The evidence of the plaintiff's witnesses tended to show that at the time of the accident there were no lights of any sort on the obstruction, or about it; that it had existed in the street for several weeks, with the knowledge of the officers of the city; and that for two or three nights, at least, before the plaintiff was hurt, it was not lighted in any way. The court approved instructions to the effect that it was the duty of the person using the street as a place of deposit for building material to protect persons using the street at night from injury by giving notice or warning of the obstruction to the street by placing sufficient lights upon or near the material; that it was the duty of the defendant city to exercise ordinary care in causing the said warning to be given by persons to whom it may have given a license to use a portion of a public street as a place of deposit; and that if the jury should believe from the evidence that the defendant city did not exercise ordinary care to have the said notice of warning given of the obstruction to the street, then the law was for the plaintiff against the city. The precedents cited were: *District of Columbia v. Woodbury* (1890) 136 U. S. 450, 34 L. ed. 472, 10 Sup. Ct. Rep. 990; *Stephens v. Macon* (1884) 83 Mo. 345; *Sutton v. Snomish* (1895) 11 Wash. 24, 48 Am. St. Rep. 847, 39 Pac. 273; *Boucher v. New Haven* (1873) 40 Conn. 456; *Anderson v. Wilmington* (1889) 8 Houst. (Del.) 516, 19 Atl. 509; *McAllister v. Albany* (1890) 18 Or. 426, 23 Pac. 845. The effect of all these was said to be that

"where a city authorizes an excavation to be made in one of its streets, and a traveler on the street is injured by the negligence of the person making the excavation in not sufficiently covering the hole, or not giving sufficient warning of the danger, the city is liable to the person injured by reason of the act which it has licensed, without notice to it of the dangerous condition of the excavation." (The facts involved in the last three of these cases are such as to place them within the scope of the present annotation.)

In *Blocher v. Dieco* (1907) 30 Ky. L. Rep. 689, 99 S. W. 606, the plaintiff, Dieco, stumbled over some bricks lying on a sidewalk in front of a building which was being erected by Blocher, under a permit issued by the co-defendant, the city of Owensboro. No light, barricade, or other warning had been placed on the sidewalk. There was evidence for defendants to the effect that each evening, when the men ceased work, any bricks that might have been on the sidewalk during the day were carefully removed from it and stacked up on the grass plot by the side of the pavement, and that on the night in question a large crowd of people gathered on the street and sidewalk where the bricks were located. The theory of the defendants was that these persons, in climbing about or leaning against the pile of bricks, may have caused some of them to fall over on the sidewalk. There was also some testimony that Dieco, in passing through this crowd, was pushed or jostled by some of the crowd, and thus caused to fall. Held, that the case had been properly submitted to the jury, and that the evidence was sufficient to support a verdict for the plaintiff. The court said: "Ordinarily a city is not liable to persons who have been injured by obstructions on the streets or sidewalks, unless it knew, or by the exercise of ordinary care might have known, of the obstruction. *Hazelrigg v. Frankfort* (1906) 29 Ky. L. Rep. 207, 92 S. W. 584. There is, however, an exception to the rule that a city is not liable without notice, as where the city grants the right to place building material upon the sidewalks or streets that may obstruct it. When this privilege is extended by the city, it is at once charged with notice that the streets and sidewalks may be obstructed by the person to whom the privilege has been granted, and the city is required

to exercise ordinary care to prevent persons being injured by such obstructions. The measure of care exacted is that persons traveling the street be given some notice of the obstruction. . . . It was the duty of Blocher, as well as the city, to have placed on or near the obstruction of the sidewalk notice or warning of its presence. The license from the city did not exonerate Blocher from this duty, and, as said in the *Keher Case* (1904) 117 Ky. 841, 79 S. W. 270, the city was chargeable with his neglect in this respect."

In *Harrodsburg v. Sallee* (1911) 142 Ky. 829, 135 S. W. 405, some dirt taken from a hole made in a grass plot in front of a house rolled onto the sidewalk. A pedestrian stumbled against this obstruction in the nighttime, and fell into the hole. There being evidence to the effect that the dirt had stood upon the sidewalk for about thirty hours before the accident occurred, the case was held to have been properly submitted to the jury.

In *Sinclair v. Baltimore* (1883) 59 Md. 592, where the plaintiff's buggy came into collision with an unlighted pile of building materials, a verdict was directed for the defendant on the ground that the municipal ordinance, providing that piles of building materials should, "during the night, be designated by displaying a lighted lamp or lantern at such part of the same as to be easily observed by persons passing along the street," and imposing a fine for a violation of this provision, belonged to the class of ordinances which required the agency of a police force to execute them, and that, as the city had no such police agency of its own, and was not allowed the direction and control of the police force within its limits, it had no means at its command to enforce the ordinance, and it would, consequently, be unjust to hold it liable for injuries resulting from a failure to enforce the ordinance. This situation was held to have been created by the Police Act of 1867, chap. 367, the effect of which was to render the police commissioners officers of the state, and not of the city. This decision apparently requires for its support the theory that the combined effect of the ordinance and statute referred to was to take all cases to which the ordinance was applicable out of the scope of the duty to which the city was subjected by its charter (see case next cited) with regard to protecting trav-

elers against such dangerous conditions as those which caused the plaintiff's injury.

In *Baltimore v. Beck* (1903) 96 Md. 183, 53 Atl. 976, 13 Am. Neg. Rep. 313, the plaintiff's injury was caused by the collision of her carriage, during the night, with a pile of bricks which had been placed in the streets by certain builders and contractors, who were building houses at or near the place of the accident. The evidence showed that there was no light burning at the time or at the place of the accident, either on the pile of bricks or in the street; that, in consequence of a strike of the employees of the electric light company which furnished the municipal lights, they had not been burning for several nights before and after the accident. By § 6, chap. 123, of the Maryland Acts of 1898 (city charter), it is provided that the mayor and city council of Baltimore shall have full power and authority to regulate the use of the streets, highways, roads, public places, and sidewalks by foot passengers, vehicles, etc., and prevent encroachments thereon and obstructions of the same, and to erect lamps in any streets, etc., and cause the same to be lighted, at the expense of the city, and to provide for and regulate the construction, inspection, and repairs of all private and public buildings within the city. Having referred to this provision, the court proceeded thus: "There can be no question, then, that as the municipal authorities of Baltimore had the power and authority to regulate and to remove obstructions from its streets, and to cause the streets to be lighted at the expense of the city, it was its plain duty to have kept the avenue lighted and in a safe condition for public travel, on the night of the accident in question. The law is well settled that if it negligently fails so to do, and persons acting without negligence on their part are injured while passing along its highways, the city is liable in damages for the injuries caused by the neglect, and the person so injured can recover against the municipality therefor.

... The municipality could not escape liability for its neglect of duty in not having its streets and avenues lighted at night, because of the failure of an electric light company which had contracted to light the streets, and had neglected its duty. The neglect of the company would be the neglect of

the city." The court observed that the *Sinclair Case* (Md.) supra, was "clearly distinguishable in principle." But it would seem that, if the ordinance and statute which were treated as controlling factors for the purposes of that case were still in force when the later decision was rendered, the two cases must be deemed essentially inconsistent in this respect: that the *Beck Case* involves by implication a tacit abandonment of the theory propounded in the *Sinclair Case* in regard to the operation of the ordinance and statute with reference to the civil liability of the city.

In *Leonard v. Boston* (1903) 183 Mass. 68, 66 N. E. 596, an abutter, acting under a permit, had inclosed a portion of a sidewalk by boards about 30 feet apart. One of these barriers ran to a tree and another to a telegraph pole. The plaintiff, while walking along the street in the evening, passed by the former barrier on the outside of the tree, and, after taking a step or two, stumbled over a pile of stones. A verdict against the defendant was sustained, the court being of the opinion that "if the jury believed . . . that the pile sloping toward the curbstone had been there for a few days, and found that this pile was outside of a line connecting the tree with the telegraph pole, they were warranted in finding that the defendant had reasonable notice of the defect, or could have had notice thereof by the exercise of proper care and diligence."

In *Grant v. Stillwater* (1886) 35 Minn. 242, 28 N. W. 660, the evidence tended to show that the owner of a lot, being about to excavate a cellar on his property, obtained a license from the city council to deposit the rock and dirt temporarily upon the street in front of his lot; that, after the pile had been there about two weeks, the plaintiff was driving a cutter along the street; that his horse, being startled by the noise of a locomotive at the neighboring depot, shied so as to bring the cutter into collision with the pile and upset it; that there were no guards around, nor lights upon, the pile of rock and earth; and that the city authorities had notice of the manner in which the pile had been deposited. Held, that the question whether the city was chargeable with negligence had been properly submitted to the jury. The court said: "It seems to us that the real question in this case has been obscured by giv-

ing undue prominence to this license, and to the consideration of the question whether or not it was within the provisions of the city ordinance on that subject. It strikes us these matters have very little to do with the case. It was the duty of the city to use reasonable diligence to keep its streets in safe condition for use by the public. The alleged neglect of this duty is the gist of plaintiff's cause of action. As to the duty of the city in this respect, it could make no possible difference whether this material was placed in the street with or without a license from the city. In either case, if it was deposited or kept in such condition as to render the street unsafe and dangerous, it would be the duty of the city to cause the street to be made safe for use; and if it neglected to do so after it had notice, or was chargeable with notice, of the facts, and injury resulted to any person from this neglect, the city would be liable. The fact that the city council had granted a license to use this street for the deposit of this material neither suspended nor abrogated the duty of the city to exercise reasonable care to keep it in safe condition. *Seneca Falls v. Zalinski* (1876) 8 Hun (N.Y.) 571."

In *Killeen v. St. Cloud* (1917) 136 Minn. 66, 161 N. W. 260, where the plaintiff's buggy collided with an unlighted pile of sand, which, under a permit issued by the defendant, had been deposited upon the street in front of a school building then in course of construction, evidence which tended to show that the pile had remained unguarded for several nights was held to be sufficient to warrant the jury in finding that the defendant was chargeable with notice of the unsafe conditions.

In *Griffin v. New York* (1854) 9 N. Y. 456, 61 Am. Dec. 700, where the plaintiff was thrown out of his buggy when it was tilted by a pile of dirt which had been deposited in the street by persons engaged in repairing buildings opposite the spot, it was proved that this pile, as well as other obstructions of a similar character, had been lying there for several months. One of the grounds upon which a nonsuit was held to have been properly granted was thus stated in the concurring opinion of Allen, J.: "The defendants are not chargeable for any injury resulting from an obstruction of a public

street not caused by their own act or the acts of their authorized agents, especially when notice of the obstruction is not brought home to the city authorities. A duty is devolved upon the common council of New York, in their legislative capacity, to prevent by adequate laws all improper encroachments upon the highways, and to provide for the removal of all obstructions, as also to prevent other nuisances which might injuriously affect the health, property, or rights of the citizen. This obligation is an imperfect obligation, and for its nonperformance an action will not lie at the suit of an individual who may sustain injury by the omission." From the more recent New York cases it is clear that the theory thus propounded with regard to the limits of the obligations of a municipal corporation is no longer accepted, so far as respects cases of the type here under discussion.

In *Breil v. Buffalo* (1894) 144 N. Y. 163, 38 N. E. 977, reversing (1893) 68 Hun, 219, 22 N. Y. Supp. 845, where the plaintiff's carriage was overturned by a collision with an unlighted pile of dirt which had, on the day preceding the night when the accident occurred, been left on the roadway by workmen engaged in filling a lot, the liability of the defendant was denied on the ground that there was no evidence from which constructive notice of the dangerous conditions could be inferred.

In *Van Vranken v. Clifton Springs* (1895) 86 Hun, 67, 33 N. Y. Supp. 329, where the plaintiff's buggy was overturned by reason of its wheel having collided with an unlighted pile of building material, which had been lying about a month in front of a building under construction, the nature of the evidence which was held to have established the defendant's evidence "beyond all question" is not stated.

In *Carlson v. New York* (1912) 150 App. Div. 264, 134 N. Y. Supp. 661, where the plaintiff, while driving an automobile on a street at or near midnight, came into collision with a pile of sand which the codefendants of the city sued had, under a permit issued by it, caused to be placed there, for the purposes of a building in course of construction, a verdict for the plaintiff was set aside on the ground that there was no evidence in this case which would justify a jury in finding that there was not a lighted lantern at the

end of the pile of sand when the accident occurred; that, if there was such a light, it was sufficient warning of the unsafe conditions; and that the contention of the defendants that at the time of the accident the sand had spread beyond the limits specified in the permit was not borne out by the evidence, so far as respected that portion of the pile with which the automobile collided.

In *Friedman v. New York* (1909; App. T.) 63 Misc. 310, 116 N. Y. Supp. 750, where the plaintiff was injured by striking his foot against certain boards placed by an abutter on a sidewalk for the purposes of work on a building, the liability of the defendant was denied on the ground that "no evidence was given to show notice to it of the defective condition of the street where the boards were, and because it was not in any way responsible for placing these boards upon the street." The court said: "The theory of the plaintiff's case is that the boards constituted a nuisance. The boards were merely a temporary obstruction of the sidewalk, and the city had power to authorize its existence during the alteration of the building of Bloom & Shapiro. This obstruction, having been erected with the consent of the city and under its license, must be regarded as being governed by the principles of the law of negligence, and not the law of nuisance."

In *Seneca Falls v. Zalinski* (1876) 8 Hun (N. Y.) 571, the action was brought to recover from an abutter the amount which the plaintiff village had been compelled, by a judgment in a previous action, to pay as damages for an injury occasioned to a pedestrian by falling over an unlighted pile of building materials which the defendant had placed in the street with the permission of the president of the village, and kept there with the knowledge of the trustees and the superintendent of streets. The point actually decided was that the plaintiff had been erroneously nonsuited. But the court expressed the opinion, arguendo, that the injured person's claim had been properly sustained in the previous action, as the obstructions put in the street by the abutter were not effectively guarded by lights when plaintiff collided with them. The court laid down the general rule that, "where streets in a city or village are used, as in this case, for the deposit

of materials by the adjoining proprietor for building purposes, or dug up for the construction of sewers, the laying of water or gas pipes, or for other improvements, by the corporation or by the adjoining owner, the corporation is bound to see to it that proper guards, or lights by night, be erected and maintained around such excavations or obstructions, so that travelers be not exposed to injury. *Storrs v. Utica* (1858) 17 N. Y. 104, 72 Am. Dec. 437." On its face this statement would seem to import an acceptance of the doctrine that the issuance of a permit renders a municipality absolutely liable for any negligence of which the licensee may be guilty in respect of failing to protect travelers, irrespective of whether it had or had not notice of the unsafe conditions.

In *Magee v. Troy* (1888) 48 Hun, 383, 1 N. Y. Supp. 24, affirmed in (1890) 119 N. Y. 640, 23 N. E. 1148, where plaintiff was injured through the upsetting of his wagon, when it collided with a pile of building material, a nonsuit was held to have been properly refused, the evidence being to the effect that the pile extended more than half way across the street; that it was from 2½ to 3 feet high; that it had been maintained in substantially the same condition for two or three weeks before the accident; and that it had never been guarded or lighted. The court said: "Whether the city had given this builder express or implied license was probably immaterial to the plaintiff. If the builder had the license, then the mere deposit and storage of the materials in the place covered by the license would not be a nuisance. But the license to the builder would not relieve the builder and the city from the duty of so storing, or guarding, or lighting the pile as to leave the street reasonably safe for the traveler by night as well as by day, and whether this had been done in this case was a question for the jury. As between the city and the builder, the duty primarily rested upon the builder. But the duty rests upon the city to keep its streets in a condition reasonably safe for the public travel, and it cannot escape the responsibility which this duty imposes by permitting the private builder to leave his pile of materials in a dangerous condition."

In *Columbus v. Penrod* (1906) 73 Ohio St. 209, 3 L.R.A. (N.S.) 386, 112

Am. St. Rep. 716, 76 N. E. 826, 20 Am. Neg. Rep. 169, where the plaintiff had stumbled over a mortar board placed on the street in front of a building under construction, the contention unsuccessfully advanced by the defendant city was that it was entitled to judgment on certain special findings, for the reason that they were substantially to the effect that, if the policeman on duty in the district had been notified concerning the unsafe conditions such notification did not affect the city with knowledge of those conditions, and that there was no evidence from which constructive notice thereof could be inferred. The court said: "That the knowledge of the policeman or notice to him does not make the city liable is ruled in *Cleveland v. Payne* (1905) 72 Ohio St. 347, 70 L.R.A. 841, 74 N. E. 177, 18 Am. Neg. Rep. 211, so that the principal question for consideration is whether, in an action to recover damages for personal injuries received from an unguarded or unlighted obstruction in a street, it is necessary to prove that the city had knowledge or notice, when the city had given permission to occupy a part of the street at the place with material for the construction of a building upon the adjacent property; or, differently stated, whether it is the duty of the city, when it gives such permission, to see that a nuisance is not created. . . . If the regulation of such obstructions is highly proper, it would seem unreasonable to hold that a regulation, requiring a permit to be obtained, may be enforced only at the risk of becoming liable in damages for such injuries as may result from its abuse; and strange that such regulation is usual. An examination of the cases will show that it is only when the city is the actor, or in cases of license by the city to do an intrinsically dangerous thing in the street, and not in cases properly of mere regulation, that the city is liable without notice, or is charged with notice by the fact that it gave the permit to do the thing in the street. An ordinance regulating the use of the street for such purposes emanates from the police power of the city, and the granting of the permit under it, or neglect to enforce its provisions, cannot make it, civilly liable to an individual in consequence." Having referred to some earlier decisions, and distinguished them on the ground that they

related to obstructions which were necessarily dangerous, and that the obstructions involved in the case under review did not belong to that category, the court continued thus: "To hold that the city may not grant such a permit without assuming the duty of seeing that the obstruction is properly guarded with barriers and lights would require the city to exact from the property owner the expense of doing so, which, in many cases, would be a hardship on the property owner and an unreasonable regulation; so that, being of the opinion that a permit by a city to use part of the street for the placing of building materials for use in the construction of a building on the adjacent property is a mere regulation of a right of the property owner to make such use of the street, and not a license to do an act in the street which but for such license would be illegal or a nuisance, the city by giving such permit is not charged with the duty of seeing that the place is guarded, and will not be liable in damages to a person injured in consequence of the omission to guard such place with barriers or lights, unless it had notice, express or implied, of such omission, and after such notice was guilty of negligence."

In *Koch v. Williamsport* (1900) 195 Pa. 488, 46 Atl. 67, 7 Am. Neg. Rep. 663, where the plaintiff's injury resulted from the collision of his buggy with a heap of stones, deposited on the roadway by contractors who were engaged in building a house, a verdict for the plaintiff was upheld, the court being of opinion that the instructions under which the questions whether the defendant city was properly chargeable with constructive notice of the obstructions, and whether it was the proximate cause of the injury, were submitted to the jury, were correct.

In *Knoxville v. Bell* (1883) 12 Lea (Tenn.) 157, where the plaintiff was injured in consequence of his horse stumbling against a pile of broken brick and rubbish left in the street by the tenant of the adjacent premises, a verdict in his favor was held to be warranted by evidence to the effect that the obstruction had remained there from thirty-six hours to four days.

In *McCoull v. Manchester* (1888) 85 Va. 579, 2 L.R.A. 691, 8 S. E. 379, where, by reason of the collision of a riding horse with an unlighted pile of

sand, deposited in a street opposite a building then in course of construction, the rider was injured and the animal killed, a verdict for the defendant was set aside on the ground of error in the instruction, given at the defendant's request, to the effect that the existence of the ordinance authorizing the deposit was a complete and absolute defense to the city itself, and relieved it from all amenability to the law which required it to the duty to keep its streets and highways in safe condition for the use of the public; and, where necessary, to have a light, or barrier, or other signal to warn travelers of the temporary and necessary danger in the street. The court said: "The duties and liabilities imposed by its charter for the safety of the public cannot be abrogated or dispensed with by an ordinance of the city council." Error was also held to be predicable in respect of the refusal of an instruction, requested by plaintiff, which stated, *inter alia*, that the passage of an ordinance does not relieve the city of liability for injuries resulting from its negligence in failing to light the street in question, so as to warn travelers of existing danger in the use thereof; that, in order to hold the city liable, it must have had notice either expressed or implied; that if the obstruction is on a frequented street, and has been there ten days or two weeks, the jury may infer that the city had notice of the obstruction; that if the jury believe from the evidence that one of the city officers, who is the chief of police, had notice before the accident of the obstruction, that is express notice to the corporation; and that, even if there is an ordinance of the city allowing a builder to put sand in the street, yet if the jury believe from the evidence that it was necessary in such case to safe traveling that there should have been a city lamp lit at the place of the accident, to warn travelers of this existing danger, they are instructed that the failure of the city to have such light, at the time plaintiff passed by, is negligence. The propositions here enumerated with regard to proof of notice as a condition precedent to the city's liability, and the absolute obligation to maintain a lamp at the place where the obstruction was created, seem to be inconsistent, when considered separately. But they are presumably to be read together, and un-

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derstood as importing that the obligation specified is predicable as respects an obstruction of which the city has actual or constructive notice. Such construction, however, does not entirely dispose of the difficulties which are suggested by the court's approval of the instruction. It is scarcely possible to contend with any show of reason that a city which issues a permit to do a certain thing which, in the nature of the case, cannot be done without producing an obstruction in a street, is not chargeable with notice of the existence of the obstruction itself. The only question, as it would seem, concerning which there is any room for a difference of opinion, is whether the issuance of the permit should also be deemed to affect the city with notice of the unsafe conditions which result, not from the existence of the obstruction, but from the failure of the licensee to take such precautions as may be necessary to protect the public while it exists. How far the court intended to go in the direction of the doctrine under which this question is answered in the affirmative is a point left in doubt by its ruling.

In *Richmond v. Leaker* (1900) 99 Va. 1, 37 S. E. 348, the plaintiff received the injury complained of by stumbling over a piece of plank used as a gangway for hod carriers on a building then in course of construction. The plank was 2½ or 3 inches thick, and was lying across the gutter, and extended upon the pavement about 2 or 2½ feet. The streets were lighted diagonally across the street from the place of the accident. A new trial was ordered on the ground that the trial judge had refused an instruction to the effect that the defendant city was not liable for the placing of the plank unless it was allowed to remain across the pavement an unnecessary length of time, and the city authorities had actual notice or constructive notice of the dangerous position in which it was left.

In *Apker v. Hoquiam* (1909) 51 Wash. 567, 99 Pac. 746, a complaint was held not to be demurrable which alleged in substance that, by reason of the collision of the plaintiff's carriage with a pile of gravel which had remained in the street for thirty days, his horses became unmanageable, thereby causing him and his family to be thrown out of the carriage.

In *Humphries v. Montreal* (1868) 9

Lower Can. Jur. 75 (decision of a single judge), where a carter's horse and vehicle collided with a pile of building materials in front of a house under construction, the liability of the city was affirmed on the ground that the cause of the accident was its negligence in allowing the street to be unduly encumbered.

Cases of the type reviewed above, in which the injuries complained of were caused by "a reasonably necessary and temporary obstruction which was incident to the improvement of an abutting lot," were distinguished in *McDowell v. Preston* (1908) 104 Minn. 263, 18 L.R.A.(N.S.) 190, 116 N. W. 470, where the evidence showed that, while the plaintiff was driving along a street, her horse became uncontrollable, and that her buggy was consequently brought into collision with a temporary building erected by a merchant in the street, for the purpose of enabling him to carry on his business while he was constructing a new brick building on an adjacent lot. It was held that the trial judge had correctly charged the jury that the defendant was negligent in permitting the building to be erected and maintained in the public street.

§ 6. Injuries occasioned to children by building materials.

In *Gnau v. Ackerman* (1915) 166 Ky. 258, 179 S. W. 217, where a boy between two and three years old, while playing in a pile of sand, fell into a mortar bed in the center of it, the evidence showed that the pile of sand had been placed in the street some days before the lime bed was made, and that the children of the neighborhood had been playing in this sand until a few hours before the accident; that the lime bed had not been made in the sand, nor the slacking of the lime commenced, until late in the afternoon of the day on which the plaintiff was injured; and that there was no barrier of any kind placed around the sand pile, nor any covering placed on top of it. For the purpose of the case it was taken for granted that the boy "only knew, in his childish way, that there was a sand pile there, and into that sand pile he wanted to and did go, totally ignorant of the burning lime in the middle of the sand, and unconscious of the danger of playing in or about it." Held, that the trial court had properly overruled

a motion to direct a verdict in favor of the city, such motion being made on the ground that the evidence showed that it did not have any notice of the fact that lime had been put in the sand bed for the purpose of slacking, between the time it was placed there and the time of the accident, a few hours afterwards. The court said: "There would be much force in this position if it were necessary to bring notice home to the city in order to charge it with liability for the accident. But it is well settled in this state that where a city authorizes work to be done, and a part of its street to be obstructed by material while the work is in progress, it must take notice of the nature and character of the obstruction which it has authorized. *Louisville v. Keher* (1904) 117 Ky. 841, 79 S. W. 270; *Blocher v. Dieco* (1907) 30 Ky. L. Rep. 689, 99 S. W. 606; *DeGarmo v. Vogt* (1913) 151 Ky. 847, 152 S. W. 969; *Bellevue v. Rentz* (1913) 152 Ky. 426, 153 S. W. 732. . . . The city granted permission to Gnau to place this obstruction, or attractive nuisance, to children, in the street, and therefore it occupies precisely the same attitude as if it had placed this obstruction in the street. The city could not, by granting this permission, relieve itself of the duty it owed to keep its streets in reasonably safe condition for use. The duty of keeping its streets in condition for use is an absolute duty that the city cannot delegate to others and thereby excuse itself. When it grants permission to another party to place an obstruction in its streets, it must take notice of the nature and character of the obstruction so placed, and the manner in which it is maintained, and see to it that it does not make the street unsafe for use by the public. If this were not so, the city could, by granting permits to occupy its streets, relieve itself entirely of the duty it owes the public; and we do not know of any authority that would countenance a doctrine like this."

In *Buttron v. Bridell* (1910) 228 Mo. 622, 129 S. W. 12, where a child fell into a lime pit, it was held, in an action brought against the abutter and the city, that the trial judge had properly refused an instruction to the effect that "the city would not in any event be guilty of negligence in failing to cover, or cause to be covered, the lime pit, until after it knew, or by

the exercise of ordinary care could have known, that the same had been, on the evening in question, left filled with lime so heated as to be productive of injury to persons coming into contact therewith, and the same was uncovered." The court said: "It is common knowledge that these pits are constructed and maintained for the express purpose in which to slack lime, and that while going through the process of slacking the lime becomes intensely heated, sufficiently hot to set on fire any ordinary combustible material that may come in contact with it, and when large quantities of water are added the whole mass becomes a boiling mass. The granting of the permit brought home to the city the knowledge for what the pit was to be used, as well as the knowledge of the natural and usual dangers incident to that use, namely, that it would be used for the purpose of slacking lime, which would produce a boiling mass; and that it would be dangerous to children playing around it, and to other pedestrians and travelers upon the street who should happen to come in contact with it. Under the circumstances, the city was entitled to no notice."

In *Beetz v. Brooklyn* (1896) 10 App. Div. 382, 75 N. Y. S. R. 1876, 41 N. Y. Supp. 1009, several boys gathered up a quantity of lime which had escaped from barrels deposited in front of a building then in course of erection, and carried it to a vacant lot. There one of them poured some of it into a tomato can, held by another boy, which contained water. The result of its contact with the water was an explosion which destroyed the eyes of the boy who held the can. The liability of the defendant was denied on the ground that the injury was not the natural and probable consequence of negligence of the city in allowing the lime to remain on the street. The court said: "There is nothing which appears in the case having a tendency to establish that the lime, if left alone in the street as it was placed, would have inflicted injury upon any person, or that it would be likely to be so blown about as to inflict damage. Could the defendant, in reasonable contemplation, have supposed that children would carry this lime from the street to this vacant lot, and there attempt to make use of it in the manner described? We think to ask the

question is to answer it. The lime was harmless as it lay upon the street; it was only made dangerous by the active intervention of two other agencies: the boy who carried it and its contact with water. It does not appear that there was any water near it or anything connected with it, except the use to which it was commonly put, that would suggest to anyone that it could be carried away and mixed in this vacant lot. It is suggested that it was as dangerous as exposed gunpowder, and constituted a nuisance. We are not able to accept this view. It is as commonly in the streets for building purposes as is building stone; is placed therein, and used therein daily, without danger or serious inconvenience to the general public using the streets."

§ 7. Injuries caused by collisions with barriers inclosing portions of streets.

In *Youngblood v. Mason City* (1914) 165 Iowa, 488, 146 N. W. 20, the evidence showed that, when the work of erecting a building on a corner lot was drawing to a conclusion, the contractor had cleared away from the plot bounded by the curb and the intersecting sidewalks at the side of the lot the brick and other material required for the building during the progress of the work, and had then seeded it down, and inclosed it by a wire fastened to stakes; that on the night in question, and for some time previously, the line of sidewalk extending east from the intersection to the curbing had been obstructed by a pile of radiators, but the line running to the southward was open; and that the plaintiff, when taking a short cut in the darkness, tripped over this wire, upon which no signal lights had been placed. The theory upon which he based his claim was that, having permitted the contractor to occupy a portion of the sidewalk and parking with building materials, the city could not relieve itself from liability for injuries occasioned by such use; and that it was bound to know that proper precautions were taken to avoid damage to travelers from obstructions. The precedent relied on was *Prowell v. Waterloo* (1909) 144 Iowa, 689, 123 N. W. 346, where it was held that the liability of the city is a primary one, and that it is not entitled to notice of a dangerous condition resulting from a work it has authorized or permitted,

and which renders the streets unsafe for public travel. But the court was of opinion that this ruling was not applicable to the circumstances under review, because "the only obstruction which was incident to the work of the contractors . . . was that of the radiators, which lay upon that part of the walk running east from the intersection to the curb; and this condition had no greater connection with the injury of the appellant than that by it he could not pass over that walk, and therefore, instead of taking the unobstructed walk running to the south, he crossed the triangular park, and was injured; but this was not a causal or proximate connection. This was, at most, a secondary result from the first condition." The court also approved an instruction by which the jury were told that, in order to recover, the plaintiff must prove that a traveled path used commonly by pedestrians had existed across the parking at the place in question; that the defendant's officers actually knew of its existence, or that it had existed for such a length of time that they should have known of its existence; that a wire had been negligently stretched across such path; and that the defendant's officers had notice, actual or constructive, of the erection of the wire for a sufficient length of time before the accident to have enabled them, in the exercise of reasonable care, to remove or safeguard it before plaintiff was injured. This ruling was based upon the ground that "the work of improving, seeding, and protecting the little park was wholly collateral to the work being done by the contractors." In *Prowell v. Waterloo* (Iowa) *supra*, the permit was issued to a contractor employed by the city itself. For this reason alone it was evidently not a precedent in point.

Under this head reference may also be made to *Stanton v. Parkersburg* (1909) 66 W. Va. 393, 66 S. E. 514, though, strictly speaking, it does not fall within the scope of this annotation. In that case, where a verdict in favor of a complainant who had tripped over an unlighted netting, stretched across a sidewalk to protect a newly laid pavement, was reversed on the ground of the refusal of the trial judge to give a certain instruction, the court thus laid down the law: "There being an absolute liability on the city, it was not material to plain-

tiff's recovery to show want of reasonable diligence on the part of the city. It was bound to take notice of the obstruction, and the existence of the dangerous obstruction, unguarded by any signal light or other warning, was negligence per se."

§ 8. Injuries caused by the fall of heavy objects piled in streets.

In *Senhenn v. Evansville* (1895) 140 Ind. 675, 40 N. E. 69, where a child was injured by the fall of a pile of lumber which had been deposited in a street for building purposes, a verdict against the defendant city was set aside on account of the impropriety of certain instructions, which, when taken together, were "calculated to leave the erroneous impression that the city might place or suffer any obstruction on its streets, provided it did not know such obstruction to be actually dangerous to public travel, and that therefore there was no negligence in this case in suffering the lumber to be placed upon the street, unless the city had notice that it was piled there in a dangerous manner." The court said: "The piling of the lumber in a dangerous manner was, however, but an aggravation of the original wrong in suffering it to be placed upon the street in the first place. There was negligence, *prima facie*, in suffering the lumber to be piled upon the street; there was additional negligence in suffering it to be piled there in a careless and dangerous manner. If there was any sufficient reason why the lumber was rightfully in the street, that was for the appellee city to show. The presumption is that an obstruction in the public highway is there wrongfully."

In *Duffy v. Dubuque* (1884) 63 Iowa. 171, 50 Am. Rep. 743, 18 N. W. 900, a section of the roof of a building in which the owner was making some improvements had been removed to the adjacent sidewalk, and there placed on its edge in such a position, so that it rested against a tree on the side towards the street, and was supported on the side towards the lot by other sections of the roof and a pile. About two weeks afterwards it was blown over by a high wind and struck a teamster, who, after having unloaded some building materials had passed along the sidewalk, and, when the roof fell, was stooping down to get a drink at a hydrant. It was contended that

the jury was not warranted in finding that the city was guilty of negligence in respect of its not having removed the section of roof, because, when it was first placed on the sidewalk, it was supported on the side towards the lot by a prop at each end, and it did not appear that any officer of the city had knowledge, actual or constructive, knew that these props had been taken away. But the court said: "We think, however, that the finding that the city was guilty of negligence is not without support. The jury might have found from the evidence that there was no support at all on the side of the roof towards the lot, after the other sections and the pile of lumber were removed from the sidewalk, which must have been several days before the accident. Besides this, as the obstruction was not a mere structural defect of the street, but an object entirely foreign to it, the duty of the city, if it permitted it to remain at all, was to see that it was kept in such a situation as that the safety of travelers on the street would not be endangered by it."

§ 9. Injuries caused by fall of heavy objects from buildings.

In *Grove v. Ft. Wayne* (1874) 45 Ind. 429, 15 Am. Rep. 262, it was held that a demurrer had been erroneously sustained to a complaint which alleged in substance that a brick cornice overhanging the sidewalk was being constructed in such a manner as to be liable at any time to fall and injure persons passing underneath; that no barricade was erected, or other means used, to prevent persons from passing along the sidewalk, or to give any notice of danger; that for six weeks prior to the time when the injury complained of was received, the city had full notice that the cornice had continued in this dangerous condition; and that, while the plaintiff was passing, a large number of bricks composing the cornice fell upon him.

In *Moore v. Townsend* (1899) 76 Minn. 64, 78 N. W. 880, 6 Am. Neg. Rep. 95, a ladder used by an independent contractor employed to paint a building abutting on a street in a village was blown down by a high wind and fell upon the plaintiff, a passerby. The evidence showed that the ladder had been so used for several weeks, and for at least thirteen days after all necessity for its use had

ceased. Held, that liability in respect of the resulting injury was imputable to the village on the ground of its having permitted a nuisance to be maintained in its streets.

In *Rowe v. Richards* (1913) 32 S. D. 66, L.R.A.1915E, 1069, 142 N. W. 664, the complaint in an action brought against an abutter and a city alleged that the plaintiff's husband, while passing a building in course of erection, was killed by the collapse of the front wall, abutting upon the sidewalk, which "was composed of such weak materials and was so poorly constructed that it was unable to sustain its own weight; and that by reason of the inefficiency of the materials used in the said wall and the faulty construction thereof the same became, and was, a nuisance and a menace to the safety of people using the said sidewalk; and that, in their failure to erect and maintain proper guards and warnings to prevent people from using the said sidewalk, the defendants were guilty of carelessness and negligence in the performance of their duties to the public." Held, that a good cause of action was shown by these allegations. The court said: "In this case, it is true, the wall causing the injury was on private property. It did not encroach upon or overhang the sidewalk, but it was in such proximity to the sidewalk that if it fell, and fell in that direction, it was bound to fall upon the sidewalk, and to injure any person who might be passing at the time. The city had granted a permit to the owners of the property to erect the wall, and therefore must be charged with knowledge that it was in course of construction. *Indianapolis v. Doherty* (1880) 71 Ind. 5. This imposed upon the city the duty of placing proper guards or obstructions across the sidewalk, at either extremity of the wall, that would prevent people from passing along the sidewalk at that place while the wall was in course of construction. . . . Regardless of the efficiency or inefficiency of the wall, it was the duty of the city to erect and maintain such warnings and obstructions across the sidewalk as would prevent people from using it at that particular place for the time being. In addition to the danger that a wall will fall of its own weight, which, in most cases, would be very remote, there is always more or less danger of objects, such as tools,

materials, etc., falling from the top of the wall while work is being done thereon, and inflicting injury on whomsoever may be passing by at that particular time. The fact that the wall did not project into the street, nor upon the sidewalk, does not in any wise change the rule nor reduce the degree of care imposed upon the city to keep its streets and sidewalks in a reasonably safe condition."

In *Holmquist v. C. L. Gray Constr. Co.* (1915) 169 Iowa, 502, 151 N. W. 828, 9 N. C. C. A. 208, a verdict was held to have been properly directed in favor of a city which had been made codefendant with a construction company in an action brought to recover damages for the death of a pedestrian, upon whom an employee of the company had fallen when he was blown by a high wind from a wall in which he was working. The evidence showed that at no time had there been any covering over the sidewalk. It was alleged that the defendants maintained and permitted a nuisance, and were negligent in the following particulars: (1) In failing to erect, or cause to be erected, on the sidewalk adjacent to and in front of the wall that was being constructed, a safe and suitable covering of boards, so that pedestrians walking along in front of said building would be protected from injury by falling workmen or material; (2) in requiring and permitting workmen to work on said wall on the day of the accident, with the high wind that was prevailing, making it almost impossible for the men to maintain their positions on the work because of such wind; (3) in creating conditions in the street in front of the building which made the street at that point a public nuisance; (4) in failing to place barriers across the sidewalk and from the curb to the building, preventing the use of that portion of the street by pedestrians; (5) in failing to post in a conspicuous place on either side of the south end of said building, and at and between the curb line and the wall, conspicuous signs warning the public of danger in passing along the street in front of said wall; (6) in violating and permitting to be violated the provisions of a municipal ordinance which provides that "if the building to be erected is to be more than two stories in height, with walls at or near the sidewalk line, there shall be built over the sidewalk pavement a

roof or shield of planks, thoroughly supported and constructed, as regards size, strength, and safety, to the satisfaction of the board of public works, and be maintained as long as they shall deem necessary, sufficient to protect any person passing along such sidewalk from injury by falling material or debris." The alleged liability under the second of the above heads was denied on the ground that "the city had no control over the workmen as to whether they should work when a high wind was blowing. They were in the employ and under the control of private individuals, engaged in the erection of a private building upon private property." In support of the other allegations with regard to the maintenance of a nuisance, the plaintiff argued that the nuisance was, in fact, created by the city when its superintendent of streets ordered the construction company to remove its barriers across the sidewalk and parking in front of the wall, a few weeks before the accident. One of the grounds upon which this contention was rejected was that the order to remove the barriers was not the proximate cause of the decedent's injury and death. The court said: "The injury probably would not have happened but for the wind. It might be argued that, if the request or order had not been made by MacVicar, the barrier would not have been removed; if the barrier had not been removed, the deceased would not have been on the walk at the point where he was struck; that if Kennedy had not been blown from the building, and deceased had not been at the precise point where Kennedy's body would strike, and if the wind had not been blowing, Kennedy would not have been blown from the building. But we think it is too remote. We are unable to see causal connection between the order itself and plaintiff's injury." Another reason assigned for holding the city not to be liable as for a nuisance resulting from the order was thus stated: "While the so-called order does not relate to the roof or shield over the sidewalk, the ordinance gives the city authorities a discretion as to how long it is necessary to maintain such covering. The purpose of such covering, as stated in the ordinance, is to protect persons passing along the sidewalk from injury by falling material or debris. At the time of the injury to

plaintiff's decedent, the building was substantially completed; no bricks were being laid and there was but little, if any, danger of injury from such material or debris. And the record does not show that the city had any notice or knowledge, either actual or implied, of the more or less perilous position of the employees of the construction company in leaning out and pointing up or finishing the work; that is, as to the conditions as they existed at that time. We think the act of MacVicar in requesting or ordering the removal of the barriers was not, under the circumstances, a negligent act on the part of the city, nor did it create a nuisance. . . . The duty enjoined upon [the city] by § 753 of the Code [as to the supervision of streets] must be considered in the light of the right of the landowner to so use the street [in determining whether the city had performed its duty under the statute], in view of such lawful use by the landowner of a portion of the sidewalk and street. The city had the right to assume that the owners of buildings abutting the street, or the construction company, would exercise a proper degree of care to prevent injury to travelers upon the street. *Parmenter v. Marion* (1901) 113 Iowa, 297, 85 N. W. 90. In the instant case, while doubtless the city knew, or should have known, of the building operations of its codefendant, in a general way, it is not shown that the situation, as it was at the time of the injury to Holmquist, in regard to men reaching out and up and pointing the work in a high wind, or otherwise, had existed before, or that the city had any notice thereof."

The present writer ventures to express the opinion that the elaborate arguments of the court are unsatisfactory for the reasons that they do not deal adequately with what seems to be the really crucial question involved, viz., whether the absolute duty of the city of keeping its streets in safe condition did not impose upon it the obligation of seeing that some specific precautions were adopted after the removal of the barrier, for the purpose of protecting travelers against the risk of being injured by the fall of heavy objects from the building. As the precaution obviously indicated under the circumstances was the maintenance of an overhead covering, its liability might, as it would seem, have

been properly predicated on the ground that it failed to require the construction of such a covering, and that it was thus guilty of a continuous breach of duty, productive of a permanent situation which might at any moment eventuate in injury to a passer-by.

In this point of view it is difficult to admit that there is any decisive force in the considerations, emphasized by the court, that the city was justified in assuming that the abutter and the construction company would exercise care to prevent such an injury, and that it was not chargeable with notice of the special dangers incident to the particular operations which were in progress when the accident occurred. With regard to the former of these considerations, moreover, it should be observed that the *Parmenter Case*, cited by the court, is not a precedent in point. There the object which injured the plaintiff had fallen, not from a building in course of erection, but from one which had been completed, and in which business was being conducted upon the ordinary footing. The circumstances involved in the earlier case, therefore, were essentially different from those presented in the case under review.

In *Copeland v. Seattle* (1903) 33 Wash. 415, 65 L.R.A. 333, 74 Pac. 582, the plaintiff alleged that his testator had been killed by a plank hurled from the roof of a church under construction onto the street, while he was passing, and that the "building was authorized by" the respondent city, but that neither the church nor the city took any precautions whatever to prevent the use of the street by pedestrians, or placed any kind of a warning thereon, notifying pedestrians that its use was dangerous. Held, that the demurrer of the city had been properly sustained, on the ground that these facts were not sufficient to constitute a cause of action. The court said: "The allegation that the city authorized the construction of the building, when taken in connection with what is elsewhere alleged in the complaint, means no more than that the city granted to its correspondent a permit to construct a building, or did not forbid its construction; it carries with it no implication of participation on the part of the city. Clearly, a city, by granting a building permit, does not render itself liable for the negli-

gent acts of persons constructing a building under a permit so granted. Nor is this allegation aided by the allegation that no notice or warning of the danger was given. This was not a danger that the city was bound to guard against. Had it granted to the respondent church the right to use the street, and then knowingly suffered it to so use it as to endanger the lives of persons traveling upon the street, a different question would be presented; but it was not bound to anticipate that the persons erecting the building would be so grossly negligent as to throw a board from the roof of the building into the street. If it can be held liable for such an act, there is no wrong which one of its citizens may inflict upon another for which it is not liable." This decision is open to the same criticism as the one last cited, viz., that it apparently requires for its support the broad doctrine that a municipal corporation which authorizes a person to construct a building on land adjacent to a street is under no obligation to protect travelers against the danger of falling objects during the progress of the work; and will scarcely meet with approval in all jurisdictions.

The Copeland Case was cited in the reported case (*JOHNSON v. HUNTINGTON*, ante, 1337) as a precedent for the doctrine that "the mere grant of such a permit clearly does not involve the liability of the municipality for the negligent exercise of the authority granted, or the negligence of workmen engaged in the construction of the building itself, unless it suffered the structure to remain upon the pavement in such condition as actually to endanger the safety of persons lawfully using the easement." It will be seen, however, that no facts to which the qualifying words in the final clause of this statement could apply were involved in the Washington Case.

§ 10. Injuries caused by collapse of temporary bridges.

In *Parks v. New York* (1906) 111 App. Div. 836, 98 N. Y. Supp. 94, affirmed in (1907) 187 N. Y. 555, 80 N. E. 1115, the court upheld a verdict in favor of the administrator of a person who had been fatally injured by reason of the collapse of a footbridge constructed by a contractor, in pursuance of a permit issued to him, over a vault which had been excavated un-

derneath a sidewalk for the purposes of a building then in course of erection. The accident was due to the extraordinary strain to which the structure had been subjected in consequence of the assemblage of an abnormally large crowd to view a parade. A policeman stationed in that locality testified, in substance, that the bridge from the time it was constructed, which was nearly a month before the accident, was shaky, and vibrated when walked upon; that after his attention had been called to the bridge, he made, several days before the accident, an oral report at the station house to the captain in charge that the bridge was unsafe in case a parade passed there; and that he made a written report on the day of the accident, and about eighteen hours before it occurred. Held, that this testimony was sufficient to justify a finding that the city had actual notice in time to remedy the defect, and this irrespective of whether or not the policeman had made his oral report. Another witness, an inspector, detailed by the defendant's building department to inspect the structure, testified that he had made several inspections. Held, that this was actual notice to the city that the bridge was defective, by reason of the absence of certain braces which should have been inserted. It also appeared that the defendant had workmen ready to respond immediately to the call of the police, in case of emergency, to remedy defects in structures of this character. Held, that it was a question for the jury, in view of this fact, whether the city performed its full duty in not resorting to this means of strengthening the bridge after the actual notice was given by the policeman on the morning of the day of the accident. The conclusion of the court was that it could not be said that the verdict in the plaintiff's favor was against the weight of evidence," either as to the defective condition of the bridge, or as to the city's having actual notice a sufficient time prior to the accident to have enabled it to have remedied the defect." It was also held that, "irrespective of any notice, the city was liable, inasmuch as the jury found the bridge was defective, and its verdict was based upon evidence which fairly sustained the same." The reasons for predicated liability in this point of view were thus stated: "The

law imposes upon a municipality the duty of seeing that its streets and sidewalks are kept reasonably safe for public travel. Here the city issued a permit to the owner of the land abutting upon the street to excavate beneath the sidewalk, which necessitated the removal of the sidewalk itself and the erection of a temporary bridge in place thereof. Having issued this permit, there was an absolute duty imposed upon the city to see to it that the portion of the street interfered with by reason of the permit was kept reasonably safe, or that a person using it was seasonably warned that he could not rely upon the presumption that it was safe for use. The city, by issuing the permit, became a joint actor with the owner of the land in the erection of the bridge, and by reason thereof became responsible for any neglect or fault of the owner in properly erecting the bridge. The principle is precisely the same as if an obstruction had, under a permit, been placed in the street."

Some remarks with regard to the general aspects of this second ground of liability, considered with reference to earlier New York decisions, will be found in note 9 to § 1, *supra*. It was not adverted to in *Coolidge v. New York* (1904) 99 App. Div. 175, 90 N. Y. Supp. 1078, affirmed without opinion in (1906) 185 N. Y. 529, 77 N. E. 1192, where a verdict rendered against the defendant in the first trial of the case had been set aside, for the reason that the city did not have actual notice of the defective condition of the bridge until the morning of the day the accident occurred, and that in this state of the evidence the city was not chargeable with negligence in respect of its having failed to take appropriate steps to strengthen the bridge. It is rather singular that the conception of an absolute duty incumbent on the city was not adverted to. If the verdict rendered at the second trial was sustainable in this point of view, there was clearly another ground upon which the verdict rendered at the first might have been condemned, but, moreover, there is much difficulty in admitting that an absence of negligence on the part of the police was inferable as a matter of law, from the evidence relied upon, which showed that after the officer on the beat had reported, on the morning of the day when the accident occurred, that the

bridge would be unsafe if a large crowd of people were allowed to gather on it, they merely took measures to warn the persons in charge of the bridge as to its condition. The court argued thus: "Such warning was given, and the public officials had a right to infer that reasonable means would be taken by those responsible for the bridge to prevent an accident. The police officers recognized the danger from overcrowding the bridge. They took such means as appeared to them proper to avert that danger. Police officers were placed in charge of the bridge to prevent people from gathering and standing on it, and they did all that they could do except to strengthen the bridge, for which they had no facilities, and which it would be most unjust to require them to do on such short notice. The city is responsible for a failure to take such means as were available at the time to keep this street in a safe condition; but there is nothing to show that such an unusual crowd could have been anticipated, or that the city could have done any more than it did to prevent the accident." In this passage, the feasibility of the precaution of stopping entirely the traffic along the bridge is, it will be observed, ignored altogether. It is, to say the least, open to doubt whether the court was justified in rendering a decision which, in effect, committed it to the position that a reasonable man would not be warranted in finding that the omission of the police to take such a precaution, on a day when they knew that an unusual number of persons would be passing along the street, constituted negligence.

§ 11. Injury caused by explosion of boiler under sidewalk.

In *Beall v. Seattle* (1902) 28 Wash. 593, 61 L.R.A. 583, 92 Am. St. Rep. 892, 69 Pac. 12, where it was held that a nonsuit had been improperly granted, in an action brought to recover for injuries occasioned to a pedestrian by the explosion of the boiler of a heating apparatus, which had been removed from the basement of a building and placed under the adjacent sidewalk, while a carpenter was performing certain work in the basement, there was evidence to the effect that when the carpenter applied for and received a permit authorizing the work, he also asked for a permit to

remove the heating apparatus; that the assistant building inspector Josenhans, who, according to the testimony of the chairman of the board of public works, was a proper official to deal with applications for permits regarding alterations in buildings, told him he needed no permit for this purpose, and directed him how to place the boiler in the proposed position under the sidewalk; and that the carpenter followed this direction. By an ordinance of the defendant city it was provided that "any person desirous of utilizing the under side of the sidewalks in front of any building owned by him shall construct a sufficient stone or hard brick wall, not less than 2 feet thick, to be laid in one part cement and four parts sand, to retain the roadway of the street, and shall extend the side, division, or party walls of such building under the sidewalk to such curb wall. The sidewalks in all cases shall be of incombustible material entire, supported by walls or iron beams in accordance with [certain specifications]." The court said: "It is manifest, under the evidence as it now stands, that the space under the sidewalk was being utilized without a compliance with the requirements of said ordinance. When the owner of this building sought to use the space under the sidewalk, it involved the alteration of the building by way of the extension of the side walls, and otherwise as required by said ordinance. Being in the nature of an extension to the building, and for its use and benefit, the work, therefore, became in effect an alteration of the building itself. This alteration necessarily involved the use of the materials, and the manner of construction for the extended side walls and the sidewalk, and its supports required by the ordinance aforesaid, and an inspection of the work as it progressed, or when completed, might have disclosed the manner of construction and the location of this boiler with its attachments connecting it with the main building." The court then quoted an ordinance which imposed upon the superintendent of buildings the duty of examining and inspecting each building which was in course of erection or alteration within the city, and continued thus: "In any view of the matter, it would therefore appear that the city had actual notice that some alterations were being made

under that sidewalk as an attachment to, and for the benefit of, that building, and that actual consent to make the alterations to the extent required for stairway purposes was given. We do not think it can be said, as a matter of law, that a proper inspection of that completed work, as required by the ordinances of the city, would not have led to the discovery of the entire situation there, including the location of the boiler and its attachments. We think it is, at least, a question for the jury to determine whether, with the exercise of reasonable care under the circumstances, the city should have known that this boiler was there located, and the purposes for which it was so placed. . . . We think, under the evidence as it now stands, that Josenhans occupied such a position in the premises as made notice to him notice to the city. Whatever notice was involved in the conversation between him and Hamilton related to something that was yet to be done, and not to what had been done, and it is urged that it could not be noticed that the thing was actually done. Strictly speaking, it probably cannot be said to have been notice of the thing actually accomplished; but, being an expression of intention to do a thing, we think it was such notice as at least emphasized the duty of an inspection to discover what was really done, and it is for the jury to say whether that duty was neglected. . . . Under all the circumstances, we think it cannot be said, as a matter of law, that the city had no notice of the existing conditions; and, for further purposes of this opinion in the consideration of the motion for nonsuit, it must be held that there was sufficient evidence to go to the jury upon that subject. With knowledge of the conditions brought home to the city, what is the status of the case, without further testimony? . . . In the case at bar, as we have seen, this boiler was being maintained as an attachment to a building, but located within the limits of the public street, under conditions which were in violation of a city ordinance. If the extended side walls, the supporting stone or brick wall laid in cement, and the stronger overhead structure had been constructed, as required by the ordinance, at places where the space beneath the sidewalk is used, who can say that appellant would have been injured? The defect in the boiler, if

there was a defect in the beginning, may not have been patent; but, under the evidence as it now stands, the boiler was maintained and operated there, for a period of three months, under unlawful conditions. It may, therefore, have been a nuisance which it was the duty of the city to abate, whether there was any apparent defect in the structure of the boiler or not. Appellant was injured by an unseen instrument exploding within the area of the street over which the city had control. We think, when he had shown those facts, that a *prima facie* case of negligence was established, and that it devolves upon the city to show that it exercised reasonable care in the premises, in order to overcome the presumption of negligence arising from the fact of the explosion. An explosion being a thing so unforeseen and unexpected in its nature, it is held that negligence will be presumed, if unexplained."

§ 12. Injuries caused by excavations in or adjacent to streets.

In *Chicago v. Robbins* (1863) 2 Black (U. S.) 418, 17 L. ed. 298, the action was brought by a city to recover from an abutter the amount of the damages which it had been compelled to pay to a pedestrian who had fallen into an unlighted excavation made by a contractor who was engaged in erecting a house for the defendant (Robbins). No formal permit for the work had been issued, but the rights and liabilities of the parties were determined in the assumption that it had been impliedly licensed, no objection having been raised by the city. The doctrinal position of the court with respect to the extent of the city's duty in respect of travelers is shown by the following remarks: "We can see no justice or propriety in the rule that would hold the city under obligation to supervise the building of an area such as this."

In *District of Columbia v. Woodbury* (1890) 136 U. S. 450, 34 L. ed. 472, 10 Sup. Ct. Rep. 990, a hole had been made in a sidewalk for the purpose of putting a new boiler into the basement of the adjacent building. This hole had been closed after the completion of the work, with the exception of a manhole, which was covered with loose boards. The precedent relied on was *Barnes v. District of Columbia* (1876) 91 U. S. 540, 23 L. ed. 440,

where the liability of the District for injuries caused by the unsafe condition of the streets of Washington was affirmed. The accident in the earlier case was occasioned by an open excavation made during the construction of a railroad. The instructions of the trial judge were approved, and the principles embodied in them restated by the Supreme Court in its own language. The following passages may be quoted: "People must build houses, and in order to do that it is necessary to excavate for cellars and areas, if needed, and to dig trenches to connect with the water mains, gas pipes, and sewers. Nobody has a right to do this without a permit from the authorities, and if any person undertakes to do it without a permit, he would be responsible for any injury resulting; but the District would not be, unless it had the notice already spoken of. If a permit is granted, as is usually the case, the fact is notice to the authorities that the work is in progress, and then they are charged with the duty of seeing that it is properly conducted. . . . If a private individual fails to protect the excavation or hole, or whatever it may be, it is the duty of the District authorities to see that it is protected, and they are held responsible that he shall do it, for they were notified that he was going on with the work when he obtained his permit. If the individual himself supplies the protection against danger, then the duty will have been discharged on his part, and that of the District also will have been discharged just the same as in the case of the works being constructed by itself. If, then, by any unforeseen accident, or the act of somebody that could not be anticipated, the protection has been removed and new danger supervenes, of course the law about notice applies." The question whether, in the first instance, a sufficient protection had been provided to guard the public against accident, was held to be for the jury. It was also held for them to decide whether the board was sufficient to sustain the weight of a person passing over it, and whether it was sufficiently secured, either by artificial appliances or by its own inherent weight, to hold it in its proper place. The theory adopted in this case with regard to the effect of the issuance of a permit in enlarging the responsibility of a mu-

municipal corporation seems to be essentially inconsistent with the doctrinal position indicated by the reasoning in *Cleveland v. King* (1889) 132 U. S. 295, 33 L. ed. 334, 10 Sup. Ct. Rep. 90. See § 5, *supra* (building materials).

In *Fitch v. Hartford* (1918) 92 Conn. 365, 102 Atl. 768, where the evidence showed that the licensee had dug a hole close to the opening between two flagstones, and that this opening was concealed by the dirt thrown up, the following instruction was held improper: "A municipality is responsible for the negligence of one who, acting under its license or permission lawfully granted, creates any defect or obstruction which endangers the safety of persons using the streets. . . . Notice of the defect or obstruction is not necessary in such cases." The court said: "When a municipal corporation, charged with the duty of maintaining its highways in reasonably safe condition for travel, grants a permit for specified work to be done within the limits of a highway for the private benefit of the licensee, it is, of course, notified in advance of all defects and obstructions in the highway which may reasonably be expected to arise in the performance of that particular work at the given time and place, and in the exercise of reasonable care it is bound to anticipate and provide for all such defects and obstructions. *Boucher v. New Haven* (1873) 40 Conn. 456; *Cummings v. Hartford* (1897) 70 Conn. 123, 38 Atl. 916. Since the duty of exercising reasonable care rests continuously on the municipality, it must also use reasonable care to protect travelers against the negligence of its licensees by a reasonable supervision and control of the work. *Carstesen v. Stratford* (1896) 67 Conn. 434, 35 Atl. 276. But it is not an insurer of the safety of travelers on the highway, and therefore it is not bound at its peril to provide in advance against unnecessary and unexpected dangers, such as may be created in the highway by the negligence of its licensees. In such cases the rule is not that the municipality is liable for the negligence of the licensee, but that it is bound to use reasonable care in ascertaining the neglect and averting its harmful consequences; and that in the absence of actual notice of a defect due solely to the negligence of the licensee, it is not liable unless it

has failed to use reasonable care in discovering the existence of the defect. See 4 Dill. Mun. Corp. 5th ed. § 1723, as modified by *Boucher v. New Haven* (Conn.) *supra*."

In *Herfurth v. Washington* (1868) 6 D. C. 289, where the plaintiff's buggy had fallen into a trench dug for a sewer connection, a new trial was ordered on the ground that the defendants' knowledge, actual or constructive, of the unsafe conditions, had not been proved. The court said: "The corporation is only responsible for the negligence of a licensee under its authority when charged with notice of the defect."

In *District of Columbia v. Blackman* (1908) 32 App. D. C. 32, where the plaintiff fell into a hole made in a sidewalk for a sewer connection, while it had been left temporarily unguarded by the workmen, the grounds upon which it was held that a verdict should have been directed were thus stated: "Having issued the permit authorizing the hole to be dug, the District was chargeable with knowledge of the prosecution of the work, and the duty of supervision over it, to the end that the safety of the public be secured. Was the District remiss in its duty? The work was commenced three days prior to the accident, and until the trench was fully dug the requirements of the permit as to protection were complied with. It therefore clearly appears that in the first instance the District was not guilty of negligence, because sufficient protection was provided to guard the public against danger. From the completion of the excavation at 11 o'clock in the forenoon of the day the plaintiff was injured, until within a very short time prior to the accident, one of the men employed in digging the hole remained near it. A representative of the District, seeing this laborer near the hole he had assisted in digging, and apparently guarding it, naturally and reasonably would have inferred that he had been placed there not merely to await the coming of material to be put into the hole, but to warn the public of the existence of the hole, and thereby fulfil the conditions of the permit. There was no evidence before the jury that the District had knowledge, either actual or constructive, of the unguarded condition of the hole at the time plaintiff fell into it. On the contrary, the circumstances as

disclosed by the evidence were such as to warrant the District in believing that the conditions of its permit were continuing to be carried out. If, therefore, in the circumstances of this case the District is to be chargeable with liability, we must in effect impose upon it the duty of placing a representative in direct supervision over every similar work in the District. We do not so understand the law. . . . Having issued a permit, the District must exercise reasonable care to see that its conditions are obeyed. But that does not constitute the District an insurer of the public, nor require it instantly to take notice of a failure on the part of a licensee to fulfil his obligations under the license. . . . In the present case, the District having fulfilled its duty in the first instance, we do not think there was any evidence before the jury tending to show negligence on the part of the other defendants for a sufficient length of time before the accident to impute knowledge of such negligence to the District."

In *Savannah v. Donnelly* (1883) 71 Ga. 258, where a judgment in favor of a plaintiff whose riding horse had fallen into an unlighted sewer trench was affirmed, it was held that the trial judge had properly refused to give the following instruction: "The granting of permission to Masters, to make repairs or improvements in the supply pipe for Dickerson, was lawful and innocent in itself, and cast no obligation on the city to superintend and look after said work, to see that it was properly done; and if said work was in fact carelessly and negligently done, then the city would not be liable for damages, unless notice of the condition of the street was brought home to the city, either actually or constructively." The ratio decidendi was that the authorization to open the trench was, "in effect, opening the ditch by the city itself." See § 1, note 11, *supra*.

In *Augusta v. Cone* (1893) 91 Ga. 714, 17 S. E. 1005, the declaration alleged, in substance, that Mrs. Cone, while walking on the sidewalk, was injured, without fault on her part, by falling into a trench which on the day of the accident had been dug by a licensed plumber employed by one Connelly in order to put in a water main from the street, the plumber and Connelly acting under a special li-

cense granted the latter by the city council; that the ordinances of the city council, relative to the duties of plumbers and other persons acting under licenses for the purposes aforesaid, required that danger signals should be placed at an excavation made for such work, and that the same should be covered when not being actually worked upon; that this hole or trench was left open thirty minutes while no work was going on, during which time Mrs. Cone fell in; that the accident was caused by the negligence of the defendant and its licensees, in that no warning was given her of the excavation, no ropes, red flags, or danger signals placed at the trench to warn pedestrians, and no cover put across the same over which they could walk without danger; that the excavation had existed long enough to put the defendant on notice thereof and of its danger to pedestrians; "that said sidewalk was perfectly safe and in repair before said excavation was made by the positive misfeasance of the said city and its said licensees, by whom the said sidewalk was left unsafe for travel thereon by the public in the way and manner in which sidewalks are generally used, said excavation or trench across said sidewalk having been done by the direct permission of the said city council of Augusta, which knew of its progress on the day aforesaid as being done under the license issued as aforesaid." Held, that this declaration sufficiently set forth a cause of action. The objection that the allegation concerning notice to the defendant of the unsafe condition alleged to exist at the time of the injury was insufficient was held untenable. The court said: "The declaration alleges special permission from the city council to do this particular work, and knowledge of its progress on the day in question, and the ordinance requires that a certain officer of the city shall exercise supervision over the work and see that it is properly done. This being so, the city became liable for any damage which might accrue to any person by reason of the careless and negligent manner in which the work was done." The court approved of the general doctrine laid down in *Savannah v. Donnelly* (Ga.) *supra*. But it should be pointed out that the element introduced into the later case, by the provision in the ordinance specifically imposing upon the city the

duty of supervision, created a situation in which the liability of the city might have been affirmed, even in jurisdictions in which that doctrine does not prevail. It would seem that the court did not clearly appreciate the fact that the earlier case was decided with reference to a theory essentially different from that which underlies one of the precedents cited (*Wendell v. Troy* (1868) 4 Keyes (N. Y.) 261), in which constructive notice to the city was predicated on the ground that the contract provided for the performance of the work under the direction of a municipal agent. *Augusta v. Cone* (Ga.) supra, was followed in *Rome v. Davis* (1911) 9 Ga. App. 62, 70 S. E. 594, which, however, did not involve facts of the description discussed in the present note.

In *Sterling v. Thomas* (1871) 60 Ill. 264, a person who was erecting a building made, with the knowledge and consent of the authorities of the defendant city, an excavation under the sidewalk. This excavation was kept covered with loose boards except when access to the basement was necessary; the boards, or a portion of them, were then removed, and replaced after the necessity had passed. On a certain evening some person unknown removed the covering, and the plaintiff, while walking along the sidewalk in the darkness, fell into the basement and broke his shoulder. The street commissioner testified he knew the opening was there the day before the accident; that he saw it open when the sidewalk was first built; and that he went down to it on purpose to see if it was covered. Held, that the city was liable for the injury.

In *Springfield v. Scheevers* (1886) 21 Ill. App. 203, where the defendant was held liable to a person who had fallen into an unguarded excavation, made (apparently for an area) with its permission by a person engaged in the erection of a building, the decision was based upon the ground that "the duty of maintaining the streets in safe condition devolves upon the corporation, and cannot be evaded or delegated to others, and if the city by its direct act or authority causes or permits the street to get out of repair, it will be liable,"—citing *Dill*. *Mun. Corp.* 2d ed. § 791. It was laid down that "the defendant must be presumed to have known the condition of things, and should be held responsible, as

though it had notice, for the direct result of what it expressly authorized."

In *Evansville v. Behme* (1912) 49 Ind. App. 448, 97 N. E. 565, the wheel of plaintiff's wagon dropped into an unlighted excavation which had been made by a plumber for the purpose of locating a leak in a water pipe. The party employing him seems to have been an abutter, but the report does not contain any explicit statement to that effect. The contention of the city that it was under no duty to place lights or guards about such defect in the street, for the reason that the evidence showed without dispute that the city had no notice or knowledge of its existence prior to the time when the accident occurred, was rejected. The court said: "Where a city authorizes a person not in the employ of the city, and in no way connected with the administration of its affairs, to do some act upon some of its streets, and the act contemplated is of such a character as to create a condition of the street which is necessarily or ordinarily dangerous unless precautions are taken to make it safe, the duty rests primarily upon the city to see to it that such precautions are taken, and that the street is made safe for use. . . . From the evidence most favorable to appellee, which we have set out, the jury was warranted in finding that the plumber, in making the excavation in the street, was acting under the express sanction of the city. An excavation made in a street creates a condition which is ordinarily dangerous unless precautions are taken. The precautions necessary to make the street safe, under such circumstances, are: (1) Properly to guard the excavation while it remains open; and (2) properly to fill the excavation and restore the street to a safe condition for use. The duty to see to it that these precautions are used rests primarily on the city, and cannot be delegated to others. . . . Appellant was therefore guilty of negligence, in failing to see that this excavation made by the plumber under its express sanction was properly filled so as to make the street reasonably safe for use, or in keeping the place protected by guards or warning lights until it was so restored to a condition of safety."

In *Rowell v. Williams* (1870) 29 Iowa, 210, the liability of the code-

defendant municipalities for injuries occasioned to a person who had fallen into an unguarded excavation, dug for a cellar up to the line of the street, was affirmed on the ground that several of the municipal officers had knowledge of the dangerous condition created by the excavation.

In *Bender v. Minden* (1904) 124 Iowa, 685, 100 N. W. 352, the evidence held to be insufficient to warrant a verdict for the plaintiff was substantially as follows: The hole into which he had fallen was produced by the act of some workmen, who, for the purpose of getting materials into the cellar of a saloon, in which they were making repairs, had removed three planks from the adjacent sidewalk. They had been engaged in this work two or three days, and it was their custom, when they took up the planks, to place some of them lengthwise over the opening, so as to afford a means of passage thereover, and to barricade the other places with beer kegs and cases. The jury was justified in finding that this hole was not barricaded at 9 or 10 o'clock in the forenoon of the day on which plaintiff was injured, and it was conceded that it was not barricaded at the time plaintiff fell into it, a little after 2 o'clock in the afternoon. But the evidence also showed that the planks were replaced at noon on that day; that they were not removed again until 10 minutes before 1 o'clock in the afternoon; that they were replaced by the workmen whenever they quit work, and that the hole was generally barricaded. The court said: "We must assume that the officers of the town had knowledge of the custom of the men to barricade this hole, and that they would continue to do so; and they are not to be held negligent, nor the town charged with knowledge of the situation, unless it should, in the exercise of ordinary care, have known of the failure of these workmen to barricade the opening in the walk at the time the accident occurred. The most that can be claimed from the evidence is that the workmen engaged in repairing the cellar, contrary to their usual custom, left the hole unguarded for an hour and a half prior to the time plaintiff received his injuries. Was this enough to take the case to the jury on the question of the negligence of the defendant? The presence of such an opening in a populous city for such

a length of time, without barricades, might very well be considered negligence, but not so, we think, in a town the size of this one, where foot travel is small, and officials are not required to be as watchful as in more populous centers. In small places like this, no one is or can be employed to keep constant supervision over the sidewalks. True, the officials are required to exercise ordinary care and diligence, but whether they did or did not depends upon the circumstances and surroundings. While the same degree of care is required, no matter what the size of the place, yet what may be such care in one place may not be in another. The size of the place, the amount of travel, the customs and habits of the workmen engaged in the work, the nature of the duties imposed upon the officers of the municipality—these and all the surrounding facts and circumstances must be considered in determining the question of defendant's negligence. There was not, in our opinion, sufficient evidence to take the question of defendant's negligence to the jury."

In *Pace v. Webster City* (1908) 138 Iowa, 107, 115 N. W. 888, where the plaintiff had fallen into a trench dug across a sidewalk for a water pipe, the liability of the city was held to be predicable both on the ground that, as the work had been commenced on the day before the accident, it was chargeable with constructive notice of the existence of the unsafe conditions, and on the ground that the street commissioner was shown by affirmative proof to have had actual notice of these conditions. It was held that the trial judge had properly instructed the jury that the fact that the excavation was made by an independent contractor was in itself immaterial; that it was the duty of the city having notice of an excavation involving danger to a traveler on the street, to safeguard the same, no matter who in fact created the danger.

In *Kansas City v. Bermingham* (1891) 45 Kan. 212, 25 Pac. 569, where a verdict was sustained in favor of the personal representative of a man who had fallen at night into an unguarded excavation made for a cellar, the court rejected the contention that instructions informing the jury that the liability of the defendant was conditional upon its having had notice, actual or constructive, of the unprotected state

of the excavation, were prejudicially erroneous for the reason that they referred to the "defect in the sidewalk" and the "dangerous condition of the sidewalk," instead of directing the attention of the jury to the question of the sufficiency of the safeguard.

In *Grider v. Jefferson Realty Co.* (1909) — Ky. —, 116 S. W. 691, where the plaintiff, while trying to board a street car, fell into a ditch excavated in the course of building operations, a judgment for the defendants was reversed on the ground of error in giving an instruction which imported that the abutter's duty to exercise ordinary care would have been fulfilled if it had protected the excavation by barriers, and in the nighttime by lights. The court said: "It does not follow that in all cases they [barriers and lights] will afford the degree of protection required, and, if they do not, then other means, whatever they may be, must be employed to make the street reasonably safe for public travel by giving reasonably sufficient notice and warning of the defect. . . . It is the duty of a city and the persons who are using the streets as the Jefferson Realty Company [abutter] and Probst [contractor] were, to give such warning and notice of excavations and obstructions, by barriers and lights or other means, as are reasonably sufficient to warn pedestrians and travelers of the obstruction or unsafe place. The test of sufficiency is not particularly, or in all cases, whether barriers and lights have been used, but is whether or not the means employed, whatever they may be, are reasonably sufficient for the purpose. The fact that the proximity of the excavation to the street car track prevented its complete inclosure by barriers did not excuse the defendant from adopting such means as might be reasonably sufficient to give warning of the excavation, and prevent persons exercising ordinary care from falling into it. If the barriers erected did not extend close enough to the street car track to inclose or protect the excavation, then some other means should have been employed that would be reasonably sufficient for this purpose."

In *Baltimore v. Pendleton* (1860) 15 Md. 12, the evidence showed that, before the injury complained of was received, the trench in question, which had been dug for a water pipe, had

been filled up with earth, and the paving stones placed upon it, but in such a manner that, by reason of the snow and rain, the ground was so soft that the plaintiff's horse, while hauling a load of coal, sank into it. The system by which lateral pipes were inserted into the main pipe was as follows: The officers of the corporation, for an established charge paid to it, bored a hole in the main pipe, and the rest of the work was done by the person into whose premises the water is to be conducted; the necessary excavation, filling up, and paving being also done by the owner of the property. The court said: "These responsibilities imposed upon the property owner do not relieve the corporation from the obligation, under its charter, to keep the public highways within its limits free from nuisance, and in a condition to be safely traveled. In the present case the performance of their duty was wholly neglected for nearly a month, and as a consequence of such neglect the accident happened, and the liability of the city, in the absence of fault on the part of the plaintiffs, attached and became complete."

In *Blessington v. Boston* (1891) 153 Mass. 409, 26 N. E. 1113, the action was brought to recover damages for injuries sustained by the plaintiff from falling into a trench which had been dug in a street for a drain, under a permit issued by the defendant city, and extended underneath the tracks of a steam railroad and horse railroad. The accident occurred about 7 o'clock in the evening, and up to the time of the accident the trench had been guarded by a wooden fence extending across the sidewalk and into the gutter, and a wooden horse which extended from the fence the length of the trench, and had on its outer end a lantern. The plaintiff's evidence tended to prove that, while walking on the sidewalk, he turned to one side when he came to the fence, walked to its end, and, having proceeded into the street a few steps, fell into the trench. The city had stationed no men there, and the only persons guarding the hole were two employees of the street railway company, who moved the wooden horse whenever a car came, in order that the car might go through. The evidence tended also to prove that from a second or so to half a minute before the plaintiff reached the line of the fence, these men had

taken up the wooden horse and placed it parallel with the sidewalk, and with the railroad track, leaving between the horse and the fence an opening through which the plaintiff had walked when he fell into the hole, and that the cause of the accident was that the horse railway men swung the wooden horse off into the street, instead of round towards the curbstone. Held, that the jury were warranted in finding for the plaintiff. The following instruction was approved: "It is a question purely of fact for you [the jury] whether such barriers or safeguards existed in this case as were reasonably required. . . . The city must, either by lights, bars, or boards, or in some other way, provide a reasonable safeguard. In ordinary cases, the city would not be liable if those barriers or safeguards were removed by others, but in this case it is competent for the jury to consider the fact that it was known that horse cars would pass the barrier in question, and that it would frequently have to be removed in order that the cars might pass over the trench; and it is for the jury to say, under all the circumstances of the case, whether this barrier was sufficient, whether this was all the city should have done, or whether other precautions, such as planking over the hole and stationing officers or servants there to warn people, should have been adopted. . . . If the city trusted to the agents of this company properly to guard the hole, the city is liable for their negligence, because it intrusted to them a duty which belonged to it. . . . If these agents are negligent, it must take the consequences of it." The liability of the city was again affirmed by the court, *arguendo*, in *Boston v. Coon* (1900) 175 Mass. 283, 56 N. E. 287, where the city was held to be entitled to recover from the abutter the amount of the damages which it had been compelled to pay in the former action.

In *Hyde v. Boston* (1904) 186 Mass. 115, 71 N. E. 113, a deep trench had, under permit, been excavated in a street for the purpose of laying a drain from a building in the process of erection to the main sewer. It extended under a railway track. At the time of the accident the sidewalk and the street in front of the building were obstructed so that it was impossible to pass along the sidewalk, or the street between the sidewalk and the

first railway track. In order to get around these obstructions the plaintiff went out into the street and along the railway track, and sank into the trench, which was full or nearly full of soft mud. The evidence showed that the trench had been there four or five days. Held, that the question whether the defendant city exercised reasonable care and diligence to keep the street safe for travelers should have been left to the jury. The court said: "The city had notice, or at least could be found to have had notice, of the existence of the trench, and of the circumstances under which it was being dug, and was bound to take reasonable precautions for the safety of travelers."

In *Bennett v. Everett* (1906) 191 Mass. 364, 77 N. E. 886, the plaintiff fell into an unlighted and unguarded trench which, in pursuance of a permit issued to a plumber a day or two before the accident, had been dug under a sidewalk for a sewer connection. The accident occurred during the evening of the day on which the work was commenced. The court thus discussed the contention of the defendant that there was no evidence that the defendant had notice, or by the exercise of proper care and diligence might have had notice, of the alleged defect: "The work to be done under the permit would create, of necessity, a dangerous defect in the street and sidewalk. It is not a violent presumption that the officers having charge of the streets would have early notice of the issuing of such a permit. The jury also had a right to consider whether this defect, a trench dug transversely across the sidewalk, was not of such a nature that the defendant's officers would have been likely to receive immediate notice of its existence. *Harriman v. Boston* (1873) 114 Mass. 241; *Donaldson v. Boston* (1860) 16 Gray (Mass.) 508. The place of the accident was within four or five minutes' walk from the defendant's city hall, in the center and business part of the city. It cannot be said that the only defect was a failure to guard the trench by lights or barriers. The trench itself constituted a defect in the sidewalk, though under the circumstances the city would not be liable for the existence of this defect, if it used proper care to protect the public against the danger by sufficient barriers. *Torphy v. Fall*

River (1905) 188 Mass. 310, 74 N. E. 465. We are of the opinion that this question also properly was submitted to the jury. *Welsh v. Amesbury* (1898) 170 Mass. 440, 49 N. E. 735. As the issues already stated appear to have been found in favor of the plaintiff, the defendant's liability depends upon whether reasonable care had been used to protect the public by barriers against the excavation which had been temporarily made. *Jones v. Collins* (1905) 188 Mass. 53, 74 N. E. 295, and cases there cited. The way had not been actually closed to public travel; but a trench had been opened in the middle of the street, running thence across half of the street and the whole of the sidewalk in question. The duty accordingly devolved upon the defendant of putting up proper fences or barriers to guard against the danger thus created; and if it chose to delegate the duty to Henderson, the drain layer, it could be held liable to anyone injured by his negligence in this respect. *Blessington v. Boston* (1891) 153 Mass. 409, 26 N. E. 1113.

In *Welsh v. Lansing* (1897) 111 Mich. 589, 70 N. W. 129, 1 Am. Neg. Rep. 268, the right of the plaintiff to recover for injuries caused by falling at night into an unguarded excavation made for a cellar was denied for reasons thus stated: "No claim is made that a barricade consisting of plank laid upon barrels, completely fencing in a shallow excavation made for temporary purposes, is not a reasonable one, and, if there were, we should be inclined to say that it is sufficient, as matter of law, in a case like this, and that it should not be left to the jury to say that it was not, under ordinary circumstances. We are of the opinion that there is an absence of proof to support the claim of negligence upon the part of the city. The most natural inference from the testimony is that the board was removed in some unexplained way, for which the city is not shown to be in any way responsible."

In *Monje v. Grand Rapids* (1900) 122 Mich. 645, 81 N. W. 574, the defendant city which, by a provision in its charter was declared to be liable for injuries caused by defects, etc., in highways, etc., was held liable for injuries received by a person who had fallen into an unlighted and unguarded trench made by a plumber for a

sewer connection. The court said: "The city has the responsibility of constructing sewers and their connections, under the charter, whether it be done by its own employees, or by persons licensed to dig up its streets." After having cited some earlier decisions, the court continued thus: "These cases seem to us to dispose of the claims that the city was not responsible for the act of the plumber, and that it had no notice of the defect."

In *Bonneville v. Alpena* (1909) 158 Mich. 279, 122 N. W. 618, the evidence showed that a trench, excavated for a sewer connection by the workmen of the plumber employed by an abutter, was left open and unlighted by them when they ceased work; that early in the evening of the same day one C, while riding a bicycle, ran into the trench; that he immediately went to the police station, and notified an officer, who said he would look after it, which he did, placing lights there; and that in the meantime the plaintiff had driven into the trench. The trial judge directed a verdict for the defendant, for the reason that there was no failure to place danger signals as soon as its officers had notice that the trench was open. The court, following *Monje v. Grand Rapids* (Mich.) supra, held that this ruling was erroneous.

In *Repperd v. Chapin* (1916) 190 Mich. 19, 155 N. W. 706, where the plaintiff drove into an unguarded and unlighted excavation made under a permit issued to a firm of licensed plumbers, it appeared that a municipal ordinance provided that no such excavation should be left open overnight. A verdict for the codefendant city had been directed by the trial judge, who was of the opinion that no negligence had been shown upon the part of the city, because it had received no notice that the excavation was left open in violation of the ordinance; and that the city could not presume that the plumbers would thus violate the ordinance. Commenting upon this theory, the court said that the trial judge, "with this situation, applied the rule which prevails where the municipality charged with the duty of keeping the highway in repair has no notice or knowledge that the highway is out of repair, and to which it has not given its consent." This position was held to be erroneous. The court said: "In

the present case the city of Jackson authorized the other defendants to open the excavation. It thereby had notice and knowledge that the excavation was about to be made. After that, its liability to third persons for injuries was no different than as though it were doing the work itself.

To permit the city to escape liability on the ground of its ordinance would be to concede that the city could, by a well-worded ordinance, lessen the liability placed upon it by the statute. The question as to whether the city was negligent in failing to properly guard the excavation was one which should have been submitted to the jury." In the present case the city authorized the other defendants to open the excavation. It thereby had notice and knowledge that the excavation was about to be made. After that its liability to third persons for injuries was no different than as though it were doing the work itself.

In *Cleveland v. St. Paul* (1872) 18 Minn. 279, Gil. 255, where plaintiff's horse fell at night into an excavation made for a water pipe, it was unsuccessfully contended that the duty imposed upon the defendant, by a statute requiring it to keep its streets "open and in repair and free from nuisances," was absolute and unconditional, in such a sense that any failure to perform it rendered the city liable, whether or not it had notice of the defects in question. But the city was held liable on the ground that the evidence showed "an obstruction in the most prominent thoroughfare of the city, so open, notorious, and dangerous, and continued for such length of time, that the city authorities with reasonable diligence might have known its existence in ample time to have secured it with sufficient guards and lights to have protected travelers against it." It was furthermore held that, as the city was thus chargeable with notice, it was a matter of no importance whether the owner of the building or the contractor employed to dig the trench had created the obstruction with the permission of the city, for a lawful purpose, or had created it wrongfully.

In *Clark v. Austin* (1888) 38 Minn. 487, 38 N. W. 615, where the court sustained a verdict in favor of a person who had fallen into an unlighted and unguarded excavation adjoining the

street, the only point discussed was one of procedure.

In *Bassett v. St. Joseph* (1873) 53 Mo. 290, 14 Am. Rep. 446, where the plaintiff had fallen into an excavation made for the foundation of a building on an abutting lot, it was held error to give an instruction to the effect that, unless they believed from the evidence that the excavation extended into the highway, and was by the defendant carelessly, negligently, and knowingly left unguarded at the time of the alleged injury to plaintiff, they should find for the defendant. The court said: "This instruction assumes that notwithstanding the excavation complained of was a dangerous one, and rendered travel on the highway passing thereby dangerous and hazardous, and notwithstanding the defendant knew the dangerous condition of the street, and left it unguarded, and that in consequence thereof the plaintiff was precipitated into the excavation and was injured, yet if the excavation did not actually extend into the highway, the plaintiff cannot recover. This cannot be the law. It would not be difficult to imagine many cases in which it would be as much the duty of the city authorities to protect the public who travel its streets and highways against dangers which do not actually form a part of the street, as it would be to protect them from obstructions or excavations forming a part of the street. . . . All of the evidence in the present case shows most clearly that the excavation was either extended into the highway a few feet, or came up to the edge of the highway. In such cases, if it renders travel dangerous, it is as much the duty of the city to protect the public against the danger in the one case as in the other, and it makes no difference in such case, whether the excavation was made by the city, or made by another, except, when not made by the authorities of the city, they would not be liable until after they had notice of the dangerous condition of the street."

In *Russell v. Columbia* (1881) 74 Mo. 480, 41 Am. Rep. 325, where the plaintiff's injury was caused by falling into a trench dug for a gas main, the contention of counsel that affirmative proof of notice, actual or constructive, was a prerequisite to liability on the part of the defendant, was rejected on the ground that, "the

trench having been dug by a company to which the town of Columbia had given permission to make it, and which permission it was at liberty to withhold, the liability of the corporation is the same as if it had been made by its own servants, by its direction."

The above case was followed in *Stephens v. Macon* (1884) 83 Mo. 345, where the defendant was held liable for injuries occasioned to a person who had fallen into a ditch cut across a sidewalk for the purpose of draining a cellar which an abutter was excavating. An instruction by which the liability of the municipality was represented as being dependent upon proof that it had notice of the unsafe conditions was held to have been properly refused. The court said: "The act of Stone [abutter], by permission of the city, was the act of the city, and it makes no difference in such case whether the excavation was made by the city, or by Stone with its permission. The city would be equally liable."

In *Lindsay v. Kansas City* (1906) 195 Mo. 166, 93 S. W. 273, where the carriage of the plaintiff fell into an unlighted and unguarded trench, dug for a water pipe, the liability of the defendant was affirmed for reasons thus stated: "The evidence very clearly shows that the ditch or hole into which the horses fell which were drawing the carriage in which plaintiff was riding at the time she was hurt had been dug by the consent and authority of defendant, and, when the street was thus rendered unsafe, no question can be made as to the liability of the defendant for the injuries thus produced, when the person suffering is without contributory fault or was exercising ordinary care."

In *Ball v. Independence* (1890) 41 Mo. App. 469, where plaintiff was injured by falling into an excavation made for a cellar, the defendant relied upon the doctrine which absolves a corporation from liability where such an accident occurs during the night, in consequence of a wrongdoer having removed signals and other safeguards which were duly placed at the time when the day's work ceased. A verdict for the plaintiff was upheld on the ground that there was a conflict of evidence as to some of the material facts which had a bearing upon the applicability of that doctrine.

In *Wilder v. Concord* (1903) 72 N.

H. 269, 56 Atl. 193, where the plaintiff had been injured by falling into an unlighted and unguarded trench dug across a sidewalk for the purpose of repairing a private drain, it was held that, under chap. 59 of New Hampshire Laws 1898, a town is not liable to a traveler for an injury resulting from such a defect, unless express notice of the unsafe conditions has been given to it.

In *Dolan v. Brooklyn* (1870; N. Y. Ct. App.) 1 Alb. L. J. 315, the plaintiff's wagon collided with an unlighted pile of dirt which had, on the day before the accident, been excavated by the workmen of a plumber from a trench made for a sewer connection. The permit to do the work provided that all work of the kind was to be examined by the inspector before it was covered up, and also that no excavation in any street must be left open overnight. Held, that the law was well settled that where, by the authority of any municipal corporation, any of its streets are excavated or out of repair, so as to be unsafe for use, it is the unqualified duty of such corporation to cause guards or lights to be put and kept up at night to prevent accidents; and, for its neglect to do so, it is always liable to respond in damages. It was furthermore laid down that the defendant, having given authority to excavate or open a street, was bound to see that it was safely done, and that said street was restored to its former safe condition during the same day, or was properly guarded at night. In the absence of any detailed report, it is impossible to say what was the precise position taken by the court with regard to the element of notice to the city. The supreme court, whose judgment was reversed ((1866) 46 Barb. 604), made the following remarks in this connection: "The water commissioners knew that the work was in progress, but there is no evidence that they, or any other officers of the city, knew or had notice that those whose work it was had been guilty of this negligence, and they were not bound to presume it. They exercised no control over the work, except such as was necessary for the protection of the sewers, and the declaration in their certificate of permission that the work is to be done under the direction of the engineer and inspector of sewers has reference only to this. The inspection for which

their rules provide is only of the plumbing work and material." If the rationale of the reversing judgment was that the lower court had placed an erroneous construction upon the provision as to "direction," the decision is in line with the somewhat later one in *Wendell v. Troy* (1868) 4 Keyes (N. Y.) 261, 4 Abb. App. Dec. 563, affirming (1862) 39 Barb. 329. There the evidence showed that, while the plaintiff was driving his wagon along a street, the ground suddenly sunk at a place where a drain had recently been constructed by a house owner under a permit which provided that the work should be done under the direction of the city commissioners. The defendant's liability was affirmed on the ground that no supervision or direction had been bestowed upon the work by the appropriate city officer. The court approved an instruction to the effect that, "although the work in question was one undertaken for private use and benefit, yet the city was not thereby discharged from the duty of oversight and direction, and responsibility for proper construction, especially as in the resolution giving permission to perform the work it was provided that it was to be done under the direction of the proper city officer; that it was the duty of the corporation to send a proper and competent person to oversee the work; and finally, that it was not enough to relieve the defendant from liability that there was no external indication of imperfection in the work which diligence could discover, provided the street was, in point of fact, unsafe, and although this might arise from a hidden defect not cognizable by outward observation."

In *Masterton v. Mt. Vernon* (1874) 58 N. Y. 391, where a wagon sank into a negligently filled trench which had been dug under permit to connect a drain with a sewer, an exception was sustained to an instruction by which the jury were told that, the village having given such permission to make such connections, the act of the persons who dug that trench was the act of the village, and that they were as liable for any omission of duty upon the part of the men who acted under their permits as if the village authorities had employed the men directly to do the work in question. The court said: "The question by this exception is clearly presented, whether the de-

fendant, in the exercise of a lawful right, by giving permission to the lot owners to make the connection, made itself responsible for the improper conduct of those employed by the owners to do the work, in the absence of any want of proper care by any of its officers in keeping the streets in a safe condition for use by the public. Upon what ground can such a liability be imposed? In giving the permission, the defendant only exercised a power conferred upon it by law. The work was not in fact done by it or for its use, but wholly by the lot owners and for their own purposes. The latter employed and paid the men for doing the work, and the relation of master and servant between them and the defendant did not exist. I can see no legal reason for holding the defendant responsible for the acts or omissions of those men. The law imposed upon the defendant the general duty of keeping its highways in a safe condition for use, and made it responsible for the omission of reasonable care under all the circumstances in this respect. If its officers knew they were unsafe, and neglected for a reasonable time to make them so, or if, from the lapse of time after the defect existed, they ought to have ascertained it, the defendant was responsible for their negligence to those who, without fault on their part, sustained an injury therefrom. . . . The degree of attention and care depends upon the circumstances. If excavations are being made in the streets by lot owners, to whom permits to connect with sewers or any other lawful purpose have been given, which may render the streets dangerous, or there is reason to believe that such excavations may be made, the officers of the defendant should exercise reasonable care under the circumstances to prevent injury. If such care was omitted, the defendant was responsible. In short, it was responsible for its own negligence in the care of the street, but not for the negligence of the servants of the lot owners in the performance of their work, lawfully undertaken for their own purposes." The *Wendell Case* (N. Y.) *supra*, was distinguished on the ground that the permit there involved had expressly provided that the work should be done under the direction of the city commissioner.

In *Taylor v. Mt. Vernon* (1890) 58 Hun, 384, 12 N. Y. Supp. 25, affirmed in

(1891) 129 N. Y. 651, 29 N. E. 1032, the liability of the defendant was denied under circumstances thus stated in the opinion of the supreme court: An owner of lands had excavated a cellar thereon flush with the street. There were no lights and no guard rail placed at the excavation to indicate the danger of leaving the sidewalk. The lots were naturally on the grade of the sidewalk. The excavation was 4 feet inside of the stoop line of the house on the street. The sidewalk had a flag walk, the inside of which was 8 feet from the excavation. The excavation did not encroach on the sidewalk, and had not caved in so as to diminish the sidewalk. The plaintiff intentionally left the sidewalk for his own purpose, and thus stepped into the excavation. The sidewalk itself was not out of repair. The court said: "Under this state of facts the village owed no duty in respect to the excavation. It had been recently made as a cellar for a new building. It was entirely off the street. No notice is proven to any of the city officers. The only notice shown was to a police officer on the day preceding the accident, and he at once notified the owner to guard his excavation; whether he was liable for neglect, under the case of *Beck v. Carter* (1877) 68 N. Y. 283, 23 Am. Rep. 175, is doubtful. The facts of that case show an invitation to use the place excavated as a highway by the owner, and the case seems to have been decided on that ground against the owner. The place excavated was not an exposed place, under *Hubbell v. Yonkers* (1887) 104 N. Y. 434, 58 Am. Rep. 522, 10 N. E. 858.

In *O'Hara v. Buffalo* (1899) 39 App. Div. 443, 57 N. Y. Supp. 367, where the plaintiff fell into an unlighted and unguarded trench dug across a sidewalk for a private drain leading to a new building, it was held that its existence for eight days in its unprotected condition was amply sufficient to justify the jury in finding that the authorities ought to have known of the unsafe conditions.

In *Blakeslee v. Geneva* (1901) 61 App. Div. 42, 69 N. Y. Supp. 1122, the plaintiff was thrown from her carriage, upon its being driven into a trench opened for the purpose of making connections between a house and the sewer and water mains along the street. There was evidence to the effect that the accident occurred at 9

o'clock in the evening; that a resident of the street, observing that there was no light to guard the excavation, though there was a barrel and stick barricade, went and formally notified the defendant's general sewer inspector of the neglect a half or three quarters of an hour before the accident; that it would not have taken the inspector more than five minutes to go and put up the light after such notice was given; and that he did not go to the place until just after the accident. The trial judge left it to the jury to say whether the defendant was guilty of negligence in not putting up a light or barricade to guard the trench within a reasonable time after it had notice of the neglect of the property owner who opened the trench to put up such light and barricade. The jury having found this issue in plaintiff's favor, the court refused to disturb their verdict.

In *Tabor v. Buffalo* (1910) 136 App. Div. 258, 120 N. Y. Supp. 1089, where the plaintiff's wagon fell into a depression created by the subsidence of the earth filling of a trench dug for water and sewer connections, the court thus stated its reasons for holding the defendant to be liable: "The excavation was made by the plumber employed by the owner of the premises, but in pursuance of a permit granted by the city department of public works. The work was under the control and authority of the city engineer, and the person to whom the permit was granted was required to restore the opening to as good condition as previously existed. The whole work was, therefore, intrusted to the department of public works or its engineer, and the city could protect itself from any failure on the part of the holder of the permit to comply with its provisions. In fact a penalty is imposed for failure to meet these provisions. Ordinances, chap. 4, § 30. In this situation the city, therefore, is a joint actor with the owner in making this excavation. If a person using the street property is injured by reason of failure to restore an opening to its former condition, it is not essential for him, in order to recover for his injuries, to show notice of the defective condition either to the city or to the owner. Its restoration is an affirmative obligation, and the question in such a case is, therefore, whether the provisions of the permit

have been complied with. The street was previously safe. It was opened and made dangerous, to be sure, for a lawful purpose. The safety of the public using the streets requires that while the excavation is open it must be suitably barricaded or denoted by warning lights, and when filled it must be taken care of until it is permanently restored to its previous condition. The city had notice of the original excavation, and it was made with its permission, and until restoration has been made complete its duty of inspection continues and it is entitled to no notice of its condition." It was also held that the trial judge had erroneously directed the jury to render a verdict for the defendant, if they found that the trench "came into the condition in which it was at the time of the accident, only on that day. The court said: "Ordinarily, constructive notice of eleven hours prior to the accident might be inadequate. Its sufficiency depends on circumstances. Rhode Island street was an important one, and much traveled. The trench where the injuries were sustained was dug and filled up in January, and partly with frozen earth. Inevitably, when rains came and the frost thawed out the earth, it would sink and a dangerous hole be left, and this sinking would continue until into the spring of the year. For a day or two preceding the accident the weather had been moderate, with some rain. On the evening of the 26th and the morning of the 27th there was warm weather with a heavy rainfall, and the street depressions all over were filled with water the morning of the 27th and all that day. The very conditions had arisen which would soften the frozen chunks and cause the earth to settle, and the city authorities and the plumbers must have realized the effect of this heavy downpour. In view of the permit granted and the conditions referred to, I think it was error for the court to charge the jury, as matter of law, that they could not find constructive notice if the hole had existed only since 9:15 that morning."

In *Scanlon v. New York* (1883) 12 Daly (N. Y.) 81, the liability of the defendant city was denied on the ground that there was no evidence from which constructive notice could be imputed to the defendant with regard to the subsidence of the earth in a recently filled sewer trench, into

which the plaintiff's buggy had fallen.

In *Kinsey v. Kinston* (1907) 145 N. C. 106, 58 S. E. 912, where the plaintiff had fallen into a trench dug across a sidewalk by a contractor employed to make a sewer connection, the evidence showed that the contractor had finished the work at 4 P. M. on the day preceding the night on which the accident occurred; that he immediately notified the city inspector to inspect the connections; that the inspector was temporarily ill when this notice was given, and did not inspect the ditch that day; and that it was left open all night, without lights or other protection. A verdict in favor of the plaintiff was sustained. The court approved an instruction to the effect that "the grant of a permit . . . to make the ditch is notice to the city that the work is in progress, and thereafter it would be liable for the injuries arising from the negligence of the person doing the work, which is dangerous in itself." The following remarks were made: "It is admitted that on the day the excavation was made the defendant issued its permit authorizing it to be done. The defendant's authorities were, therefore, expressly charged with knowledge of the character of the work and its possible dangers to those of the citizens who should use the street, especially after nightfall, as the plaintiff happened to do. A ditch cut across a much-used street in a city is necessarily dangerous, and it is the duty of the person doing the work to protect it against accident to those using the street. The duty of a private person is very much the same as that of the city itself, when it is prosecuting an improvement. If a private individual fails to protect an excavation in the street, then it is the duty of the city authorities to see that it is protected, and they are held responsible that he should do so, for they are notified that he is going on with the work when he obtains the permit. The city is liable for negligence in failing to exercise supervision and inspection, if injury results by such excavation made by the individual under such permit or license issued by it."

In *Gable v. Toledo* (1895) 9 Ohio C. D. 63, where the plaintiff's buggy was overturned as the result of a collision with a mound thrown up from an excavation, made under permit, for a sewer connection with a house, the

liability of the defendant city was affirmed with reference to the doctrine thus stated by the court: "It was the duty, therefore, according to the established doctrine of the supreme court of the state, of the city, when it issued to the parties named in this record the permit to make this excavation, and they went forward to make it, to guard the excavation against danger to the parties. It was bound to see to it that this necessarily dangerous work was so done as to protect the party from liability to danger in the use of the street, and, as I have already said, it mattered not, so far as this liability of the city was concerned, whether it knew that guards had not been provided, or lights had not been placed there, to warn and guard the public. It was bound to know whether it was done or not."

The above decision was followed in *Hewitt v. Cleveland* (1901) 21 Ohio C. C. 505, 11 Ohio C. D. 710, where the plaintiff was injured by falling into an excavation made in the sidewalk adjacent to a building then in course of construction. The evidence showed that, for the protection of the public in the use of the sidewalk, a fence had been constructed around the excavation; that a walk had been laid outside this fence; that before the accident a part of the fence was occasionally removed for the purpose of carrying materials to be used upon the building; that when it was not necessary to have this gap opened, a plank was laid, upon either boxes or barrels, across it. The court set aside a verdict for the defendant city, on the ground that the trial judge had erred in giving an instruction which represented the right of recovery as being dependent upon the city's having had notice, actual or constructive, of the fact that the plank was not in place when the plaintiff fell into the excavation. The position was taken that the city, "having knowledge of the dangerous excavation, and such excavation having been made under its license, owed to the public the duty of reasonable protection against the dangers arising from such excavation, and that the want of notice to the city of the removal of the guard or plank constituted no defense to the plaintiff's right to recover." The theory with reference to which this case and the preceding one were decided seems to be essentially inconsistent with the

reasoning of the supreme court in *Columbus v. Penrod* (1906) 73 Ohio St. 209; 3 L.R.A. (N.S.) 386, 112 Am. St. Rep. 716, 76 N. E. 826, 20 Am. Neg. Rep. 169. See § 5, *supra*.

In *West Chester v. Apple* (1860) 35 Pa. 284, 78 Am. Dec. 386, the object of the action was to recover back the sum which the plaintiff had been compelled to pay the owner of a horse which had plunged into the soft filling of a trench dug by the defendant, a plumber engaged by an abutter to lay a water pipe into a house. The court, in the first place, laid down the doctrine that "if the original injury in this case was not legally chargeable against the borough, then it can have no right of action against the original wrongdoer, even though it was sued for it and gave him notice to defend, and an award was had against it, which it paid. One who is improperly sued for the wrong of another must secure himself by a defense against that action, and not by subrogation to another." The liability of the borough for the original injury was denied on grounds thus stated: "The excavations made for this purpose [laying water pipes] are for private benefit, done at private expense, and usually without any direct superintendence of the public; and only the persons who make them, or cause them to be made, are answerable for any injury they occasion to the right of travel. The borough had no hand in this excavation, and is not answerable for the carelessness with which it was done. The public fulfils its duty when it furnishes a complete highway, and it is not answerable for the improper modes in which individuals connect their property with it. Alleys and doors, and steps and drains, are necessary to connect private property with public streets, and branch pipes to connect with gas and water mains; and when the public leaves it to individuals to make such connections, they alone are responsible that the work shall be done without injury to anyone. . . . It is enough for the injured person that he has a remedy against the actual wrongdoer." In the above-cited case it will be observed that, in determining the question of liability, the court made no reference whatever to the conception of an absolute duty on the part of the corporation, or to the effect of notice or absence of notice. By Judge Dillon

(Mun. Corp. 5th ed. p. 3023), the decision is criticized as being one "which, in its result and reasoning, is opposed to the general doctrine of the courts elsewhere, and rests upon the questionable basis that a city corporation has the right to disregard its duty to the public to keep its streets in a safe condition."

The 'same elements were also ignored in *Susquehanna Depot v. Simmons* (1886) 112 Pa. 384, 56 Am. Rep. 317, 5 Atl. 434, where it was held that the plaintiff was not entitled to recover from the abutter, for whom a trench had been dug by a contractor employed to lay a water pipe, the sum which it had paid to a person injured by falling into the trench. The position of the court is indicated by the following remarks: "It is settled that the defendant had the right to grant the license to dig the ditch complained of; in this it did nothing unlawful. How, then, is it responsible for the negligent act of Florence [the contractor]? It certainly cannot be contended that its responsibility would be greater in a case such as this, than if Florence had been acting under a contract with the borough instead of Dr. Smith [the abutter]. Yet under such a contract it would not have been liable. His employment was independent of the control and direction of the person with whom he had contracted. He was in the lawful possession of the street in which the water pipes were to be laid, and, as was said in *Erie v. Caulkins* (1877) 85 Pa. 247, 27 Am. Rep. 642, the borough could not fill up the trench which he dug, or erect barriers which he might not tear down if they obstructed his work. . . . If, as was said in *Smith v. Simmons* (1883) 103 Pa. 32, 49 Am. Rep. 113, the excavation had been per se a nuisance, the case would be different, for in that event the public authorities would have been bound to abate it as soon as they had knowledge of the obstruction, but not being a nuisance, but lawful, the borough cannot be held for an accident happening thereby, and Florence alone must be regarded as responsible for the injury resulting to the plaintiff from his neglect."

For a still later case, decided on a similar basis, see *Levenite v. Lancaster* (1906) 215 Pa. 576, 64 Atl. 782, where it was held that a person whose vehicle was upset by coming into contact with an unlighted and unguarded

ditch, dug for a sewer pipe by a contractor, could not recover damages from the defendant city.

It seems scarcely possible to reconcile the doctrinal standpoint indicated by the language used in the three cases cited above, with that reflected by the decision in *Philadelphia v. Smith* (1889) 1 Monaghan (Pa.) 147, 16 Atl. 493, where the court upheld a verdict in favor of a pedestrian who was injured by stepping into a depression in a sidewalk, produced by the subsidence of a sewer trench. It was held that the trial judge had refused three points, all based upon the theory that only the persons who make such excavations, or cause them to be made, are answerable for injuries occasioned by them to travelers. The court said: "Conceding that the persons who made or caused the excavations to be made across the sidewalk for their own benefit were answerable to plaintiff below for the injury she sustained, it does not follow that the city, under the facts established by the verdict, was not also liable. If it had notice of the dangerous condition of the sidewalk, as the jury has found, and neglected to perform its duty to the public by having the street put in a safe condition for travel, it was undoubtedly liable for the consequences of such neglect." Neither *West Chester v. Apple* (1860) 35 Pa. 284, 78 Am. Dec. 336, nor *Susquehanna Depot v. Simmons* (1886) 112 Pa. 384, 56 Am. Rep. 317, 5 Atl. 434, was referred to in the opinion.

In *Corsicana v. Tobin* (1900) 23 Tex. Civ. App. 492, 57 S. W. 319, where the plaintiff's buggy fell into an unlighted and unguarded trench, excavated for a sewer connection, a verdict in his favor was sustained.

In *Sutton v. Snohomish* (1895) 11 Wash. 24, 48 Am. St. Rep. 847, 39 Pac. 273, one of the grounds on which the court sustained a verdict in favor of a pedestrian to recover for injuries caused by falling at night into an unguarded excavation, made in a sidewalk for the purposes of the basement, was that the evidence tended to prove that the excavation had been made some two months before the accident, that the mayor of the city and at least one of the members of the council were very frequently in close proximity to it during that period, and that, if the street commissioner had not seen it, he was remiss in the discharge

of his official duty. Reliance was also placed upon the consideration that "the fact that a permit was granted was notice to the authorities that the work was in progress, and they were then charged with the duty of seeing that it was properly conducted." The argument based upon the ground that the barrier usually maintained across the sidewalk had been removed by some unknown person after the termination of the preceding day's work, and that the interval between that time and the occurrence of the accident was so short that the defendant could not be charged with constructive notice of the removal, was rejected, for the reason that the question "whether want of notice or knowledge of the removal would exempt the city from liability, under the circumstances of this case, depends entirely upon whether or not, in the first instance, a sufficient protection was provided to guard travelers upon the sidewalk against accident." The evidence as to this point was that the owner of the adjoining property, or those who erected the building thereon, had placed a loose plank or joist across the sidewalk at or near the south end of the excavation, and that the end of this plank next to the building and excavation rested upon a lime barrel, and that the other end was supported by a board which was fastened to a post

near the outer edge of the walk. Held, that the jury were warranted in finding that this barrier had not been, at any time, a sufficient protection to the public.

In *St. Louis v. Dallas* (1901) Rap. Jud. Quebec 11 B. R. 117, the plaintiff was injured by a stone thrown by a blast out of a trench which an abutter had been authorized to excavate for a sewer connection. Under the charter of the defendant city, "owners or occupants were bound to establish connections at their own cost, under the superintendence of an officer appointed by the corporation." The right to maintain the action was denied on the ground that the duty contemplated by this clause did not extend to the supervision and control of all the blasts which might be necessary in the course of the work of excavation. It seems safe to say that, under the circumstances shown in this case, the corporation would be held liable in most, if not all, of the American states, either for the reason that an absolute obligation on its part to see that reasonable care was exercised in respect of the details of the work was inferable from the language of its charter, or for the reason that such an obligation arose from the fact of its having authorized the performance of intrinsically dangerous work.

C. B. L.

SARAH SCHNEIDER, Resp.,

v.

JACOB SCHNEIDER, Appt.

California Supreme Court (Dept. No. 2)—July 26, 1920.

(— Cal. —, 191 Pac. 533.)

Marriage — annulment — division of property.

1. Upon annulment of a marriage because one of the parties had a living spouse at the time of its celebration, the court may permit the innocent wife to share in the property accumulated while the parties were living together.

[See note on this question beginning on page 1394.]

— void — effect on property rights.

2. A void marriage confers no rights upon either of the parties to it in respect to the property of the other, such

as would be conferred by a valid marriage.

[See 18 R. C. L. 445.]

— settlement of property rights without dissolving marriage.

3. Where, in an action for divorce, it appears that the marriage was void because the man had a living wife when it was entered into, and the par-

ties, without pressing the prayer for annulment, took evidence on the issue of their property rights, the court may adjudicate upon that question, although it enters no decree of divorce.

APPEAL by defendant from a judgment of the Superior Court for Los Angeles County (Wood, J.) in favor of plaintiff, and from an order denying a motion to set aside the judgment in an action for a divorce, and for a division of the "community property." *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Gerecht & Chambers and Harry Ellis Dean for appellant.

Mr. A. P. Thomson for respondent.

The following opinion was prepared by Kerrigan, J., of the District Court of Appeal, First Appellate District, while acting as justice pro tem. of this court in place of Melvin, J. It is adopted as the opinion of this court:

This was an action for divorce brought by the wife, and the appeal is taken by the defendant from that part of the judgment awarding to the plaintiff a portion of the joint property. The defendant also appeals from an order denying his motion to set aside the judgment, and brings said appeals to this court upon the judgment roll alone. No argument is made in the briefs in support of the appeal from said order.

As to the appeal from the judgment, it appears from the findings of the trial court that the plaintiff, at the time of her marriage to the defendant, was the wife of another man, although at that time she was laboring under the belief that as the result of a certain proceeding had in the year 1905 her prior marriage had been dissolved. Her union to the defendant took place in 1908, and was entered into in good faith, and the parties thereafter lived together as husband and wife for about eight years, accumulating by their joint efforts certain property, a part of which, by the judgment in this case, was awarded to the plaintiff.

The plaintiff as a ground for divorce alleged cruelty on the part

of the defendant, and, in addition to praying for the dissolution of the matrimonial bonds, sought a division of the "community property." Upon the finding as to the continued existence of said prior marriage of the plaintiff, the court denied a divorce, but declared the property described in the complaint to be joint property of the parties, in the nature of and analogous to community property, and by its decree divided it equally between them, giving to the defendant, however, in such division, credit for certain payments which he had been required to make to the plaintiff during the pendency of the action, in recognition of the fact that the parties were not legally husband and wife.

Under the authorities it is clear that a void marriage confers no rights upon either of the parties to it in respect to the property of the other, such as would be conferred by a valid marriage; but in the case before us the question for determination is, Conceding that the marriage was void, what right, if any, has the plaintiff in the property acquired by the joint efforts of herself and the defendant during their cohabitation, entered upon innocently upon the faith of their admittedly void marriage?

Marriage—
void—effect on
property rights.

On this question there is a conflict in the decisions. In the states where the common-law right of dower exists it is generally held that a woman, in order to be entitled to dower, must base her claim upon a legal marriage. In those states, if a

man has a wife living, and enters into a second marriage, no matter how innocent of wrongdoing the other party to it may be, nor how gross the deception by which she enters into the marriage, she is not entitled to dower, not being his lawful wife. *Kennelly v. Cowle*, 6 Ohio S. & C. P. Dec. 170.

In the case of *De France v. Johnson* (C. C.) 26 Fed. 891, a man had a wife living at the time he married the plaintiff, a mere girl, with whom he lived for a great many years and until his death. By her he had thirteen children. After his death she sought to recover dower, but the court decided against her, holding that a woman who innocently marries and cohabits with a man who has a wife living, from whom he has never been divorced, cannot acquire an interest in his land by reason of such illegal marriage.

This doctrine does not prevail in all the states, nor in fact, in any where the community property régime has been adopted. In Louisiana, and possibly New Mexico, a marriage such as the one here is known as a "putative" marriage, and the property rights of the woman are recognized and protected by statute. In four of the seven states where the community rule as to property of the character here considered prevails, it has been held that where a woman is an innocent party to a void marriage she is entitled to the same interest in property acquired by the parties as if the marriage were valid. In the state of Texas the question has often been before the courts, and in a number of recent cases has been given attentive consideration. The Spanish law as to marital rights prevailed in Texas until 1840, and the doctrine of putative marriage was a part of that law, as shown by the decisions of its courts, and even since the adoption of the common law the property rights of persons who contract void marriages, but in good faith, have been upheld. *McKay, Community Property*, 194.

In the case of *Morgan v. Morgan*,

1 Tex. Civ. App. 315, 21 S. W. 154, which was decided after the adoption of the common law in that state, the court said: "The status of property acquired by a man and woman living together as husband and wife without having been lawfully married has been the subject of doubt and litigation almost from the time Texas became an independent republic," and after reviewing the early cases the court continued: "It will thus be seen that the strong tendency of our judges in the past has been to hold that property acquired in this state, under our community laws, by a man and woman living together as husband and wife, should belong to them in equal shares, whether they were legally married or not. And why should this not be so, especially when they have attempted to enter into a marriage contract, and believed that they were lawfully husband and wife? In such cases, by attempting to enter into the marriage contract, they agreed, as far as they had the power to agree, that they would live together as husband and wife, and that all property that they might thereafter acquire should be community property, and belong to them in equal portions. Such is the meaning of the contract they attempted to make under our law. How, then, can it be said that the property acquired in pursuance of such a contract shall belong to one of the parties more than to the other? What right has the husband to all of the property to the exclusion of the wife, or what right has the wife to all of the property to the exclusion of the husband? Suppose a wife so situated should by her own exertions acquire property towards which the husband did not contribute anything, would it be contended that this property became his property? How, then, can it be that where the property is acquired by the joint labors of both, each in the eye of the law contributing one half thereto, it shall belong only to the husband? It will not do to refer to the decisions in common-law

states to sustain the proposition that the woman, under such circumstances, has no right to any part of the property so acquired. In those states, by entering into the marriage contract she understood that all the property they might acquire while living together should belong to the husband, but in this state she understood that their rights in the property they might accumulate should be equal."

See also *Lawson v. Lawson*, 30 Tex. Civ. App. 43, 69 S. W. 246; *Routh v. Routh*, 57 Tex. 589.

In the case of *Barkley v. Dumke*, 99 Tex. 150, 87 S. W. 1147, a girl had innocently contracted marriage with a man having a living wife; and the court held that it was the settled doctrine in that state that by virtue of such a marriage the putative wife became entitled to the same rights in property acquired by the parties as would be the case if the marriage were free from defect, pointing out that the statute law of Texas upon the subject of the mutual property rights of married persons is so inconsistent with the common law as to show an intention on the part of the lawmaking power not to subject such rights to the rule of the latter. This case has since been frequently followed in that state.

In California, as in Texas, the common law is the general rule of decision, but in both states the law regulating the mutual property rights of married persons is radically different from that law; and, while we do not wish to be understood as saying that the rules of the common law as to husband and wife apply to no case under our system, yet we agree with the Texas courts that the common-law rule as to the consequences of a void marriage upon the mutual property rights of the parties to it is inapplicable where the community property régime prevails. This conclusion is dictated by simple justice, for where persons domiciled in such a jurisdiction, believing themselves to be lawfully married to each other, acquire property as the result of their joint

efforts, they have impliedly adopted, as is said in the Texas case cited, the rule of an equal division of their acquisitions, and the expectation of such a division should not be defeated in the case of innocent persons.

In *Werner v. Werner*, 59 Kan. 399, 41 L.R.A. 349, 68 Am. St. Rep. 372, 53 Pac. 127, a case very similar to the present one, a woman having a husband living contracted marriage, and lived with this supposititious husband for many years in the belief that her former marriage was invalid. Her action for divorce was held to be an equitable proceeding in which the court had full jurisdiction to give adequate relief, and accordingly it annulled the marriage and made an equitable division of the property.

In the province of Quebec, a civil law jurisdiction, it was held, in *Gregory v. Dyer*, 15 Lower Can. Jur. 223, that a woman who in good faith had married a man who had a wife living, and lived with him until his death, was entitled to a community interest in the property acquired by them after their marriage. See also *Cathcart v. Union Bldg. Soc.* 15 Lower Can. Rep. 467; *Morin v. Corporation des Pilotes*, 8 Quebec L. R. 222; 1 Cyc. 1633.

In the case of *Buckley v. Buckley*, 50 Wash. 213, 126 Am. St. Rep. 900, 96 Pac. 1079, it is held that, where a woman enters into a marriage contract with a man without knowledge that he has a wife living, the court has power to annul the marriage, whether the action be for divorce or annulment, and in such action to dispose of property acquired by the joint efforts of the parties, and can, as in a true divorce proceeding, award to the innocent injured woman such proportion of the property as under all the circumstances would be just and equitable.

The authorities on the subject are reviewed and the rule in this state announced by Mr. Justice Sloss in the well-considered case of *Coats v. Coats*, 160 Cal. 671, 36 L.R.A. (N.S.) 844, 118 Pac. 441. That was an ac-

tion, after a decree of annulment, for a division of the property which had been accumulated by the parties after the marriage. It was held that a woman who in good faith had entered into a marriage, which was subsequently annulled at the instance of the other party upon the ground of her physical incapacity to enter into the marriage state, was entitled to participate in the property which had been accumulated by the efforts of both parties during the existence of the abortive marriage. "To say," declares the court, "that the woman in such case, even though she may be penniless and unable to earn a living, is to receive nothing, while the man with whom she lived and labored in the belief that she was his wife shall take and hold whatever he and she have acquired, would be contrary to the most elementary conceptions of fairness and justice." In that case the appellant argued that, the marriage being voidable, the effect of the decree of annulment was to render the marriage void from the beginning, and that all property rights of either dependent upon the marriage were terminated and annulled. "But," said the court, "these decisions . . . deal with the rights of one of the parties in property owned by the other. . . . Here, however, the question is a different one. The controversy is not over the property owned by the defendant prior to marriage, or acquired by him alone thereafter, but has to do with the acquisitions of the two parties after marriage and before annulment. . . . In the absence of fraud or other ground affecting the right to claim relief, there can be no good reason for saying that either party should, by reason of the annulment, be vested with title to all the property acquired during the existence of the supposed marriage." And the court proceeds to hold that, while, strictly speaking, there can be no community property in the absence of a valid marriage, courts will, in dividing gains made by the joint ef-

forts of a man and woman living together under a voidable marriage which is subsequently annulled, apply by analogy the rule which would obtain when a valid marriage is dissolved. It is true in that case that the marriage was only voidable, while here it was void; but this difference furnishes no logical or sound reason why a different rule should be applied in the division of the jointly acquired property. Indeed, in the case from which we have quoted, the marriage having been annulled, the court assumed it to have been void ab initio.

We do not overlook the fact that the present action was for divorce, and that no decree of divorce or annulment of the marriage was entered. But it is also to be noted that, when the parties discovered that the plaintiff was not entitled to a divorce, they agreed upon a day to which the trial should be postponed for the purpose of hearing evidence on the issue of their property rights, and accordingly such issue was tried on the day set. It therefore appears to us that, in view of the issues framed by the pleadings, and the course of trial adopted upon the development of the facts bearing upon the marriage of the parties, the court was warranted in adjudicating upon the question of their property rights. The circumstance that the court failed to settle their legal status, as it might well have done, is no ground for reversing that part of its judgment dealing with such property rights, and to which the appeal is directed.

The judgment and order are affirmed.

Wilbur, Lennon, and Sloane, JJ., concur.

NOTE.

The subject of division of property upon annulment of a marriage is considered in the annotation following *KNOLL v. KNOLL*, post, 1394.

~~annulment—
division of
property.~~

~~settlement of
property rights
without dissolv-
ing marriage.~~

FRANCES KNOLL, Appt.,
v.
JOSEPH KNOLL, Respt.

Washington Supreme Court (Dept. No. 2)—October 30, 1918.

(104 Wash. 110, 176 Pac. 22.)

Marriage — annulment — division of property.

1. The property acquired after marriage by parties who in good faith and with a belief in the honesty of their act went to a foreign jurisdiction to be married, because they were forbidden to do so by the laws of their domicile on account of a recent divorce of one of the parties, may, upon annulment of the marriage, be divided equally between them as between partners.

[See note on this question beginning on page 1394.]

— foreign — validity.

2. A marriage by a divorcee within the time prohibited by the laws of his domicile, in a foreign jurisdiction to which he goes for the purpose of mar-

riage, and with the intention of immediately returning to his former domicile, is invalid at the domicile.

[See 5 R. C. L. 1004, 1005.]

APPEAL by plaintiff from a decree of the Superior Court for Snohomish County (Alston, J.) granting part only of the relief demanded, in an action brought to secure a divorce. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Noah Shakespeare and Louis A. Merrick, for appellant:

Plaintiff was legally divorced from her former husband.

Forsyth v. Dow, 81 Wash. 137, 142 Pac. 490; Wooddy v. Seattle Electric Co. 65 Wash. 539, 118 Pac. 633; Mundy v. Kern, 74 Wash. 477, 133 Pac. 1035; Hickey v. Hinsdale, 8 Mich. 267, 77 Am. Dec. 450; Cincinnati, P. B. S. & P. Packet Co. v. Bellville, 55 W. Va. 560, 47 S. E. 301; Fish v. Emerson, 44 N. Y. 376; Schultz v. Schultz, 71 Wash. 328, 128 Pac. 660; Paich v. Northern P. R. Co. 86 Wash. 379, 150 Pac. 814; Hays v. Dennis, 11 Wash. 360, 39 Pac. 658; Burns v. Skelton, 29 Tex. Civ. App. 453, 68 S. W. 527; Black, Judgm. § 106; Ball v. Trenholm, 45 Fed. 588; 23 Cyc. 835 A; Mellon v. St. Louis Union Trust Co. 153 C. C. A. 285, 240 Fed. 359; Ex parte Schantz, 26 N. D. 380, 144 N. W. 445; 1 Freeman, Judgm. 4th ed. § 39.

Plaintiff was entitled to one half the property acquired by the joint efforts of the parties.

Morgan v. Morgan, 1 Tex. Civ. App. 315, 21 S. W. 154; Carroll v. Carroll, 20 Tex. 743; Re Brenchley, 96 Wash. 223, L.R.A.1917E, 968, 164 Pac. 913.

Messrs. Coleman & Fogarty and I. A. Kaune for respondent.

Main, Ch. J., delivered the opinion of the court:

The purpose of this action, as originally brought, was to secure a divorce. An amended complaint was filed in which it was alleged that the marriage contract between the parties was void, but entered into in good faith. The defendant answered and, among other things, alleged affirmatively that the plaintiff, at the time the marriage ceremony here sought to be annulled was performed, had not been legally divorced from a former husband. The affirmative defense was denied by a reply. The cause in due time came on for trial before the court, and at the conclusion of the plaintiff's evidence the defendant moved that the action be dismissed. The court declined to dismiss the action, but indicated that a judgment would be entered annulling the marriage, which judgment the defendant did

not resist. The plaintiff in her amended complaint had not only asked for an annulment of the marriage, but the custody of two minor children, one a natural child born as a result of the marriage, and the other an adopted child, and also for a division of the property which had been acquired subsequent to the marriage. The decree annuls the marriage, but makes no adjudication as to the property rights or the custody of the children. The failure to mention the children in the decree was doubtless due to an oversight, because the defendant conceded the right of the plaintiff to the custody of them, and in one of the conclusions of law which follow the findings it is recited that the plaintiff is entitled to the care and control of the children. From the decree entered the plaintiff appeals.

The controlling facts may be stated as follows: On the 20th day of March, 1899, the appellant, being then the wife of one Henry V. Coles, instituted an action in the superior court of King county, Washington, for a divorce. The defendant in that action, though personally served, defaulted. The cause was tried on the 17th day of April, 1899, the prosecuting attorney appearing in the action. At the conclusion of the evidence the court orally announced that a decree for the plaintiff would be granted. No decree was in fact entered until the 8th day of October, 1906. The trial judge before whom the cause was tried had long prior to this time retired from the bench, and the judge who signed the decree had no knowledge of the cause except that disclosed by the record.

On June 14, 1899, the parties to the present action were married in Vancouver, British Columbia, and immediately thereafter returned to the state of Washington. They went to Vancouver solely for the purpose of having the marriage ceremony performed and with the intention of immediately returning to the state of their domicil. They had no thought of changing their domicil to

the jurisdiction where the marriage ceremony was performed. Soon after returning from Vancouver they took up their residence in Everett, where they resided together until a short time before the present action was begun, sometime during the early part of the year 1917.

The plaintiff in this action did not know that no formal decree had been entered in the former divorce action prior to the time that the parties to this action entered into the contract of marriage, and in fact did not know that there was any question about the validity of the decree in the prior action until after the present action was instituted. The fault apparently was due to the failure of her attorney in that action to prepare findings, conclusions, and a decree, and have them signed and entered.

The parties to this action, as above stated, shortly after the marriage ceremony was performed in Vancouver, went to Everett, where the respondent engaged in the saloon business. During a portion of the time he was so engaged the appellant helped prepare the free lunches that were served in the saloon. During a large portion of the time they lived together the appellant worked as a seamstress. The property acquired during the time parties lived together is in the name of the respondent. The evidence shows that, while the parties went to Vancouver to have the marriage ceremony performed and knew that they had no right to be married at the time in the state of Washington, they believed that the marriage performed in Vancouver, being legal there, would also be valid in the state of Washington.

Much argument appears in appellant's brief in an endeavor to establish the validity of the decree entered in the former action, but we shall not review this argument nor the authorities cited. Even though a valid decree had been entered on the 17th day of April, 1899, the marriage ceremony in Vancouver, having been performed within six

months from that date, would be void in this jurisdiction; the parties having gone there solely for the purpose of being married and with the intention of immediately returning to the state of Washington, and having had no intention of changing their domicile.

Marriage—
foreign—
validity.

Pierce v. Pierce, 58 Wash. 622, 109 Pac. 45; Peerless Pacific Co. v. Burckhard, 90 Wash. 221, L.R.A. 1917C, 353, 155 Pac. 1037, Ann. Cas. 1918B, 247.

The fact that the marriage ceremony performed in Vancouver may also be void for another reason would not affect the situation here.

The controlling question upon this appeal, as it seems to us, is whether the marriage here sought to be annulled was entered into and kept in good faith by the appellant, and was in no sense meretricious. The record shows that the appellant believed she had been legally divorced from her former husband, and the fault in failing to have the decree rendered was not hers, but that of her attorney in that action. As to the effect of that proceeding, the appellant, at the time she entered into the marriage contract with the respondent, was in good faith acting under a mistake of fact. In going to Vancouver to be married for the purpose of circumventing the laws of this state the appellant in good faith believed that such marriage there performed would constitute the parties thereto legally husband and wife in the state of Washington, notwithstanding the fact that the marriage ceremony could not be performed here until six months after former divorce. It thus appears that the appellant's good faith rested both in mistake of fact and mistake of law. The fact that the appellant knew that she had no right to be married in the state of Washington, but believed that she had a right to be married in a foreign jurisdiction, and that such marriage would be valid here, does not make the contract of marriage meretricious, nor taint her relation with the re-

spondent with conscious guilt. Such good faith, whether resting in mistake of fact or mistake of law, is enough to authorize the courts, in an action brought for the annulment of the marriage, to treat the relation as a partnership as to all property acquired by the joint efforts of the parties. Buckley v. Buckley, 50 Wash. 213, 126 Am. St. Rep. 900, 96 Pac. 1079; Lawson v. Lawson, 30 Tex. Civ. App. 43, 69 S. W. 246; Re Brenchley, 96 Wash. 223, L.R.A. 1917E, 968, 164 Pac. 913. In the case last cited, this court quoted approvingly from the Lawson Case as follows: "In Morgan v. Morgan, 1 Tex. Civ. App. 315, 21 S. W. 154, Justice Head, in his discussion of the principles under which the putative wife, acting in good faith, might have her just rights secured to her, entered into a thorough review of the authorities, and held that the tendency of our courts, as evidenced by the decisions involving kindred questions, justified the conclusion that she should be treated as a partner as to all property shown to have been acquired by their joint efforts."

The record now before us shows that during the time the parties lived together property was acquired by their joint efforts. For a time the appellant assisted in preparing the lunches which were served in the saloon of which the respondent was a part owner, and during much of the time that they lived together she worked as a seamstress. It is said, however, in the respondent's brief that the money earned as a seamstress was spent by the appellant for her personal expenses. But if the appellant had not provided for her personal expenses the respondent would have been under the necessity of providing therefor, and his savings would have been depleted to that extent. In addition to this the appellant performed all the duties of a housewife faithfully. So long as the parties lived together as husband and wife both labored in their respective fields, and the property

acquired during this time was the result of their joint efforts.

This requires a reversal of the judgment upon the question of the acquisition and the proper disposition to be made of the property. The appellant has had no opportunity to be heard upon this question. At the conclusion of the appellant's evidence the court announced that the marriage would be annulled, but that no judgment would be rendered

upon the property rights. This judgment was acquiesced in by the respondent, and, consequently, there was no occasion or opportunity for him to offer testimony on the question.

The judgment will be reversed, and the cause remanded, with directions to the Superior Court to proceed as herein indicated.

Holcomb, Mount, and Chadwick, JJ., concur.

ANNOTATION.

Division of property upon annulment of marriage.

When a marriage is annulled it is upon some ground which makes it either void or voidable. And many of the courts hold that even if it is of the class known as voidable when it is annulled, it is void ab initio, so that in actual cases of annulment it matters little to which class it is held to belong. No rights as wife can be secured by a void marriage. Therefore the woman cannot claim dower in the man's property, and, unless expressly authorized by statute, she cannot be awarded alimony upon annulment of the marriage. It is also held that rights in the community can be acquired only under a valid marriage. The general question of dower, alimony, and community is not within the scope of this annotation, and therefore the cases sustaining the above statements are not gathered here, but the principle is believed to be so well settled that it may be assumed for present purposes. Statutes have made some changes in these rules.

Thus, in *Stapleberg v. Stapleberg* (1904) 77 Conn. 31, 58 Atl. 233, upon the annulment of a marriage, void because of the relationship existing between the parties, an allowance of \$1,100 out of an estate of the husband of \$10,000 was upheld, under a statute which provided that, upon the annulment of a void marriage, the court may make such order concerning alimony as might be made in a divorce proceeding. The allowance in this case is stated to be a reasonable com-

pensation for the benefits derived by the husband, and is based in part on money loaned to the husband by the wife.

And in *Barber v. Barber* (1888) 74 Iowa, 301, 37 N. W. 381, under a statute which provided that, upon the annulment of a marriage entered into in good faith by a party mistakenly supposing the other capable of contracting, the court may decree such innocent party compensation, as in cases of divorce, a woman who had entered into a marriage contract in good faith with a man of unsound mind, and who lived with him about two years, during which time she became broken in health, was held to be entitled to \$3,500 out of an estate of \$15,000. It was urged on behalf of the wife that she had contributed to the accumulation of the property. This point, however, is not decided by the court.

In *Attwood v. Attwood*, L. R. [1903] Prob. (Eng.) 7, 71 L. J. Prob. N. S. 129, 87 L. T. N. S. 750, 18 Times L. R. 833, upon the annulment of a marriage in which a question relating to the division of antenuptial settlements arose, it was ordered that the portions settled by each of the parties should be returned to them respectively, the costs to be paid out of the husband's contribution. The court in this case denied the prayer of the wife that she be given an interest in the husband's portion, but the grounds do not clearly appear.

And the question of the right to alimony may depend upon whether or not the marriage was void or voidable, as shown in *Brown v. Brown* (1907) 13 B. C. 73, where the action was for divorce on the ground of impotency, and the court granted permanent alimony on the ground that a marriage of an impotent person was voidable only, so that the right to permanent alimony accrued.

Where the marriage was annulled because the wife remarried too soon after she procured a divorce from a former husband, the court held that, the marriage being void ab initio, there could be no community property, and therefore the wife was entitled, as against the claim of the husband, to property which she owned at the time of the marriage, it appearing that the husband had added nothing of value to it after the marriage. *Sortore v. Sortore* (1912) 70 Wash. 410, 126 Pac. 915.

The rule, then, being that a void marriage gives the wife no rights in the property of the husband, is there anything to which she is equitably entitled? While there seems to be no provision at common law for such a situation, the courts before which the question has come have realized the hardship of the case, and have attempted to find some way of giving her relief. In *Higgins v. Breen* (1845) 9 Mo. 497, an action was upheld against the estate of one who, although having a living wife, had induced another to marry him, for the value of her services.

Rights under civil law.

Equity, to a very large degree, was developed by the application by the chancellors of rules of the civil law when the common law afforded no remedy, and such process seems likely to prevail in the solution of this problem. The civil law is the source of the Community Property Law which is in force in some of the states of the Union.

Under the Spanish law, which is a branch of the civil law and which was adopted by statute in Texas, a woman who entered into a marriage with a man having a living wife was regarded as a putative wife, and so long as

she remained in ignorance of the true facts, she was entitled, by the same law, to one half of the property acquired by either of the spouses during the existence of the putative marriage. *Barkley v. Dumke* (1905) 99 Tex. 150, 87 S. W. 1147.

In *Cole v. His Executors* (1828) 7 Mart. N. S. (La.) 49, 18 Am. Dec. 241, it is said that the Louisiana Code declares that every marriage superinduces, of right, partnership or community in all acquisitions. And in *Routh v. Routh* (1882) 57 Tex. 589, the court held that, since the civil law has been supplanted by the common law in Texas, the incident of community rights did not follow an unlawful marriage. But it is further said that, under the Texas law, every marriage superinduces, of right, partnership or community in all acquisitions.

The statutory rule giving the status of putative wife to the woman so long as the relation of marriage is continued in ignorance of the invalidity of the marriage has not been generally adopted, but other states in which the community property rule exists have applied such rule to the division of property acquired during the existence of the relation. For the purpose of the division of the property, it matters not whether the relation is annulled by the court or terminated by death, and to show the full scope of the rule, some cases are here included which deal with the distribution of an estate after the death of one of the parties to the marriage, as well as those in which the marriage has been annulled.

In *Smith v. Smith* (1846) 1 Tex. 621, 46 Am. Dec. 121, and in *Lee v. Smith* (1856) 18 Tex. 142, it is stated that, under the Spanish law, a marriage void because one party has a living spouse is designated as putative, and a consort who enters into such matrimony ignorant of the facts has all the rights of a lawful marriage so long as the ignorance continues.

Perhaps the fullest statement of the reasons for the adoption of this rule is found in *Morgan v. Morgan* (1892) 1 Tex. Civ. App. 315, 21 S. W. 154, the argument in which is set out in

SCHNEIDER v. SCHNEIDER (reported herewith), ante, 1386. After making such argument and stating that the courts might not enforce the contract while it remained executory, the court states that after it has been voluntarily executed by both, and property has been acquired, it is common belief that the courts will refuse to recognize the respective interests of the parties therein.

In *Allen v. Allen* (1907) — *Tex. Civ. App.* —, 105 S. W. 53, reversed on other grounds in (1908) 101 *Tex.* 362, 107 S. W. 528, it is said it is now settled that in cases of marriage where the man, unknown to the woman, has a wife living, the putative wife, acting innocently, has, as to the property acquired during the continuance of such relation, the rights of a lawful wife.

In *Hayworth v. Williams* (1909) 102 *Tex.* 308, 132 *Am. St. Rep.* 879, 116 S. W. 43, where it appeared that the man had a living spouse when he married the claimant in the case, the court held that, if she could show that the money with which the land in controversy was purchased was acquired in whole or in part by her labor in connection with him before the time the land was purchased, she would be entitled to share in the land in the proportion that her labor contributed to produce the purchase money.

In *Lawson v. Lawson* (1902) 30 *Tex. Civ. App.* 43, 69 S. W. 246, where an attempted marriage after emancipation, of former slaves, was held to be invalid, the wife was given a share of the property which had been accumulated by their joint efforts, and the court said: "The almost perfect analogy between the marital relations in Texas and ordinary partnership furnished an easy solution of the difficulty, so that now, when it is once ascertained that the relation is not tainted with conscious guilt, the courts can proceed with small difficulty, and adjust the property rights according to legal principles which are new only in the sense that they have found a new application." In that case, a divorce was refused on the ground that the parties had never been legally married; and upon the alterna-

tive prayer of the wife, who was seeking the divorce, that she be adjudged a share in the community property if it should be found that the parties had never been legally married, the court granted her one half the property which had been accumulated during the time she lived with her putative husband in the honest belief that they were husband and wife.

In *Carroll v. Carroll* (1858) 20 *Tex.* 732, where the rights of the wife were established as those of a lawful wife, the court says it need not consider the strong claim which might be urged to a community share of the property. "She was a wife de facto. By her labors and toils she contributed to the accumulation of the estate. . . . Their gains were the result of their joint industry, thrift, and economy, and she is reasonably entitled to a share of the proceeds."

Ft. Worth & R. G. R. Co. v. Robertson (1909) 55 *Tex. Civ. App.* 309, 121 S. W. 202, was a case involving the question of division of the property at death, where a woman married a man with a living wife in ignorance of such fact, and lived with him until his death; and the court recognized her right to a share of the property. The court says that the common law, with respect to marriages, does not obtain in that state, but the property rights of a putative wife are recognized, and that in the case at bar, the wife, having married in good faith, is entitled to the rights of a lawful wife in the property acquired by them, or either of them, during the marriage.

In *McCaffrey v. Benson* (1888) 40 *La. Ann.* 10, 3 So. 393, a statute of the state provided that a marriage annulled should, nevertheless, produce its civil effects if contracted in good faith. Under this statute, it was held that a wife who contracted a marriage in good faith was, upon the dissolution of the community, entitled to one half of all the property acquired by the parties during the maintenance of the marriage state.

In *Packard v. Arellanes* (1861) 17 *Cal.* 537, the court says our whole system, by which the rights of property between husband and wife are regu-

lated and determined, is borrowed from the civil and Spanish law. The relation of husband and wife is regarded by the civil law as a species of partnership. The wife is a member of the community, and entitled to an equal share of the acquets and gains.

In *Galland v. Galland* (1869) 38 Cal. 265, the court, in commenting on the statute law of the state, says if the marriage relation be dissolved, the wife is entitled to one half of the common property. The theory on which this is founded is that the common property was acquired by the joint efforts of the husband and wife, and should be divided by them if the marriage tie be dissolved, except for fault of the wife.

In *Jackson v. Jackson* (1892) 94 Cal. 446, 29 Pac. 957, where a man married under the belief that his former wife was dead, and conveyed his property, which had been acquired during the second marriage, to his new wife upon her solicitation, and she, learning that the former wife was still alive, brought action for annulment of the marriage, the court allotted the property to them in equal shares. From the California statute, as set out in *Frankel v. Boyd* (1895) 106 Cal. 613, 39 Pac. 939, it appears that, if a decree dissolving the marriage be rendered on any other ground than adultery or extreme cruelty, the community property shall be equally divided between the parties.

An incompetent woman, who in good faith, believing in her competency, enters into a marriage which is annulled at the instance of the other party, is entitled, where the doctrine of community applies, to participate in the property accumulated by the efforts of the parties during the existence of the supposed marriage, and while she, in good faith, believed that the marriage was valid. The court says, in the absence of fraud or other grounds affecting the right to claim relief, there can be no good reason for saying that either party, by reason of the annulment, be vested with title to all of the property acquired during the existence of the supposed marriage. Until annulment the marriage was valid, and

the property was impressed with the community character. Upon annulment, such property, even though it be no longer community property, should be divided as community property would have been upon dissolution of the marriage by divorce or death. *Coats v. Coats* (1911) 160 Cal. 671, 36 L.R.A.(N.S.) 844, 118 Pac. 441.

In *Buckley v. Buckley* (1908) 50 Wash. 213, 126 Am. St. Rep. 900, 96 Pac. 1079, it was held that, upon the annulment of a marriage, the court may make an equitable division of the property of the parties, and in this case one fourth was awarded to the wife, who was ignorant of the fact that made the marriage void, and who helped to acquire and very materially to save the property. A statute of the state relating to divorce proceedings is referred to in the opinion, and apparently affected the decision in this case.

In *Re Brenchley* (1917) 96 Wash. 223, L.R.A.1917E, 968, 164 Pac. 913, which was a dispute over the distribution of the husband's estate after his death, it appeared that the marriage had occurred too soon after a prior divorce of one of the parties, and was therefore void, but the wife had lived with the husband in good faith until his death, assisting in accumulating the property. The court awarded the wife one half of the property, saying if the husband was now alive, and were seeking to avoid the marriage because it was illegal at the time it was entered into, no court would say that he might take advantage of his own wrong and have a decree dissolving the marriage because it was illegal, and at the same time take all the property accumulated by the joint efforts of the two. The putative character of the second marriage, with regard to the division of the accumulated property, is recognized in *Morin v. Corporation* (1882) 8 Quebec L. R. 222, *Gregory v. Dyer* (1841) 15 Lower Can. Jur. 223, and *Carthcart v. Union Bldg. Co.* (1864) 16 Lower Can. Rep. 467, in all of which the opinions are in French.

And the right to a division of the property is recognized in the reported

cases (*KNOLL v. KNOLL*, ante, 1391, and *SCHNEIDER v. SCHNEIDER*, ante, 1386).

Rule at common law.

The above cases were all decided in states which have adopted the rule of community property in some form, but some courts have applied the law as so declared without seeming to notice that they were applying civil rather than common law rules. Thus, in *Fuller v. Fuller* (1885) 33 Kan. 582, 7 Pac. 241, where permanent alimony was refused because the action was not brought under the statute allowing alimony, the court says: It is our opinion that in all judicial separations of parties who have lived together as husband and wife, a fair, equitable division of their property should be had.

In *Werner v. Werner* (1898) 59 Kan. 399, 41 L.R.A. 349, 68 Am. St. Rep. 372, 53 Pac. 127, it was held that upon the annulment of a marriage, void because the woman had a husband living, when the parties had lived together for twenty-two years, during which time she had assiduously devoted herself to the accumulation of the property, and during part of which time it had stood in her name, the court might order an equitable division of the property, and in this case an allowance of one half to her was upheld. In the course of the opinion, the court likens the relation sustained by the parties to that of a partnership, and says that the court has the same power to make an equitable division of the property so accumulated as it would have in case of the dissolution of a business partnership.

In *Krauter v. Krauter* (1920) — Okla. —, 190 Pac. 1088, it appeared that persons within the prohibited degree of relationship innocently married and lived together for several years, accumulating property. The court annulled the marriage because incestuous, and upon the question of division of property said: Can it be said that under such conditions the woman shall be turned out, and receive no benefit from her fifteen years of work and the accumulations thereof, and her pretended husband, al-

though a party to the void marriage, reap all the benefit from their joint accumulations, and not only retain the proceeds of his labor, but her accumulations also, free from any right or claim of the wife? We do not believe that such a contention is tenable under the law, nor can such a harsh and cruel interpretation of the law be sustained. While it is true the general rule is, when a marriage is void because incestuous or bigamous or for other reasons, the woman acquires no right to dower, curtesy, or alimony, notwithstanding she has acted in good faith, a void marriage ordinarily conferring no right upon either of the parties, in respect to the property of the other, such as would be conferred if the marriage was valid, a different question is presented where the property is accumulated during the existence of the void marriage relation. The court concludes that while it is true that the relation between the parties could not strictly be termed a partnership, it will be termed a quasi partnership. The facts bring the case squarely within the rule that a court of equity has power, where the parties appear in said court, to adjudicate the marriage void and settle their property rights acquired during the existence of the marriage relation, and make an equitable division thereof.

If equity is privileged to apply civil-law rules where the common law is unable to give an adequate remedy, no reason is given why the principle of those cases should not be generally adopted, and the woman given the benefit of a rule which certainly works equity in the premises, and prevents the infliction of a gross wrong.

In *Schmitt v. Schneider* (1900) 109 Ga. 628, 35 S. E. 145, however, the court refused relief to a woman who had cohabited with a man who falsely represented to her that he had been divorced from his first wife, while her husband was still living, and, after the husband's death, continued to cohabit under an agreement to live together as man and wife, although she had rendered services to the man, and turned over money earned by her, and thus assisted in the accumulation of

the property, believing that she was his wife. The court stated that this was an action in the nature of a winding up or settlement of a quasi partnership, and, as such, was without merit. H. P. F.

MRS. W. H. PITNER, Plff. in Err.,
v.
SHUGART BROTHERS.

Georgia Supreme Court — August 14, 1920.

(— Ga. —, 103 S. E. 791.)

Nuisance — cotton gin — care in operation.

1. Where in an equitable petition plaintiff, the owner and occupant of a dwelling, sought injunction against the operation of a cotton gin in close proximity to the dwelling, on the ground that it worked hurt, injury, and inconvenience by polluting the air, in consequence of its being filled with dirt, dust, lint, etc., thrown off in the operation of the ginnery, the court erred in so charging the jury as to make the plaintiff's right to the relief sought depend upon the question as to whether ordinary care and diligence were exercised in the operation of the ginnery.

[See note on this question beginning on page 1401.]

Evidence — increase in insurance premiums.

2. There was no error in excluding evidence as to the statement made by the agent for a fire insurance company

as to increased premiums for fire insurance on the dwelling, caused by the operation of the cotton gin. Such evidence was hearsay.

[See 10 R. C. L. 958.]

Headnotes by BECK, P. J.

ERROR to the Superior Court for Whitfield County (Tarver, J.) to review a judgment in favor of defendants, and overruling a motion for new trial, in an action brought to enjoin the negligent operation by defendants of a cotton gin alleged to be a nuisance. *Reversed.*

Statement by Beck, P. J.:

Mrs. W. H. Pitner filed her petition against Shugart Brothers, seeking an injunction to prevent the defendants from operating a cotton gin alleged to be within 30 feet of her dwelling, on the ground that it is a nuisance, it being alleged that the ginnery is insufficiently equipped and negligently operated, and that it has not the proper equipment for conveying the seed and lint cotton from one part of the premises to another, and that, in consequence of the negligent manner of conveying the seed and lint, loose particles of lint, as well as much dust, dirt, and trash, are blown out into the surrounding air and carried into the

residence of petitioner; that the dust and lint come in through the crevices and cracks of her residence and blow all over her place, settle on her bed and furniture, and in other respects injure her property. It is alleged that the conditions causing the nuisance could easily and cheaply be remedied, but have not been remedied, and her use and enjoyment of her property are greatly interfered with by the conduct of the defendants; and that the rental value of plaintiff's property has been practically destroyed.

After evidence was introduced the plaintiff amended her petition "by striking therefrom all allegations of negligence as to the construction of

the gin." Evidence was submitted, witnesses were heard at the trial, and the jury were permitted to view the premises. The trial resulted in a verdict for the defendants. The plaintiff filed a motion for a new trial, which was overruled, and she excepted.

Messrs. F. K. McCutchen and Maddox, McCamy, & Shumate for plaintiff in error.

Messrs. W. C. Martin, William E. Mann, and W. G. Mann for defendants in error.

Beck, P. J., delivered the opinion of the court:

1. Error is assigned upon that portion of the court's charge wherein the jury were instructed that "the defendants had the right to construct the ginnery in question, and use in its construction ordinary care and diligence, and after construction had the right to operate it, using in its operation ordinary care and diligence; . . . but if they did not use ordinary care and diligence in the operation of the ginnery after construction, and if because of the negligent construction of the ginnery, in the installation of machinery, or because of the negligent operation of the ginnery, hurt, inconvenience, or damage resulted to the plaintiff, and it was not such inconvenience or damage as was fanciful, or as would affect only one of fastidious taste, but such as would have affected an ordinarily reasonable man, then the plaintiff would be entitled to a writ of injunction as against the operation of the ginnery in this manner by the defendants."

Subsequently to the giving of this charge the amendment striking from the petition all allegations as to the negligent construction of the gin was submitted and allowed, and the court charged the jury thereupon that they would not consider the allegations contained in the petition relative to the negligent construction of the gin, nor consider the references in the charge of the court to the stricken allegations.

The portion of the charge first quoted was excepted to upon the

ground, among others, that it lays down an incorrect rule as to the plaintiff's rights in case the jury should find that the injuries complained of resulted from the operation of the gin; and the instructions given after the amendment referred to was made are excepted to, on the ground that they were vague and misleading and too general to cure the errors set out in the extract from the charge first quoted. The charge of the court stated above is open to the criticism that it is somewhat vague and confusing, but we do not pause to point out just wherein it is vague or indefinite, and confine ourselves to ruling upon the proposition, laid down by the court, that the plaintiff would not be entitled to an injunction if the gin was operated with ordinary care and diligence. This rule is radically wrong.

The jury must have understood that if a Nuisance—cotton gin—care in operation. ginnery erected within 30 feet of the plaintiff's residence did, as complained, throw dirt, lint, and trash upon the premises of the plaintiff in such a way as to cause the lint and dirt and other impurities to go through the cracks, windows, or other apertures of the residence, so as to materially interfere with the comfort and convenience or health of the inmates, and to the material decrease of the rental value of the premises, nevertheless if the defendants, the owners and operators of the ginnery, had observed reasonable care and diligence in the construction and operation of the gin, the plaintiff had no redress in a court of equity. We do not understand that to be the law. It is not true that an individual or a corporation can set up a ginnery in close proximity to a residence and continue to operate it so as to practically destroy the value of the residence near which it is located, provided in the operation of the ginnery ordinary care and diligence is shown. To hold that this is law would practically destroy the maxim, "sic utere tuo ut alienum non lædas." A nuisance is defined in

Civil Code, § 4457, as "anything that worketh hurt, inconvenience, or damage to another; and the fact that the act done may otherwise be lawful does not keep it from being a nuisance. The inconvenience complained of must not be fanciful, or such as would affect only one of fastidious taste, but it must be such as would affect an ordinary reasonable man."

It has been held more than once by this court that the operation of a cotton gin is not per se a nuisance, but that it may become so under certain circumstances; and it does become such, and it has been so ruled, if the cotton gin is operated in such a way as to invade and injure the property of another. *Tate v. Mull*, 147 Ga. 195, 3 A.L.R. 310, 93 S. E. 212. If correctly we interpret the rule there laid down, it means that if one erects a cotton gin in close proximity to the dwelling place of another, and the operation of the same works hurt, injury, and inconvenience to the owner or occupants of the dwelling, the test is not whether the operators of the gin used ordinary care and diligence, in case the owner of the dwelling should seek injunctive relief, but the test is, Does the operation of the gin, as alleged, work hurt, inconvenience, or injury, as limited in the Code section quoted above? In this connection read the well-considered

case of *Holman v. Athens Empire Laundry Co.* 149 Ga. 345, 6 A.L.R. 1564, 100 S. E. 207. In that case it was said: "Every person has the right to have the air diffused over his premises, whether located in the city or country, in its natural state and free from artificial impurities.

(a) By air in its natural state and free from artificial impurities is meant pure air consistent with the locality and character of the community. (b) The pollution of the air, so far as reasonably necessary to the enjoyment of life and indispensable to the progress of society, is not actionable. (c) The privilege of use incident to the right of property must not be exercised in an unreasonable manner, so as to inflict injury upon another unnecessarily. (d) The maxim, 'sic utere tuo ut alienum non lædas,' considered and applied."

We cite and quote from the *Holman Case* in order that sight may not be lost of the distinction that was made with reference to the "locality and character of the community when the question of injury caused by pollution of the air or similar injuries is in question."

Evidence—
increase in
insurance
premiums.

2. An elaboration of the rulings made in headnote 2 is not necessary. Judgment reversed.

All the Justices concur.

ANNOTATION.

Dust as nuisance.

This note is supplementary to that appended to the case of *Tate v. Mull*, 3 A.L.R. 310, collating the more recent cases which discuss dust as a nuisance.

Cement works.

In *Trinity Portland Cement Co. v. Horton* (1919) — Tex. Civ. App. —, 214 S. W. 510, it was admitted that a cement manufacturing plant causing large quantities of dust to fall on adjacent premises was a nuisance, the

only point decided being that the action was not barred by limitations.

Cotton gin.

(Supplementing annotation in 3 A.L.R. 315.)

In the reported case (*PITNER v. SHUGART BROS.* ante, 1399) the court, following *Tate v. Mull* (1917) 147 Ga. 195 (3 A.L.R. 310) 93 S. E. 212, holds that, while a cotton gin is not a nuisance per se, if it is operated in such a way that dust and lint are cast on

adjacent premises so as to interfere materially with the comfort and convenience, or health, of the inmates, and cause a material decrease in the rental value of the property, it is a nuisance in fact.

See to the same effect, *Knox v. Reese* (1919) 149 Ga. 379, 100 S. E. 371.

Stone quarry or crusher.

(See also 3 A.L.R. 320, 321.)

In *Fagan v. Silver* (1920) — Mont. —, 188 Pac. 900, the operation of a quarry and stone crusher, producing dust which settled in the house of the plaintiff to such an extent as to render it unfit for habitation, was enjoined.

In *Brede v. Minnesota Crushed Stone Co.* (1919) 143 Minn. 374, 6 A.L.R. 1092, 173 N. W. 805, the court held that the operation of a plant for quarrying and grinding limestone should be so restricted by injunction as to prevent the escape of dust which amounted to a substantial interference with the comfort of residents in the vicinity. In so holding the court declared that relief should be granted,

though the business was a lawful one, and repudiated the broad doctrine that a landowner may develop the resources of his property, regardless of consequences incidental thereto. It was further held that a delay of more than twelve years in bringing suit did not preclude injunctive relief, and that persons who acquired property in the vicinity of the quarry after its operation was begun were entitled to relief. It was further said that the fact that another quarry was being operated in the vicinity was not entitled to "much weight." See also (1920) — Minn. —, 178 N. W. 820, wherein the court approved an injunction issued under the rules laid down in its former opinion. The *Brede* Case was followed in *Millett v. Minnesota Crushed Stone Co.* (1920) 145 Minn. 475, 177 N. W. 641, wherein damages for a similar nuisance were recovered. See also the same case on a second appeal ((1920) 145 Minn. 475, 179 N. W. 682), passing on the extent of the recovery by the head of a family for injury to members of the family.

W. A. S.

FRED BOMBARD

v.

PARK NEWTON.

Vermont Supreme Court — October 5, 1920.

(— Vt. —, 111 Atl. 510.)

Highway — contributory negligence of one driving cow on highway.

1. Contributory negligence on the part of one driving a cow along a public highway when it was killed by an automobile will defeat recovery for its death.

[See note on this question beginning on page 1405.]

— right to drive cows on.

2. The right to drive an automobile along a public highway is not superior to that to drive cows along the highway.

Evidence — excessive speed of automobile.

3. That an automobile traveling at night was being driven at an excessive speed may be found from the fact that it struck and killed two cows in the

road, one of which it threw 57 feet, and then traveled 40 or 50 feet and buried its front end in a bank.

— negligence in failing to see cows.

4. Negligence of one driving an automobile at night in not discovering a cow on the road until within 15 feet of it may be found from the fact that his headlights were in good condition and lighted the whole road for a distance of 18 or 20 rods.

— burden of proof — freedom from contributory negligence.

5. The burden of showing freedom from negligence is upon one seeking to recover for the killing, by an automobile, of his cow which he was driving along the road.

— character of evidence necessary.

6. Direct or affirmative evidence of freedom from contributory negligence of one driving a cow along a highway when it was killed by an automobile is not necessary to warrant a recovery for its death.

Highway — duty to keep cow out of way of automobile.

7. One driving a cow along the right side of the road with nothing to indicate a necessity to take particular care of it is not bound to take extra steps to keep it out of the way of an automobile approaching from the opposite direction, which has ample room to pass if it keeps on its side of the road.

— duty to carry light when driving cows.

8. It is not necessary, as matter of law, in the absence of a statutory requirement, for one driving cows along a public highway at night to carry a light.

EXCEPTIONS by defendant to rulings of the St. Albans City Court (Post, J.) made during the trial of an action brought to recover damages for the alleged negligent killing of plaintiff's cows in a collision with defendant's automobile, which resulted in a verdict for plaintiff. *Affirmed.*

Two of plaintiff's cows were being driven by his authorized agent to a certain farm, a distance of 6 miles. The start was made late in the afternoon, and at the time of the accident, which happened on an improved highway much used by automobiles, it was dark.

Defendant testified that he was driving the car on the easterly side of the road at the rate of 25 miles per hour; that he saw nothing in the highway in front of the car until he saw the leading cow not over 15 feet away; that he turned the car to the left to avoid a collision, if possible; that the cow was headed east and was in the center of the road, and that he did not see the other cow, and, until he was told, did not know that she had been hit.

After consideration of the facts the court found as follows:

"(1) That the plaintiff and defendant had equal rights and privileges in and to the highway, the plaintiff an equal right to use the highway to drive his cows as the defendant to run an automobile, both subject to conditions and emergencies attending the use each is making of the highway; the rights and obligations of the meeting parties were mutual; (2) that the plaintiff was not guilty of contributory

negligence, and was exercising due care in driving the cows; (3) that the defendant was guilty of negligence, in that, in the circumstances as indicated by the facts herein stated, he was driving at an excessive rate of speed, failed to observe the cows as he approached with the car, the cows being on the highway, and in not exercising due care."

Messrs. C. G. Austin & Sons, for defendant:

The burden of proof as to plaintiff's freedom from contributory negligence is on plaintiff in an action for negligence.

Bancroft v. Cote, 90 Vt. 358, 98 Atl. 915; Wentworth v. Waterbury, 90 Vt. 60, 96 Atl. 334.

Persons using a highway must exercise care for their own protection, and cannot recover damages for an injury to which their own negligence proximately contributes.

Russ v. Strickland, 130 Ark. 406, 197 S. W. 709.

Defendant had a right to presume that this main traveled road was clear and free from carelessly driven cattle.

Little Rock R. & Electric Co. v. Newman, 77 Ark. 599, 92 S. W. 864; Beweinitz v. Detroit, J. & C. R. Co. L.R.A. 1917E, 773, note; Keeler v. Conestoga Traction Co. 45 Pa. Super. Ct. 462.

The speed of the car is not evidence of negligence, so long as defendant was within the statutory limits, until

the plaintiff has shown that defendant knew or ought to have known, there was necessity for driving more slowly.

Priebe v. Crandall, — Mo. App. —, 187 S. W. 605; *Armann v. Caswell*, 80 N. D. 406, 152 N. W. 813; *Smith v. Barnard*, 41 L.R.A. (N.S.) 322, note.

Messrs. H. P. Dee and F. L. Webster for plaintiff.

Powers, J., delivered the opinion of the court:

The plaintiff had as good a right to drive his cows along the highway as the defendant had to drive his automobile over it.

Robinson v. Flint & P. M. R. Co. 79 Mich. 323, 19 Am. St. Rep. 174, 44 N. W. 779; *Smith v. Matteson*, 41 Hun, 216. The parties had equal and reciprocal rights to the use of the road, and each owed the other the duty of so exercising his own right as not to interfere with that of the other. *Aiken v. Metcalf*, 90 Vt. 196, 97 Atl. 669. The fact that it was in the nighttime affected the rights of the parties only as it bore upon the amount of vigilance each was bound to exercise. The fact that the defendant was operating an automobile, an instrumentality whose capacity for harm is well exemplified by the results in this case, and the fact that the plaintiff was driving cows, animals whose viatic vagaries have come to be known of all automobile drivers, were conditions affecting merely the degree of care required of the parties respectively.

On the question of the defendant's negligence, the court found that he was driving at an excessive rate of speed, and that he negligently failed to discover the cows in time to avert the accident. These findings are fully supported by the evidence. As to the first, the defendant admitted that he was going "about" 25 miles an hour; and the results of the catastrophe indicate rather strongly that he underestimated his speed. The cows were walking along the road, one behind the other. The one ahead was spoken of as "the big cow." The automobile struck her on her right side as she

turned east, and threw her into the middle of the road in a dying condition. As a result of this collision, the car skidded, and, as the rear end swung around sharply to the left, it struck the other cow, killing her instantly and casting her dead body a distance of 57 feet to the north and west. The machine itself, at a point 40 or 50 feet from where it struck the first cow, shot across the road to the right and buried its front end in the bank. Surely all this was enough to support the first of the above findings.

Evidence—excessive speed of automobile.

As to the other, the defendant testified that he did not see the big cow until he was within about 15 feet of her. Yet the road was straight and level, and, according to the evidence, his headlights were in good condition and lighted the road ahead throughout its full width for a distance of 18 or 20 rods. The cow was walking in the west wheel track, which was the side on which she belonged, and, if the defendant had been exercising anything like the watchfulness that the circumstances demanded of him, he should have sooner discovered the cow in the road.

—negligence in failing to see cows.

Nor can we sustain the defendant's claim that there was no evidence tending to show that the plaintiff was in the exercise of due care.

Highway—contributory negligence of one driving cow on highway.

We agree that contributory negligence would defeat the action, and that

the burden of proof was on the plaintiff. But direct or affirmative evidence to

Evidence—burden of proof—freedom from contributory negligence.

this point is not required. *Ryder v. Vermont Last Block Co.* 91 Vt. 158, 99 Atl. 733. All that is necessary is that enough be

—character of evidence necessary.

shown to warrant an inference of due care. *Cross v. Passumpsic Fiber Leather Co.* 90 Vt. 397, 98 Atl. 1010.

The case before us shows that the two cows were walking quietly along on the right-hand side of the road, in charge of the plaintiff's employee. The big cow was in the wheel track as stated above. The other was walking a little outside of the track. The man was walking at the side of the latter cow with his hand on her hip. It was in the evening. The cows were giving the attendant no trouble whatever, being "good handlers," as the plaintiff put it. They were not roped or haltered, nor did the man have a stick or whip with which to guide them. There was nothing unusual in the method used. There is nothing to indicate that unusual methods were required. Everything was going well, until the automobile came onto them, swerving toward their side of the road, when, apparently, the big cow was frightened by it and turned to the left. Complaint is made that the man did nothing to get the cows out of the way when he saw the machine approaching. The law did not require him to. He was rightfully there,

Highway-duty
to keep cow out
of way of
automobile.

and had a right to assume that the driver of the car would give him his share of the road. When he discovered that there was going to be a collision, it was too late to act.

It is suggested that he ought to have carried a light. But the law does not expressly require it, and we cannot say as matter of law that it was necessary. Indeed, a light would not have saved him, for, as we have seen, the lights of the automobile brought him into the driver's plain view when the car was yet 18 or 20 rods away. The mere fact that the cows were being driven, instead of being led, is not conclusive. *Fitzsimmons v. Snyder*, 181 Ill. App. 70; *Bewernitz v. Detroit, J. & C. R. Co.* 195 Mich. 528, L.R.A.1917E, 767, 16 N. C. C. A. 227, 161 N. W. 976. The simple truth is that the whole question is one of fact. It is one of those practical questions especially adapted to the consideration of men of common sense and experience, and cannot be ruled as a question of law.

—duty to carry
light when
driving cows.

Judgment affirmed.

ANNOTATION.

Liability for killing or injuring live stock or fowls in highway by automobile.

The annotation is not concerned with cases involving injury to horses or other animals attached to vehicles.

A drover with cattle or horses, mules, sheep, or any other domestic animals has a right upon the public highway, and anyone operating an automobile should have proper regard for such traffic. *Fitzsimmons v. Snyder* (1913) 181 Ill. App. 70. And see the reported case (*BOMBARD v. NEWTON*, ante, 1402).

Nor, under a statute which provides that the operator of a motor vehicle in approaching a horse, or horses, or other draft or domestic animal, or animals being ridden, led, or driven on the highway, shall give reasonable warning of his approach and use every reasonable precaution to avoid injuring them, is it required that all

domestic animals taken upon the public highway shall be ridden, driven, and harnessed or led with halters, or in some manner restrained. *Fitzsimmons v. Snyder* (Ill.) supra.

Nor is it negligence per se for the owner of a domestic animal to drive it unhaltered upon the public highway. *Ibid.*

In *Fitzsimmons v. Snyder* (Ill.) supra, the court, referring to the statutory provisions already referred to and further provisions to the effect that no person shall drive a motor vehicle on the public highway at a speed greater than is reasonable and proper, having regard to the traffic and the use of the way, so as to endanger the life or limb or injure the property of any person, said that such provisions and other provisions of the

Road Law contemplate the safe and secure passage of domestic animals and automobiles upon the public highway, and, in order to secure that result, have imposed limitations as to speed, etc. And held, in that case, that it was negligence on the part of the defendant to drive his automobile through a herd of five loose horses, confined in a narrow lane, at a speed of from 18 to 20 miles an hour; and a judgment below for the value of a horse was affirmed, it appearing that, when the defendant had reached a point about a hundred yards from the horses, plaintiff and his father called to defendant and waved him to stop, but that he failed to stop or slacken his speed, but speeded on, frightening the horses and crowding them to right and left, causing one of them to jump through a wire fence, in consequence of which it was so lacerated that it died.

In an action to recover the value of a cow struck by an automobile, grounded upon negligence, a requested instruction that if the jury believed from the evidence that the defendant, while driving his automobile on the public highway, met and passed some cows, and that "while passing said cows he drove at such a rate of speed as to run against a cow of plaintiff's," and injured her so that she had to be killed, then they should find for the plaintiff, was held in *Tucker v. Carter* (1919) — Mo. App. —, 211 S. W. 138, to have been properly modified to make it read, "He negligently and carelessly drove," etc. The court added that the Motor Vehicle Law of the state does not make the driver of such a vehicle an insurer of persons or property on the highway.

The killing of hogs is the result of unavoidable accident, and not of any negligence on the part of an automobile driver, where the undisputed evidence is that the hogs, which were feeding along the side of the road, suddenly darted into the road and under an automobile, and were killed. *Hester v. Hall* (1919) — Ala. App. —, 81 So. 361.

And in *Armann v. Caswell* (1915) 30 N. D. 406, 152 N. W. 813, an action

for injury to a heifer through collision with an automobile, it was held that there was no error in the instruction to the jury that if they should "find by a fair preponderance of the evidence that defendant was traveling along the public highway, and came to these cattle, and saw this last cow, as they testified to, on the side of the road, and in order to get past, and believing he could get past, he speeded up his automobile and the cow or heifer ran in front of him and was thereby injured, and that the defendant was using ordinary care in traveling on that road to get past them and to avoid the injury, then the defendant in this action is not liable."

Also in *Tucker v. Carter* (Mo.) *supra*, an action to recover for injuries to a cow, caused by its being struck by an automobile while it was being driven along the highway, it was held that there was no error in the instruction to the jury that, "if the defendant was driving his car carefully and at a reasonable rate of speed, and the injury was caused solely by the cow suddenly and unexpectedly turning from its course and crossing the road in front of the car, and that immediately, and so soon as the cow turned from her course, defendant used all the means in his power to stop and keep from striking said cow, then the verdict should be for defendant." The court stated that this was not excusing the defendant upon the "contributory negligence" of the cow, but presenting the question as to whether defendant was negligent in the matter.

Negligence of the owner of a horse, in permitting it to run at large in the street in violation of a municipal ordinance, will not prevent recovery for the negligent killing of the horse, due to its being run into by a wagon, where the negligence of the driver of the wagon was the proximate cause of the injury. *Ensley Mercantile Co. v. Otwell* (1904) 142 Ala. 575, 38 So. 839, 4 Ann. Cas. 512.

So, in *Haynes v. Kay* (1918) 111 S. C. 107, 96 S. E. 623, an action to recover for death of horse at large in a public street, due to a collision with an

automobile, it was held that although the horse may have been at large in violation of law, yet there could be a recovery if such violation of the law was not the proximate cause of the collision.

But in *Dillon v. Stewart* (1915) — Tex. Civ. App. —, 180 S. W. 648, it was held that in order that there may be recovery for injury to a mule straying in the highway in violation of law, caused by its being struck by an automobile, it must appear that the driver of the automobile was guilty of gross negligence, and it is not sufficient to show that he was driving at a speed which would render him guilty of negligence under the law.

An owner of a turkey which strays upon the highway cannot recover its value where it is killed by an automobile, in the absence of gross negligence on the part of the driver of the automobile, or evidence that the injury was inflicted intentionally or deliberately. *Park v. Farnsworth* (1917) 98 Misc. 482, 164 N. Y. Supp. 735. The court in this case stated that it did not consider that the law imposed upon an automobilist the duty of slowing down so that he might have his car under control, so that he could immediately stop it, just because he might have known and probably did know that one of a flock of turkeys might take a notion to cross the road at an injudicious moment, and this although he might see a flock of turkeys as he approached

them and could see that some of them are on one side of the road and some on the other. The court said further that the lives of fowls or animals are ordinarily not particularly valuable, and their rights in the highway, if they have any, must give way to the superior right of the traveling public to pass with reasonable freedom and rational speed along the highway. Highways are not built or maintained for animals or fowls to stray in.

It will be seen that in the reported case (*BOMBARD v. NEWTON*, ante, 1402) the court conceded that contributory negligence on the part of the driver of the cows would defeat the action, and that the burden of proof in that regard was on the plaintiff; but held that no direct or affirmative evidence on the point was necessary, as the circumstances disclosed warranted an inference of due care on the part of plaintiff. And it was further held in that case that the man in the charge of the cows was under no obligation to get them out of the way when he saw the car approaching, but had a right to assume that the driver of the car would give him his share of the road. And it was held in that case that the law did not require the man in charge of the cows to carry a light, and it could not be said as a matter of law that it was necessary for him to do so.

J. H. B.

EX PARTE M. B. JOWELL, Appt.

Texas Court of Criminal Appeals — June 25, 1920.

(— Tex. Crim. Rep. —, 223 S. W. 456.)

Habeas corpus — extradition — right to take depositions.

1. One arrested in extradition proceedings, who denies being in the demanding state when the crime was committed, is entitled to an opportunity to take depositions of disinterested witnesses to substantiate his assertion in a habeas corpus proceeding to secure his release from custody.

[See note on this question beginning on page 1410.]

Extradition — arrest — alibi — right to discharge.

2. One arrested in extradition proceedings is entitled to his discharge if he establishes the fact that he was not in the demanding state when the crime was committed.

[See 11 R. C. L. 733; 12 R. C. L. 1248.]

Evidence — that accused is not fugitive.

3. Parol evidence is always admissible in extradition proceedings to

show that accused is not in fact a fugitive.

[See 12 R. C. L. 1247, 1248.]

— sufficiency — extradition proceedings.

4. The evidence in a habeas corpus proceeding to secure the release of one arrested for extradition, which will justify remanding the accused, should have that degree of certainty which would justify a magistrate in committing the accused.

APPEAL by relator from a judgment of the District Court for Hale County (Joiner, J.) denying an application for continuance to take depositions of witnesses, in a habeas corpus proceeding to secure his discharge from custody to which he had been committed on an extradition warrant. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Culton & Taylor and Williams & Martin for appellant.

Mr. Alvin M. Owsley, Assistant Attorney General, for the State.

Davidson, P. J., delivered the opinion of the court:

Relator was arrested on extradition warrant issued by the governor of Texas on the demand of the governor of the state of Montana. Habeas corpus proceedings were instituted by relator for his discharge.

The evidence discloses that against relator in the state of Montana was filed an affidavit made by the county attorney of Beaverhead county, Montana. It is direct and positive in its terms. He was placed as a witness on the trial of the habeas corpus proceeding, and testified substantially that he knew nothing of the transaction, nor had he seen relator in Montana, nor in possession of the alleged stolen property.

The contention of relator is that he was not in Montana at the time of the occurrence, and had not been in that state for practically six months prior to the alleged theft. This turned largely upon the identity of the party who was seen in possession of the stolen property. The county attorney testified that he did not see him and knew nothing about it. This is the substance of his testimony. Another witness

stated that he saw at some point in Beaverhead county, Montana, two men with the supposed stolen horses; that he had never seen relator before and not since until he saw him upon the trial of his case, or at least after the witness had come to Texas. His impression and belief were that it was relator, but this was predicated mainly upon the description he gave to other parties in Montana, who said that it was the relator. While he believed relator was the party he saw, yet he was unwilling to identify or swear to him as being the same party. This was the case on identity.

To meet this relator took the witness stand in his own behalf and testified, at length, that he had been discharged from the penitentiary in Montana in January before the alleged theft of the horses about the 1st of the following July; that he immediately left the state of Montana, and had not been in that state since and up to the time of his trial on the writ of habeas corpus. He went into detail of his movements at length, showing where he was and what he was doing and the business in which he was engaged, and his route of travel, and the names of parties whom he met and saw. If his testimony is to be credited, he was not in Montana and has not been in Montana since the 8th of January

preceding the alleged theft in July. He was at Vallejo, California; was also in the employment of the marine service on the coast of California; was in Arizona as late as the 19th of June; that at that point he saw the sheriff of the county and borrowed money through the instrumentality of the sheriff (the sheriff's name was Slaughter; the testimony shows he was related to the late C. C. Slaughter of Texas); that he left his auto in which he had been traveling for repairs and returned to California. It is unnecessary to follow his testimony in detail. It is quite voluminous. The trial court saw proper to disregard his testimony. Relator, however, sought a continuance to take the depositions of a number of witnesses at the various points in which he said he had been and which would preclude the idea he was ever in the state of Montana after leaving it in January. These were disinterested witnesses, while relator himself was not, in the result of his case.

We are of opinion that the court should have permitted him to take the depositions of these witnesses.

Relator either in his application committed perjury in stating the facts or they were true. If true, he was entitled to his discharge. The facts stated by him could not be true and the requisition from Montana justified. The question of identity is always one to be considered in cases of this character. See Branch's Anno. Penal Code, 155; *Ex parte Malone*, 35 *Tex. Crim. Rep.* 301, 31 S. W. 665, 33 S. W. 360; *Stockdale v. State*, 54 *Tex. Crim. Rep.* 100, 111 S. W. 1199; 19 *Cyc.* 100. Mr. Branch thus states the rule: "If the alleged fugitive raises the question of identity, a finding of the district judge that he is the party wanted will be sustained if the evidence supports such finding, no matter what name he went by in this state"—citing *Holland v. State*, 53

11 A.L.R.—89.

Tex. Crim. Rep. 301, 108 S. W. 1181; *Stockdale v. State*, 54 *Tex. Crim. Rep.* 100, 111 S. W. 1199.

See 19 *Cyc.* 100.

"The question of the identity of the person arrested with the fugitive demanded is open to state and Federal courts on habeas corpus." *People ex rel. Nubell v. Byrnes*, 33 *Hun.* 98; *People ex rel. McCoy v. Warden*, 3 *N. Y. Crim. Rep.* 370; *State v. Daniels*, 6 *Pa. L. J.* 417, note; *Re Greenough*, 31 *Vt.* 279; *Re Leary*, 10 *Ben.* 197, *Fed. Cas. No.* 8,162.

Parol evidence is always admissible to show the accused is not in fact a fugitive. *Wilcox v. Nolze*, 34 *Ohio St.* 520; 19 *Cyc.* 94. Quoting from *Cyc.*: "Whether he is a 'fugitive from justice' is a question of fact upon which the opinion of the governor expressed in the warrant itself is prima facie evidence; which, however, may be rebutted under a writ of habeas corpus by admissions or other conclusive evidence."

Evidence—that accused is not fugitive.

In note 79, above cited, we find this quotation: "We are of the opinion that the warrant of the governor is but prima facie sufficient to hold the accused, and that it is open to him to show by admissions, . . . or by other conclusive evidence, that the charge upon which extradition is demanded assumes the absence of the accused person from the state." *Hyatt v. New York*, 188 U. S. 691, 47 L. ed. 657, 23 *Sup. Ct. Rep.* 456, 12 *Am. Crim. Rep.* 311; *Bruce v. Rayner*, 62 *C. C. A.* 501, 124 *Fed. Cl.* 481; *Eaton v. West Virginia*, 34 *C. C. A.* 68, 61 *U. S. App.* 667, 91 *Fed.* 760; *Re Bloch* (D. C.) 87 *Fed.* 981.

See also *People ex rel. Corkran v. Hyatt*, 172 *N. Y.* 176, 60 *L.R.A.* 774, 92 *Am. St. Rep.* 706, 64 *N. E.* 825; *Jackson v. Archibald*, 12 *Ohio C. C.* 155, 5 *Ohio Ct. D.* 533; *Com. v. Trach*, 3 *Pa. Co. Ct.* 65; *Re Tod*, 12 *S. D.* 386, 47 *L.R.A.* 566, 76 *Am. St. Rep.* 616, 81 *N. W.* 637, 12 *Am. Crim. Rep.* 303. Burden of showing he is not a fugitive rests on the prisoner

when a proper warrant has issued. *State ex rel. Arnold v. Justus*, 84 Minn. 237, 55 L.R.A. 325, 87 N. W. 770; *State ex rel. Munsey v. Clough*, 71 N. H. 594, 67 L.R.A. 946, 53 Atl. 1086; *Katyuga v. Cosgrove*, 67 N. J. L. 213, 50 Atl. 679.

Had the case rested upon the testimony of the relator only, we would be of opinion that the court may probably have been justified in remanding, although the witness Erwin was quite indefinite in his identification. In the face of the positive evidence of relator as to places, times, circumstances, and names of parties by whom he could prove his identity at those places, which would show his absence from Montana, we are of opinion that he was entitled to the absent testimony, and the court should have so ruled. It may be stated that the evidence remanding for extradition should have that de-

~~—sufficiency—~~ gree of certainty
~~extradition~~ which would justify
~~proceedings.~~ the magistrate to
commit the accused. *Ex parte Morgan* (D. C.) 20 Fed. 298. This view is somewhat enhanced by a statement in the bill of exceptions to the effect, and verified by the judge as

being true, that the evidence is not contradicted that relator was not in Montana at the time.

"It is not an open question as to the authority of courts of this state to go behind the executive warrant, in order to examine and review the grounds upon which the governor may have issued his extradition warrant. *Ex parte Thornton*, 9 Tex. 635; *Ex parte Rowland*, 35 Tex. Crim. Rep. 108, 31 S. W. 651; *Ex parte Hart*, 28 L.R.A. 801, 11 C. C. A. 165, 25 U. S. App. 22, 63 Fed. 260; *Bruce v. Rayner*, 162 C. C. A. 501, 124 Fed. 481; *Roberts v. Reilly*, 116 U. S. 80, 29 L. ed. 544, 6 Sup. Ct. Rep. 291; *State ex rel. Sundahl v. Richardson*, 34 Minn. 115, 24 N. W. 354; *People ex rel. Lawrence v. Brady*, 56 N. Y. 190."

The above is a quotation from *Ex parte Cheatham*, 50 Tex. Crim. Rep. 53, 95 S. W. 1079. For further elucidation of the question, see that case; also see 2 U. S. Stat. Anno. (Judiciary) pp. 877 et seq.

We are therefore of opinion this judgment should be reversed and remanded, that the relator may secure the evidence sought by him.

ANNOTATION.

Right of one arrested on extradition warrant to delay to enable him to present evidence that he is not subject to extradition.

It seems to be well established that a person who has been arrested on an extradition warrant is entitled on a writ of habeas corpus to have tried the issue of fact whether he is a fugitive from the justice of the demanding state.

United States.—*Ex parte Smith* (1842) 3 McLean, 121, Fed. Cas. No. 12,968; *Cook v. Hart* (1892) 146 U. S. 183, 36 L. ed. 934, 13 Sup. Ct. Rep. 40; *Hyatt v. New York* (1903) 188 U. S. 691, 47 L. ed. 657, 23 Sup. Ct. Rep. 456, 12 Am. Crim. Rep. 311; *Tennessee v. Jackson* (1888; E. D. Tenn.) 1 L.R.A. 370, 36 Fed. 258; *Re Cook* (1892; E. D. Wis.) 49 Fed. 833; *Re White* (1893) 5 C. C. A. 29, 14 U. S. App. 87, 55 Fed. 54.

Indiana.—*Hartman v. Aveline* (1878) 63 Ind. 344, 30 Am. Rep. 217.

Iowa.—*Jones v. Leonard* (1878) 50 Iowa, 106, 32 Am. Rep. 116.

New Hampshire.—*State ex rel. Munsey v. Clough* (1902) 71 N. H. 594, 67 L.R.A. 946, 53 Atl. 1086, on subsequent appeal in (1903) 72 N. H. 178, 67 L.R.A. 954, 55 Atl. 554, affirmed in (1905) 196 U. S. 364, 49 L. ed. 515, 25 Sup. Ct. Rep. 282.

New York.—*People ex rel. Ryan v. Conlin* (1895) 15 Misc. 303, 36 N. Y. Supp. 888.

Ohio.—*Wilcox v. Nolze* (1878) 34 Ohio St. 520.

Pennsylvania.—*Com. v. Trach* (1887) 3 Pa. Co. Ct. 65.

South Dakota.—*Re Tod* (1900) 12

S. D. 386, 47 L.R.A. 566, 76 Am. St. Rep. 616, 81 N. W. 637, 12 Am. Crim. Rep. 303.

Texas.—Hibler v. State (1875) 43 Tex. 197. And see the reported case (EX PARTE JOWELL, ante, 1407).

From that rule it would seem to follow as a matter of course that he is entitled to such reasonable delay of the hearing of the writ as will enable him to produce evidence on the issue which he is thus entitled to have litigated, his situation in that respect differing in no way from that of any other litigant. Such is the conclusion reached in the reported case (EX PARTE JOWELL), holding that it was error to refuse a continuance to permit a person arrested on an extradition warrant to take depositions to show that he was not in the demanding state at the time of the alleged offense. No other case seems to have passed on a similar situation. The liberality shown by the courts in granting delay for the production of evidence in habeas corpus proceedings is well illustrated by the case of State

v. Lyon (1789) 1 N. J. L. 403, which arose on habeas corpus to determine the right of a negro to freedom. In that case, evidence of manumission offered by the negro being rejected as not the best evidence, an adjournment was granted to enable him to procure legal evidence of the fact. So in Hamilton v. Flowers (1879) 57 Miss. 14, a witness, committed for contempt in failing to appear in a criminal case, sought in habeas corpus to show that the accused, by whom he was subpoenaed, had escaped before the time set for the appearance of the witness. The court said: "If the chancellor, on hearing the evidence in relation to the escape, was satisfied that the return was false, he should have punished the appellant for failure to obey the writ, continued the trial to another day, and ordered the production of the relator at the time named. If he was in doubt as to the escape, he should have continued the trial of that issue until satisfactory evidence could be procured."

W. A. S.

ARTHUR T. CARTER, Appt.,
v.

ATLANTIC COAST LINE RAILROAD COMPANY, Respt.

South Carolina Supreme Court—February 19, 1918.

(109 S. C. 119, 95 S. E. 357.)

Master and servant — Federal Employers' Liability Act — injury by robber.

The insufficient lighting by a railroad company of its station yard is not the proximate cause of injury to the station master through an assault by a robber while he is about his duties in the yard; so as to render the railroad company liable, under the Federal Employers' Liability Act, for such injury.

[See note on this question beginning on page 1414.]

APPEAL by plaintiff from a judgment of the Common Pleas Circuit Court for Orangeburg County (Sease, J.) in favor of defendant in an action brought, under the Federal Employers' Liability Act, to recover damages for personal injuries alleged to have been caused by defendant's negligent failure to keep its station grounds properly lighted. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Raysor & Summers, Wolfe & Berry, and L. K. Sturkie for appellant.
Messrs. Moss & Lide and Henry E. Davis, for respondent:

In order to recover under the Federal Employers' Liability Act the plaintiff is required not only to prove negligence on the part of the defendant, but that such negligence was the proximate cause of his injury.

St. Louis, I. M. & S. R. Co. v. McWhirter, 229 U. S. 265, 57 L. ed. 1179, 33 Sup. Ct. Rep. 858; *Great Northern R. Co. v. Wiles*, 240 U. S. 444, 60 L. ed. 732, 36 Sup. Ct. Rep. 406; *Southern R. Co. v. Gray*, 241 U. S. 333, 60 L. ed. 1030, 36 Sup. Ct. Rep. 558; *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 58 L. ed. 591, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159, 9 N. C. C. A. 109; *Seaboard Air Line R. Co. v. Padgett*, 236 U. S. 668, 59 L. ed. 777, 35 Sup. Ct. Rep. 481; *Central Vermont R. Co. v. White*, 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, Ann. Cas. 1916B, 252, 9 N. C. C. A. 265.

Where an injury is caused by the act of a third party over whom the master has no control, it cannot be said to be due to the negligence of the master as a proximate cause, and consequently there is no liability on the part of the master.

26 Cyc. 1090; 29 Cyc. 477; *Atchison, T. & S. F. R. Co. v. Slattery*, 57 Kan. 499, 46 Pac. 941, 15 Am. Neg. Cas. 104; *Marcom v. Raleigh & A. Air Line R. Co.* 126 N. C. 200, 35 S. E. 423; *Kelly v. Shelby R. Co.* 15 Ky. L. Rep. 311, 22 S. W. 445; *McDoniel v. Arkansas, L. & G. R. Co.* 127 La. 757, 53 So. 981; *Canadian Northern R. Co. v. Walker*, 97 C. C. A. 44, 172 Fed. 346, 24 L.R.A. (N.S.) 1020; *Pierson v. Chicago, R. I. & P. R. Co.* 95 C. C. A. 467, 170 Fed. 271; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 256; *Cooper v. Richland County*, 76 S. C. 202, 10 L.R.A. (N.S.) 799, 121 Am. St. Rep. 946, 56 S. E. 958; *Snipes v. Atlantic Coast Line R. Co.* 76 S. C. 207, 56 S. E. 959; *Kilpatrick v. Spartanburg*, 101 S. C. 334, 85 S. E. 775; *Hart v. Western U. Teleg. Co.* 104 S. C. 476, 89 S. E. 387; *Stephenson v. Corder*, 71 Kan. 475, 69 L.R.A. 246, 114 Am. St. Rep. 500, 80 Pac. 938, 18 Am. Neg. Rep. 97.

The injuries to plaintiff resulted from risks assumed by him in the course of his employment.

Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. ed. 1062, L.R.A. 1915C, 1, 34 Sup. Ct. Rep. 635, Ann.

Cas. 1915B, 475, 8 N. C. C. A. 834; *Jacobs v. Southern R. Co.* 241 U. S. 229, 60 L. ed. 970, 36 Sup. Ct. Rep. 588; *Baugham v. New York, P. & N. R. Co.* 241 U. S. 237, 60 L. ed. 977, 36 Sup. Ct. Rep. 592, 13 N. C. C. A. 138; *Lorick v. Seaboard Air Line R. Co.* 102 S. C. 276, 86 S. E. 675, Ann. Cas. 1917D, 920.

Hydrick, J., delivered the opinion of the court:

Plaintiff, an employee of defendant, as station master, at Orangeburg, South Carolina, was assaulted and injured by a robber at night, while he was attending to his duties. Being engaged at the time in interstate commerce, he brought this action under the Federal act to recover damages for his injuries, which, he alleges, were caused by defendant's negligence in failing to keep its station grounds properly lighted.

About 3 o'clock in the morning of January 7, 1916, while plaintiff was in his office at the station, a man opened the door, and told him that a loaded box car in the yard was open. Plaintiff turned on the lights about the station house and yard, which were controlled by a switch in the office, went out and closed the car, and was going back to the office to get a sealing iron to seal it, when the city fire alarm was sounded. In pursuance of his duty, under the rules of the company, he proceeded to ascertain the location of the fire. In doing so, he passed the office door and one of the waiting room doors, in which the man was standing, and in passing plaintiff thanked him for the information given, and walked on some fifteen or twenty steps to the sidewalk on Broughton street, which crosses the railroad at right angles, to look for the fire. After having discovered that it was in a distant part of the city, he turned and was going back to the office, when he was struck from behind by the robber. The blow crushed his skull, and left him in a seriously and permanently impaired condition.

The company had provided for four lights on the outside—one above the office door, one above each of the waiting room doors, and one

on a pole in the yard, between the street and the station. This light was about 30 feet from the station house. On the night of the assault, the light above one of the waiting room doors and that on the pole were not burning, and they had not been burning for several nights before. There was an arc light in the street, about 100 feet distant, which afforded some light about the station; but it was darker at the point where plaintiff was struck (which was somewhere between the pole and the corner of the station) than it would have been if all the lights had been burning, and the testimony tends to show that the robber struck under cover of the greater darkness, caused by the absence of those lights.

After hearing all the evidence, the circuit court directed a verdict for defendant, on the ground that the alleged negligence of defendant was not the proximate cause of plaintiff's injuries. Other points of subsidiary importance were discussed by both parties at the hearing in this court, but we shall consider only the ruling of the circuit court, as that is the controlling issue in the case.

It is elementary that the law considers the proximate and not the remote cause of injury, which means that, when one party seeks to recover damages of another for a wrongful act or omission, he must allege and prove that the act or omission was the direct and efficient cause of his injury. That does not mean, however, that the cause nearest in sequence must necessarily be held to be the proximate cause; for, ordinarily, the law imposes liability upon him whose wrongful act is the active, efficient, and procuring cause of an injury which is the natural and probable consequence of that act, even though the injury may not follow the act in immediate sequence. *Cannon v. Lockhart Mills*, 101 S. C. 62, 85 S. E. 233.

But, as said by Judge Wardlaw in *Harrison v. Berkley*, 32 S. C. L. (1

Strobb.) 525, 549, 47 Am. Dec. 578: "Such nearness in the order of events, and closeness in the relation of cause and effect, must subsist, that the influence of the injurious act may predominate over that of other causes, and shall concur to produce the consequence, or may be traced in those causes. To a sound judgment must be left each particular case. The connection is usually enfeebled, and the influence of the injurious act controlled, where the wrongful act of a third person intervenes, and where any new agent, introduced by accident or design, becomes more powerful in producing the consequence than the first injurious act. *Vicars v. Wilcocks*, 8 East, 1, 103 Eng. Reprint, 244, 9 Revised Rep. 361; *Ashley v. Harrison*, 1 Esp. 48, *Peeke*, N. P. Cas. 194, 3 Revised Rep. 686. It is therefore required that the consequences to be answered for should be natural as well as proximate. *Ward v. Weeks*, 7 Bing. 211, 131 Eng. Reprint, 81, 4 Moore & P. 796, 9 L. J. C. P. 6; *Kelly v. Partington*, 5 Barn. & Ad. 645, 110 Eng. Reprint, 929, 3 Nev. & M. 117, 3 L. J. K. B. N. S. 104. By this I understand, not that they should be such as, upon a calculation of chances, would be found likely to occur, nor such as extreme prudence might anticipate, but only that they should be such as have actually ensued, one from another, without the occurrence of any such extraordinary conjecture of circumstances, or the intervention of any such extraordinary result, as that the usual course of nature should seem to have been departed from. In requiring concurring consequences, that they should be proximate and natural to constitute legal damage, it seems that in proportion as one quality is strong may the other be dispensed with; that which is immediate cannot be considered unnatural; that which is reasonably to be expected will be regarded, although it may be considerably removed. *Bennett v. Lockwood*, 20 Wend. 223, 32 Am. Dec. 532."

To the same effect are the decisions of the Federal Supreme Court. *Atchison T. & S. F. R. Co. v. Calhoun*, 213 U. S. 7, 53 L. ed. 671, 29 Sup. Ct. Rep. 321.

Let the principles announced in the cases cited be applied to the

Master and
servant—
Federal
Employers'
Liability Act—
injury by
robber.

facts of this case, and the conclusion is inevitable that the negligence alleged was not the proximate cause of plaintiff's injury. Certainly, the want of light did not directly cause or contribute to the injury. There was no causal connection whatever between the two events. That kind of an injury was neither a natural nor a probable consequence which might reasonably have been expected to result from the failure to keep all the lights burning. The want of light was merely a condition which might or might not have influenced the intervening independent act of the robber, over whom defendant had no control.

The authorities are practically unanimous in holding that, when the

negligence alleged appears merely to have brought about a condition of affairs, or a situation under which another and entirely independent and efficient agency intervenes to cause the injury, the latter is to be deemed the direct or proximate cause, and the former only the indirect or remote cause. The doctrine is discussed and illustrated by numerous cases in 1 *Thomp. Neg.* §§ 43 et seq. A late case in point is *Chancey v. Norfolk & W. R. Co.* 174 N. C. 351, L.R.A.1918A, 1070, 93 S. E. 834, Ann. Cas. 1918E, 580, in which the court held that a carrier was not liable for the robbery of a passenger, alleged to have been caused by the insufficient lighting and overcrowding of its cars.

As the facts, viewed in the most favorable light for plaintiff, were undisputed and susceptible of but one reasonable inference, the decision of the question was one of law for the court.

Judgment affirmed.

Gary, Ch. J. and Watts, Fraser, and Gage, JJ., concur.

ANNOTATION.

Insufficient lighting as proximate cause of assault or robbery.

An extended search has disclosed but two reported cases aside from the reported case (*CARTER v. ATLANTIC COAST LINE R. Co.* ante, 1411) involving the specific question whether failure to maintain a sufficient light may be regarded as the proximate cause of an assault or robbery, and those cases support the decision in the *CARTER CASE*.

Thus, the negligence of a railroad company in permitting a passenger coach to be without light and overcrowded, was held in *Chancey v. Norfolk & W. R. Co.* (1917) 174 N. C. 351, L.R.A.1918A, 1070, 93 S. E. 834, Ann. Cas. 1918E, 580, not to be the proximate cause of an assault upon and robbery of a passenger by a fellow passenger, and the carrier was therefore held not liable for the loss thereby caused.

So, too, in *Prokop v. Gulf, C. & S. F. R. Co.* (1904) 34 Tex. Civ. App. 520, 79 S. W. 101, an action for personal injuries to a woman alleged to have been sustained by reason of an assault committed by a negro, predicated on the fact that she was left alone in an unlighted station while awaiting her train, in affirming the judgment of the trial court sustaining a general demurrer to the petition, it was held as matter of law that the darkness and the isolation of the passenger were alone insufficient to put the defendant on notice of any danger from third persons, and that the injury was not the proximate result of failure on the part of the company to light the room.

The court in the *Chancey Case*, among other authorities, relied upon *Cobb v. Great Western R. Co.* [1893] 1 Q. B. (Eng.) 459 (an action to re-

cover damages from a railroad company for a sum of money alleged to have been taken from plaintiff's person by robbery, as a consequence of the company's negligence in allowing the carriage to be overcrowded), and quoted from the opinion of Bowen, L. J., as follows: "The second point argued was this: It was said that the overcrowding of the carriage had caused damage to the plaintiff by occasioning the robbery. It seems to me impossible to treat the alleged damage as otherwise than too remote, according to English law. The law is that the damages must be the direct and natural consequence of the breach of obligation complained of. The law is the same in this respect with regard both to contracts and to torts, subject to the qualification that, in the case of the former, the law does not consider too remote damages which may be reasonably supposed to have been in the contemplation of the parties when the contract was made. It cannot fairly be said that the robbery was the natural consequence of overcrowding the railway carriage."

The opinion in the Chancey Case also quoted from the opinion of Lord Selborne, in the House of Lords, on appeal in the Cobb Case [1894] A. C. (Eng.) 419, as follows: "As to this I do not think it necessary to say more than that, on the plaintiff's pleading, it is not shown that the overcrowding of the carriage did in fact conduce in any way, directly or indirectly, to the robbery; and on the assumption that under some possible circumstances this might have been actionable negligence, it would, in my judgment, be indispensable, for that purpose, to state and prove some actual connection between the overcrowding and the loss. It is not, in my opinion, enough to suggest, as the plaintiff does, that to suffer such overcrowding was to 'facilitate the hustling and robbing of the plaintiff.' As the case is stated by him, nothing turns upon the fact that the robbery was committed by a 'gang' of more than nine persons."

The annotation, however, does not assume to cover the "overcrowding" cases. J. H. B.

ROXFORD KNITTING COMPANY, Plff. in Err.,

v.

MOORE & TIERNEY.

SAME, Plff. in Err.,

v.

WILLIAM MOORE KNITTING COMPANY.

United States Circuit Court of Appeals, Second Circuit — March 18, 1920.

(— C. C. A. —, 265 Fed. 177.)

Sale — effect of commandeering seller's product by government for war purposes.

1. A purchaser of knit goods cannot recover damages from the manufacturer for delay in delivery, if the government, under statutory authority, places orders with the manufacturer for immediate delivery, compliance with which prevents compliance with the private contract.

[See note on this question beginning on page 1429.]

Contract — breach — interference by government — effect of form of contract.

2. That a manufacturer of knit goods

signs a contract with the government, on a contract form, for supplies for the Army and Navy, does not show that the government was not acting under its

commandeering power so as to relieve the manufacturer from liability for postponing the filling of civilian orders, where the government communications state that the government must have the supplies at once, that deliveries

must take precedence over civilian deliveries, which must wait, and that the manufacturer, must comply with the government requirements.

[See notes in 3 A. L. R. 21; 9 A. L. R. 1509.]

ERROR to the District Court of the United States for the Northern District of New York to review a judgment in favor of plaintiffs in consolidated actions brought to recover an amount alleged to be due for goods and merchandise sold and delivered by them to defendant. *Affirmed.*

Statement by Rogers, Circuit Judge:

The questions of law involved in the two cases are identical. They were argued together and will be decided in one opinion. The actions were commenced in the New York supreme court in the county of Saratoga, and were removed to the United States district court for the northern district of New York. The defendant in error, in each case, was plaintiff below, and is hereinafter called plaintiff. The plaintiff in error, in each case, was defendant below, and is hereinafter called defendant. The plaintiff is a corporation organized and existing under the laws of the state of New York, and owns and operates a factory for the manufacture of men's underwear, consisting of knit shirts and drawers. The defendant is a corporation organized and existing under the laws of the state of Pennsylvania.

In the first of these actions the plaintiff alleged that defendant is justly indebted to it in the sum of \$14,090.08 on account of goods, wares, and merchandise sold and delivered to defendant at its request, at agreed prices, on various dates and times between the 18th day of May and the 10th day of September, 1917. The defendant in its answer conceded that plaintiff had sold and delivered the merchandise sued for, but by way of counterclaim pleaded that the parties to the litigation had entered into an agreement for the manufacture and delivery of certain underwear; that a part only,—to wit, that sued for,—had been delivered, and that, because of the failure of plaintiff to deliver the balance,

defendant had suffered damage in excess of the amount sued for.

The plaintiff in its reply sought to avoid liability to defendant for its admitted failure to make complete delivery, by the fact that the United States government had "commandeered" it to make delivery to it of supplies of underwear for the Army and Navy, which required the entire production of the plaintiff's factory and plant from July 1, 1917, until after October 1, 1918, and that this prevented it from making complete delivery of all the goods which it had agreed to manufacture and deliver to defendant. The issue raised by the reply was separately tried in advance, and a jury trial was waived. It was decided that by reason of the facts proved plaintiff had established its reply, and accordingly the counterclaim was dismissed, and judgment was entered for the plaintiff for the amount demanded in the complaint. (D. C.) 250 Fed. 278.

Argued before Ward, Rogers, and Hough, Circuit Judges.

Messrs. Gallert & Heilborn for plaintiff in error.

Messrs. Thomas O'Connor and George E. O'Connor, for defendant in error:

The direction of the President is to be presumed in all instructions and orders issuing from a competent department, and official instructions, issued by the heads of the several executive departments, within their respective jurisdictions, are valid, without containing express reference to the direction of the President.

Wilcox v. Jackson, 13 Pet. 498, 10 L. ed. 264; United States v. Eliason, 16 Pet. 291, 10 L. ed. 968; Confiscation Cases (United States v. Clarke) 20

Wall. 92, 22 L. ed. 320; *United States v. Fletcher*, 148 U. S. 84, 37 L. ed. 378, 13 Sup. Ct. Rep. 552; *Scott v. Carew*, 196 U. S. 100, 49 L. ed. 403, 25 Sup. Ct. Rep. 193; *United States v. Cutter*, 2 Curt. C. C. 617, Fed. Cas. No. 14,911; *United States v. Tichenor*, 8 Sawy. 142, 12 Fed. 415; *Northern P. R. Co. v. Mitchell*, 208 Fed. 469; *Medkirk v. United States*, 44 Ct. Cl. 469.

The President speaks and acts through the heads of the several departments, in relation to subjects which appertain to their respective duties.

Wilcox v. Jackson, 13 Pet. 498, 10 L. ed. 264; *Williams v. United States*, 1 How. 290, 17 L. ed. 135; *United States v. Farden*, 99 U. S. 10, 25 L. ed. 267; *Wolsey v. Chapman*, 101 U. S. 755, 25 L. ed. 915; *Runkle v. United States*, 122 U. S. 543, 30 L. ed. 1167, 7 Sup. Ct. Rep. 1141; *Lockington v. Smith*, Pet. C. C. 466, Fed. Cas. No. 8,448; *United States v. Cutter*, 2 Curt. C. C. 617, Fed. Cas. No. 14,911; *Northern P. R. Co. v. Mitchell*, 208 Fed. 469.

An order sent out from the appropriate executive department, in the regular course of business, is the legal equivalent of the President's own order to the same effect.

Wolsey v. Chapman, 101 U. S. 755, 25 L. ed. 915; *Medkirk v. United States*, 44 Ct. Cl. 469, 45 Ct. Cl. 395.

Performance of defendant's contracts was rendered illegal and impossible by the acts of the government.

Re Shipton, A. & Co. [1915] 3 K. B. 676, [1915] W. N. 304, 84 L. J. K. B. N. S. 2137, 31 Times L. R. 598; *Baily v. DeCrespigny*, L. R. 4 Q. B. 180, 38 L. J. Q. B. N. S. 98, 19 L. T. N. S. 681, 17 Week. Rep. 494, 15 Eng. Rul. Cas. 799; *Dolan v. Rodgers*, 149 N. Y. 489, 44 N. E. 167; *Metropolitan Water Bd. v. Dick, K. & Co.* [1918] A. C. 119, 8 B. R. C. 483, 117 L. T. N. S. 766, 87 L. J. K. B. N. S. 370, 82 J. P. 61, 34 Times L. R. 113, 62 Sol. Jo. 102, 23 Com. Cas. 148, 16 L. G. R. 1, Ann. Cas. 1918C, 390, [1917] 2 K. B. 19; *Runyan v. Culver*, L.R.A.1916F, 10, note; 28 Yale L. Jo. 399; 32 Harvard L. Rev. 789.

Rogers, Circuit Judge, delivered the opinion of the court:

In December, 1916, the plaintiff agreed to manufacture at its factory in the city of Cohoes, in the state of New York, for the defendant, certain knit underwear. The deliveries were to be made at various times stated in the orders, be-

tween February 1, 1917, and December 15, 1917. All the orders received from defendant and accepted by plaintiff were taken subject to the following: "All orders are taken subject to delays or nondelivery caused by strikes, accidents, fire, or for any other reason beyond our control."

It is not questioned that, if a party by his contract charges himself with an obligation possible to be performed, he must make it good unless performance is rendered impossible by the act of God, the law, or the other party. If what is agreed to be done is possible and lawful, it must be done. *Sun Printing & Pub. Asso. v. Moore*, 183 U. S. 642, 46 L. ed. 366, 22 Sup. Ct. Rep. 240; *Carnegie Steel Co. v. United States*, 240 U. S. 156, 165, 60 L. ed. 576, 579, 36 Sup. Ct. Rep. 342. The plaintiff admits that it entered into contracts with defendant, which it did not completely perform within the time agreed upon. The performance was not prevented either by act of God or the other party. Was it prevented by the law? If not, was performance excused under the clause in the contracts declaring that the obligations assumed were subject "to delays or nondelivery caused by . . . any other reason beyond our control"?

The plaintiff seeks to excuse its failure to perform its contracts by the fact that the United States government placed with it certain orders for war materials for the Army and Navy, which orders the plaintiff alleges it was obliged to accept, and that the said orders of the government required the entire production which was possible to be made from plaintiff's factory and plant from July 1, 1917, until after October 1, 1918. This, it claims, relieved it from any duty or obligation to defendant by reason of the agreements which had been previously made between plaintiff and defendant. It declares that on July 6, 1917, it notified defendant that plaintiff had been obliged to enter into said contracts with the United States gov-

ernment, and that plaintiff in consequence would be unable to make any of the goods it had agreed to make for defendant, except those that had been made and delivered, and that further deliveries were prevented by reason of its orders and contracts with the government of the United States.

In time of war or of impending public danger, and without statutory authorization, private property may be appropriated to the public use. In *Mitchell v. Harmony*, 13 How. 115, 134, 14 L. ed. 75, 83, Chief Justice Taney states that there are, without doubt, occasions in which a military officer may impress private property into the public service, or take it for public use; the government being bound in all such cases to make full compensation to the owner. He adds: "But we are clearly of opinion that in all of these cases the danger must be immediate and impending, or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for."

It is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified."

That was a case which had its origin in the Mexican War. The subject was again before the court in *United States v. Russell*, 13 Wall. 623, 20 L. ed. 474, in a case which had its origin in the war between the states. Mr. Justice Clifford, writing for the court, says that beyond all doubt, in cases of extreme necessity, in time of war or of immediate and impending public danger, private property may be appropriated to the public use without the consent of the owner, and in enumerating the property which can be taken he refers, among other things, to "food or medicine for a sick and famishing army, utterly destitute and without other means of such supplies, or [property] to transport troops, munitions of war, or clothing to reinforce or supply an army in

a distant field, where the necessity for such reinforcement or supplies is extreme and imperative.

Exigencies of the kind do arise in time of war or impending public danger, but it is the emergency, as was said by a great magistrate, that gives the right, and it is clear that the emergency must be shown to exist before the taking can be justified."

Congress, however, as appears hereinafter in this opinion, has legislated upon this subject, and empowered the President in time of war or of national emergency, to be determined by the President by proclamation, to place "orders" for war supplies, and made such "orders" obligatory on any person to whom such orders are given, and provided that such "orders" shall take precedence over all other orders and contracts theretofore placed with such persons. There are four separate orders which were given to plaintiff by the government:

(1) One dated June 6, 1917, requiring the plaintiff to deliver to the Quartermaster's Department of the United States Army in the city of New York, on or before December 31, 1917, 36,000 undershirts and 36,000 pairs of drawers in equal monthly deliveries of 12,000 garments, commencing July 1, 1917.

(2) One dated July 25, 1917, requiring the plaintiff to deliver to the Navy yard in the city of New York, before December 1, 1917, 38,000 undershirts and 38,000 pairs of drawers.

(3) One dated November 16, 1917, requiring the plaintiff to deliver to the Quartermaster's Department of the United States Army, in the city of New York, on or before December 31, 1917, 6,000 undershirts and 6,000 pairs of drawers.

(4) One dated December 12, 1917, requiring the plaintiff to deliver to the Quartermaster's Department of the United States Army, on or before September 30, 1918, 108,000 undershirts and 108,000 pairs of drawers.

These orders were all placed after the enactment of the National Defense Act. 39 Stat. at L. 166, chap. 134, Comp. Stat. § 1715a, 9 Fed. Stat. Anno. 2d ed. p. 925. The defendant insists that all four of these orders were contracts voluntarily entered into, and that contracts with the government for military supplies, even in time of war, afford no excuse for the nonperformance of civil contracts. If the orders were contracts voluntarily made, we agree that the performance of contracts so made was not entitled to precedence over other contracts previously taken.

The National Defense Act of June 3, 1916, chap. 134, § 120, Comp. Stat. § 3115g, 9 Fed. Stat. Anno. 2d ed. p. 1343, empowered the President in time of war, or when war is imminent, through the head of any department of the government, to place orders for such products as might be required, and made orders so given obligatory, and gave them precedence over all other orders and contracts. It made any individual, or the responsible head of any association or corporation, failing to comply with the provisions of the section, guilty of a felony, and provided that upon conviction he should be punished by imprisonment for not more than three years and by a fine not exceeding \$50,000. See 39 Stat. at L. chap. 134, § 120, p. 213. The constitutionality of this act is not challenged. That its enactment was a lawful exercise of the war powers of Congress must be conceded.

By an act of Congress passed on August 29, 1916 (39 Stat. at L. 619, chap. 418), a Council of National Defense was established, for the co-ordination of industries and resources for the national security and welfare. It consisted of the Secretary of War, the Secretary of the Navy, the Secretary of the Interior, the Secretary of Agriculture, the Secretary of Commerce, and the Secretary of Labor. The Council of National Defense was authorized to nominate to the President, who was directed to appoint, an advisory

commission, each of whom was to possess special knowledge of some industry, or otherwise be specially qualified in the opinion of the Council for the performance of the duties imposed. It was made the duty of the Council to direct investigations and make recommendations to the President and the heads of executive departments, among other things, of data as to amounts, location, method, and means of production, and availability of military supplies, and to give information to producers and manufacturers as to the class of supplies needed by the military and other services of the government, the requirements relating thereto, and the creation of relations "which will render possible in time of need the immediate concentration and utilization of the resources of the nation," and the Council was authorized to adopt rules and regulations for the conduct of its work which were to be subject to the approval of the President, and was to provide for the work of the advisory commission. 39 Stat. at L. 649, chap. 418, § 2, Comp. Stat. § 3115c, 9 Fed. Stat. Anno. 2d ed. p. 1342.

On March 4, 1917, Congress passed the Navy Purchase Act (39 Stat. at L. 1193, chap. 180, Comp. Stat. § 3115½b), which provided as follows:

"(b) That in time of war, or of national emergency arising prior to March first, nineteen hundred and eighteen, to be determined by the President by proclamation, the President is hereby authorized and empowered, in addition to all other existing provisions of law:

"First. Within the limits of the amounts appropriated therefor, to place an order with any person for such ships or war material as the necessities of the government, to be determined by the President, may require and which are of the nature, kind, and quantity usually produced or capable of being produced by such person. Compliance with all such orders shall be obligatory on any person to whom such order is given, and such order shall take precedence

over all other orders and contracts theretofore placed with such person."

On April 6, 1917, Congress passed a resolution. (40 Stat. at L. 1, chap. 1), which was on the same day approved by the President, declaring that a state of war existed between the United States and the Imperial German Government. On June 15, 1917, Congress passed the Urgent Deficiency Act, which provided as follows:

"(c) To require the owner or occupier of any plant in which ships or materials are built or produced to place at the disposal of the United States the whole or any part of the output of such plant, to deliver such output or part thereof in such quantities and at such times as may be specified in the order. . . .

"Compliance with all orders issued hereunder shall be obligatory on any person to whom such order is given, and such order shall take precedence over all other orders and contracts placed with such person. If any person owning any ship, charter, or material, or owning, leasing, or operating any plant equipped for the building or production of ships or material shall refuse or fail to comply therewith or to give to the United States such preference in the execution of such order, or shall refuse to build, supply, furnish, or manufacture the kind, quantities, or qualities of the ships or material so ordered, at such reasonable price as shall be determined by the President, the President may take immediate possession of any ship, charter, material or plant of such person, or any part thereof without taking possession of the entire plant, and may use the same at such times and in such manner as he may consider necessary or expedient." 40 Stat. at L. p. 182, chap. 29, Comp. Stat. § 3115, *et d.*, Fed. Stat. Anno. Supp. 1918, p. 804.

On May 22, 1917, one A. Frey, a member of the knit goods committee of the Advisory Board of National Defense, wrote a letter to the plaintiff, in which he stated that the government was in the market

for a quantity of flat wool underwear. He inclosed specifications and asked to be advised as to how large a quantity plaintiff could furnish prior to September 1st and at what price. In his letter he wrote: "I request you not to write me that you are sold up and cannot furnish any of these goods. I am aware that this condition prevails with everyone. . . . I have before me a list of all the manufacturers, with their capacity as figured out by myself according to number of cards, and there should not be any trouble to place this amount within a very reasonable time. It is not the committee's intention to place the whole burden on one mill, but to divide it according to production. . . ."

A similar communication had been sent to other manufacturers of woolen knit goods in Cohoes and Waterford, and on its receipt a meeting of their association was called to consider the matter. All agreed that the letter was intended by the government as a demand, and they sent a representative to New York, there to confer with the chairman of the Knit Goods Committee of the Council of National Defense, and to inform him of the quantity they could produce, and still fill all their civilian orders. The plaintiff's proposal was to furnish 10,000 dozens during 1917. The chairman of the Knit Goods Committee increased the amount to 12,000 dozens without consulting the plaintiff. This brought a protest from plaintiff, saying that if so large an order were placed deliveries would have to be made later. To this the chairman replied that, since it was possible to make the large amount, the plaintiff would have to do it. Thereafter regular contract forms were sent to the manufacturers, including the plaintiff, and were signed. The orders thus placed were for the Army, and they did not interfere with civilian deliveries; the capacity of plaintiff's mill being sufficient for both the Army and the civilian orders. The difficulties arose later, when the order for the Navy came in. The

capacity of plaintiff's mill for the year 1917 was 33,059 $\frac{2}{3}$ dozens, and prior to the Navy's order the total civilian and Army orders aggregated 31,945 $\frac{3}{4}$ dozens.

Then July 2, 1917, the chairman of the Knit Goods Committee wrote the plaintiff that his committee had received an emergency call from the Navy Department, and that it was absolutely necessary that the underwear should be furnished for the use of the sailors on the North sea service in the winter, as the underwear in use was too light. He continued: "This underwear can be made by only a limited number of mills in the country. We have carefully apportioned it among the different mills, and know that we cannot secure the quantity needed unless we can receive from you 25,000 shirts and 25,000 drawers by October 1st, and the same quantity additional by December 1st."

The plaintiff addressed the following letter to the chairman:

Dear sir:—In reference to the Navy order, would say we have gone over this matter carefully and conservatively, and we find that you have allotted to us about 2,000 dozen more than we can produce in the prescribed time. This is known as a six-set mill, and we can only produce so many dozen per week; we are not as large in size as the Hope Knitting Company or the William Moore Knitting Company.

"In addition to this, we are facing the annual shutdown for one week's vacation during the last week in August, which we do not see any way to avoid, as the help have had this vacation every year for the last forty years. We are willing to do all in our power to give the government every dozen we can produce within the allotted time, but, as we said before, you have allotted to us 2,000 dozen more than we can produce within the time allowed. Wish you would kindly let us hear from you on this matter and oblige."

To this the chairman replied as follows: "Gentlemen:—Your letter of the 19th inst, is at hand. We

have telephoned to the Navy Department, suggesting that 12,000 shirts and 12,000 drawers of the Navy underwear shall be canceled from your order, and we shall arrange to transfer that quantity to another mill."

Upon receipt of the Navy order the manufacturers of knit goods at Cohoes, including the plaintiff, again called a meeting and appointed a committee to go to New York and confer with Mr. Cromwell, the chairman of the Knit Goods Committee of the Council of National Defense.

The testimony shows that the committee saw Mr. Cromwell with the following results:

Q. Will you give us the conversation as near as you recollect it, which occurred with Mr. Cromwell?

A. We told him we were in receipt of his letter for emergency wear, and we came down to understand it. We explained it would take our entire production for the entire year, if they insisted on us taking this order. His reply was that it was an emergency order, and was absolutely necessary to have it. The soldiers were up in the North sea—

Q. The sailors, you mean?

A. Yes; with very light underwear, freezing to death, and there was no way we could get out of making it, and we had to take our share—he was sorry, but it had to be done. We spoke to him about putting off deliveries of the Army stuff to January, February, and March; told him that would help us out with our trade. He said it was absolutely impossible; that the civilian trade would have to wait until the Army and Navy were taken care of. The committee had notified all its mills to that effect, to set aside civilian business to take care of these orders.

The testimony shows that Mr. Cromwell was the personal representative of Paymaster Hancock, the officer in charge of the purchasing division of the Bureau of Supplies and Accounts of the Navy De-

partment, and it was through Cromwell, as Hancock testified, that the Navy communicated with the plaintiff. There is also testimony that the Secretary of War issued instructions, stating that he would hold the Army officials responsible for supplying the Army, and that they were to leave to the Supplies Committee of the Council of National Defense all of such purchases. So far as Army orders were concerned, they appear to have been handled by the several advisory committees of the Council. In the placing of the orders for knit goods there was no contract between the manufacturers and the officers of the Army. The manufacturers of knit goods dealt with the Knit Goods Committee, and with Mr. Cromwell, who was placed in charge of all Army purchases of such goods. This fact needs to be kept in mind in considering the letter from Frey, already referred to, Frey being a member of the committee of which Cromwell was the chairman.

It is not necessary to state all the communications which passed between the plaintiff and those who represented the government; and we see nothing in the record which differentiates the orders placed for the Army from those placed for the Navy. The plaintiff was alike given to understand that the orders were to have precedence over civil contracts, and that the plaintiff was required to furnish the goods. If one order was compulsory, all were; and if any one was contractual, all the others were. That the issue between the parties to this litigation may be the better understood, we shall refer at some length to the correspondence which passed between them, concerning the demand, which the government had made upon the plaintiff and defendant's disposition respecting it.

The Navy order was received by plaintiff on July 2, 1917, and two days later plaintiff wrote defendant that the government had taken over its entire plant production for the next six months. This letter de-

fendant replied to on July 16th, and wrote: "We beg to state that we cannot recognize your authority to cancel any of the goods we have on order with you."

The defendant continued to demand delivery from time to time. Finally, on September 17th, plaintiff wrote defendant, explaining at length the situation in which it had been placed by the government, and stating that it would be impossible for it to make any further delivery on defendant's order during the year, adding: "We dislike to advise you to this effect, but it is only fair that you should be fully informed of the situation. We have no means of knowing whether we will be called upon to make more goods for the United States government, and in consequence, as first stated herein, we are unable to advise when we will be able to make any deliveries."

In reply defendant wrote on September 21st: "This is to advise you that we hold you liable in damages for any failure on your part to make deliveries in accordance with your contract."

On October 15th defendant wrote: "Inasmuch as you have failed to comply with your contract with us, we shall ask that you deduct from the amount of our bill the damage which we have sustained by reason of your default."

The plaintiff referred defendant to Mr. Cromwell, chairman of the Committee of National Defense, for any information it desired in regard to the plaintiff's making goods for the government of the United States. To this defendant on October 23d replied: "Whatever damages are due us, occasioned by your deliberate breach of contract, it is now up to you to make good. It is not our wish or desire to drag Mr. Cromwell into this controversy, and we do not understand what he can say which in any way would justify a deliberate breach of the contract on your part."

It appears that plaintiff in the meantime had taken the matter up

with Mr. Cromwell, sending to him the correspondence which had passed between it and defendant, whereupon Mr. Cromwell wrote the following letter to plaintiff:

Knit Goods Committee of the Council of National Defense.

New York, Oct. 23, 1917.

Messrs. Moore & Tierney,
Cohoes, N. Y.

Gentlemen.—

We have read the correspondence sent us between you and the Roxford Knitting Company in regard to an unfilled order which you took from them for civilian trade. No business placed by the Knit Goods Committee, nor to the best of our knowledge by any other agency of the Council of National Defense, can be used as an excuse to cancel obligations of civilian trade. All that the government did was to insist that its orders should be given priority in delivery, and that civilian orders, so far as they interfere with the government requirements, should be postponed in delivery.

Yours truly,

Lincoln Cromwell,
Chairman Knit Goods Committee.

On October 27th plaintiff again wrote defendant at length a full account of what had been done and said: "We have not canceled, nor did we intend to cancel, any of our contracts with the civilian trade." The letter concluded as follows: "The government is insisting that they are entitled to priority over the civilian trade, and this is exactly what we have advised all our customers, including you, that we are compelled to fulfil first the government requirements, give them priority, and afterwards will furnish the civilian trade."

In reply defendant closed the correspondence on November 2d, writing: "The reason you assign in your communication we cannot recognize as in any way affecting our contract, either from a moral or legal standpoint."

It thus appears that, notwithstanding the fact that defendant

knew that the underwear was absolutely required for the immediate needs of the soldiers and sailors of the United States engaged in the war, and in spite of the fact that it knew that the Council of National Defense had stated that the government must have the goods, and have them at once, defendant declined to see in these facts any moral or legal excuse for plaintiff's inability to deliver to it the goods ordered for its civilian trade and business. As respects the first "order," dated June 6, 1917, there appears in the record what is entitled "Contract for Supplies. . . ." It declares that "these articles of agreement entered into this 6th day of June, 1917, between Colonel M. Gray Zaluski Quartermaster Corps, United States Army, of the first part, for and in behalf of the United States of America, and Moore & Tierney, . . . witness that the said parties do hereby mutually covenant and agree. . . ."

As respects the second "order," dated July 25, 1917, it appears that the Navy Department, under date of July 23, 1917, notified the plaintiff that "the following classes in your proposal for naval supplies . . . are hereby awarded you under contract No. 31,378," and that in due course a formal contract would be forwarded for execution; and under date of July 25, 1917, the Department states that "a contract numbered as stated above (No. 31,378), and dated 4th August, 1917, has been entered into with" plaintiff.

As respects the third "order," the War Department, under date of November 15, 1917, notified the plaintiff in writing as follows: "In accordance with your offer, contract is awarded you for furnishing and delivering at the New York depot of this corps. . . ." Then followed the statement that "this contract will be dated November 16, 1917." This was signed, "H. L. Hirsch, Colonel, Q. M. Corps, in charge." Then, under date of November 30, 1917, a letter was written to the plaintiff, stating that

there was inclosed the "contract" in triplicate, dated November 16, 1917, which plaintiff was requested to sign and return at the earliest practicable date.

As respects the fourth "order," the War Department, under date of December 11, 1917, informed the plaintiff that "in accordance with your offer, contract is awarded you for furnishing to this corps. . . ." Then followed the statement: "This contract will be dated, December 12, 1917." Prior to the awarding of this contract, and on December 7, 1917, the Committee on Supplies from its New York office wrote the advisory commission of the Council of National Defense, advising "the following purchase" from the plaintiff of the undershirts and drawers in the amounts and prices as they were afterwards included in the award of the contract above referred to, under date of December 11, 1917.

All four of the plaintiff's "orders" thus appear in the record as formal contracts, reduced to writing, and signed by the contracting parties, with their names at the end thereof. An order, strictly speaking is a command or a direction. Hence, defendant insists that what the plaintiff calls "orders" were not in reality orders, placed pursuant to a commandeering statute, but ordinary voluntary contracts, and it asserts that such contracts made with the government, even in time of war, afford no legal excuse for the non-performance of civilian contracts, and that if such civilian contracts are to be displaced it can be only because some statute has so provided. The National Defense Act has not so provided, but has empowered the President "to place an order," and made "all such orders" obligatory, and provided that "they [the orders] shall take precedence over all other orders and contracts."

The Navy Department devised a form of order which was a command or direction, the first line of which was: "Effective July 1, 1917, please be prepared to furnish.

. . . ." It then went on to declare: The particular points "at which deliveries of these items will be called for under this order, as well as the forms of delivery required, are to be," and "the prices to be paid for such petroleum products as you may be required to deliver are to be determined later." This form of order was not used for the Navy contract upon which the plaintiff in this case sues, and which is dated August 4, 1917. And in a letter dated March 28, 1918, and signed, "Hancock, by direction of the Paymaster General," it is said: "Contracts for supplies for the Navy are made pursuant to §§ 3709 and 3718 of the Revised Statutes, Comp. Stat. §§ 6832, 6862, 8 Fed. Stat. Anno. 2d ed. pp. 336, 346. . . . When orders are placed under the commandeering power, as delegated to the Secretary of the Navy, by the President of the United States, a Navy order is used to distinguish the same from the usual contract."

The defendant claims that the government proceeded under § 3709 of the Revised Statutes, Comp. Stat. § 6832, 8 Fed. Stat. Anno. 2d ed. p. 336. That section provides that all purchases and contracts for supplies in any of the departments shall be made by advertising when the public exigencies do not require immediate delivery, and adds: "When immediate delivery or performance is required by the public exigency, the articles or service required may be procured by open purchase or contract, at the places and in the manner in which such articles are usually bought and sold, or such services engaged, between individuals."

It is clearly evident, the defendant says, that the supplies for the Army were, so far as this plaintiff is concerned, obtained under § 3709, in the form of purchases entered into by contract, and were not obtained by "order" under a commandeering statute. When the government had to resort to the commandeering power, it used an "order," and the price to be paid was left open, and

was to be subsequently fixed. In other cases the matter was put in contract form, and the price to be paid was specified, having been agreed upon in advance. There is not a word in these contracts to show that they are commandeering orders, or were to be regarded as such. Neither is there anything in the record to show that the plaintiff, prior to or at the time of the execution of the contracts, was informed by anyone that these writings embodied commandeering orders.

It may be conceded that the plaintiff knew, at the time the correspondence began between it and those representing the government concerning the needed supplies, that the government could commandeer its plant and compel acquiescence with its wishes. It does not follow, because this was known, that any contracts made with such knowledge, even though they may be emergency contracts, are to be regarded as though they were commandeering orders. The statutes do not say that all contracts made with the government in a period of national emergency are to have precedence over civilian contracts. Whether Congress ought to have said so, we need not inquire. It is sufficient for us that it has not said so, and that we cannot write into the statutes what Congress has left out of them.

But the question remains whether the fact that the plaintiff signed the contracts submitted to it is decisive of the issue herein involved. The plaintiff contends that the forms used cannot take away the real substance of what occurred between it and the representatives of the government. It contends that, in view of all that passed between the parties, the correspondence and personal interviews, as well as because of the exigencies and emergencies of the Army and Navy, it believed, and had the right to believe that, in acquiescing in the demands made upon it, the plaintiff was obeying commandeering orders, knowing, as plaintiff did, that if it did not yield

its assent the government could and would reach its strong hand out and take its mills; and the court below was clearly of the opinion that it was not necessary to use the particular form of order that was adopted, but that an order obligatory on the manufacturer could be placed in other ways. The learned district judge, referring to this, said: "If A., desiring to purchase for family use a bill of groceries required by him, goes to the groceryman, and, ascertaining prices for merchandise to be paid for on delivery, and that delivery is or will be made on request, says 'Please send to my house the following articles,' naming them, 'required by me' and the merchant says, 'I will do so,' has not A. placed an order therefor, and one obligatory on the merchant, assuming it to be the duty of the merchant to fill orders when given? Would it change the nature or character of the transaction that the parties then made and signed a written memorandum of what had occurred? In such case, as here, there would be a valid contract; but can it be said an order was not placed, within the ordinary meaning of the words 'place an order'?"

It must be admitted that neither the National Defense Act nor the Navy Purchase Act prescribe any stereotyped form of order which must be used. An order might be placed under the form and terms of polite request. It is left to the discretion of the government to determine the manner in which orders are to be placed, and how its intentions are to be communicated, orally or by writing. They may be made known by telegram, or by telephone, or by letter. The acts of Congress do not prescribe the method of communication, nor the form of it. In this case the plaintiff was informed by letter and by oral communication that the government *must* have the supplies, that it *must* have them at once, that deliveries *must* take precedence over civilian deliveries, which *must* wait, and that the plaintiff *must* comply with the govern-

ment's requirements. Under date of October 23, 1917, Cromwell wrote the plaintiff: "All that the government did was to *insist* that its *orders* should be given priority in delivery, and that civilian orders, so far as they interfere with the government requirements, should be postponed in delivery."

There is evidence in the record to show that the use of the contract form was a matter of departmental routine, and used where compulsory orders had been placed. The officer in charge of the Purchasing Division of the Bureau of Supplies of the Navy Department was asked whether, when he issued "orders" under the commandeering statutes, he used the form which has been set forth in this opinion as one adopted for compulsory orders. His reply was, "Not in all cases." He was then asked, "When you didn't use that form, what did you use?" He replied, "Used the ordinary contract form." He added that he used it without any changes. He was asked, referring to the contract form, "Was that a method employed in your Department for ordering goods under these acts (commandeering statutes) that have been referred to?" He answered, "Yes, sir." He was asked, "How could an outsider tell whether a formal contract was in fact a naval order, an order under these statutes?" To this he replied, "I don't know, except by developing all the facts surrounding the case." His attention was called to the telegram sent in July, 1917, by the Paymaster General of the Navy to the plaintiff, which read as follows: "Thirty-eight thousand suits underwear awarded you four dollars thirty-four cents each."

He was asked whether that telegram was a form of "ordering" goods under the statutes (the National Defense and allied acts). His answer was, "Yes, sir." He also testified that he personally prepared the "order" form, as distinguished from the "contract" form, and that in the thought of the De-

partment "the contract was an agreement with regard to the price of the material," and that whether the one form or the other was used was a matter "addressed rather to the sensibilities of the people than to any reason for the application of the authority which Congress gave the Department." The court stated that what he understood the witness to mean was that, when an order was given, the Department did not in all cases use the "order" form, but that that form was only used in those cases where it was necessary to use it to bring about results. And the witness replied, "That was the custom."

The following colloquy took place between the court and the witness:

Q. Well, you say here—I will read this last clause—"When orders are placed under the commandeering clause as delegated to the Secretary of the Navy by the President of the United States, the Navy order is used to distinguish the same from the usual contract." As I understand you now, that was not done in all cases?

A. Not done in all cases, unless we had to resort to the commandeering power. If it came down finally to a power, where we couldn't agree on the contract, and the only power we had left was to make them go ahead, then we used the Navy order form.

At the time these "orders" were given to the plaintiff it is well to remember that all the conditions which justified a commandeering order existed. From all this the plaintiff claims that the testimony shows that it is not the particular form of agreement which was entered into, or the particular notices of award that were given that are the determining feature, but it is the entire transaction between the government and the manufacturer that should be considered, in ascertaining whether the transaction was voluntary on the part of the individual, or whether it was done under the direction of the paramount war power of the government. That the en-

ture surrounding circumstances must be considered to determine whether the formal contract entered into was a voluntary agreement covering the whole matter, or whether it was a mere settlement of details after the manufacturer had been directed to furnish certain material. And it affirmatively appears that the officer in charge of the purchase of supplies for the Navy thought he was entitled to use, and did use, the contract form in cases where the parties on both sides reached an agreement with regard to the price of material. And in this case the parties had reached such an agreement.

It is evident that the plaintiff and the representative of the Navy Department considered that a commandeering or compulsory order was placed. When the Paymaster of the Navy was on the stand, the court said to him: "They [the plaintiffs] contend, in view of these letters and the war exigencies and the needs of the Navy, that they believed and had the right to believe, not only that they were following a commandeering order, but the government had the right so to consider it, and if they had turned around and said, 'We won't take the contract, we won't have anything to do with it,' that the government could have reached its strong hand out and taken their mills."

And the Paymaster replied, "I agree with that point entirely." But after all, it is not decisive to ascertain what the plaintiff or the Paymaster thought was being done, or intended to do. The real question is as to what in fact was done. In order that civil contracts should be postponed by "orders" subsequently placed by the government, it is necessary that those orders should be placed in accordance with the Commandeering Act, if the act indicates the method to be pursued. If officials of the War and Navy Departments entertain erroneous views of their power and of the construction to be placed upon an act of Congress, their decision cannot make it

the duty of the courts to perpetuate the error, and override the statute, and deprive individuals of their contract rights. The National Defense Act, as we have seen, does not prescribe the method by which an order shall be placed, beyond providing that the President, through the head of any department of the government, may place an order, compliance with which shall be obligatory, and shall take precedence over all other orders and contracts.

We think that under this statute an order need not be signed either by the President or by the head of a department. It is enough that the order is the order of either, and there is a presumption that, when an order is sent out from the appropriate executive department in the regular course of business, such order is with the knowledge and approval of the Secretary, unless the contrary appears. *Medkirk v. United States* (1910) 45 Ct. Cl. 395, 403. And the act of a head of a department is, in legal contemplation, the act of the President. *Scott v. Carew*, 196 U. S. 100, 109, 110, 49 L. ed. 403, 405, 406, 25 Sup. Ct. Rep. 193. He speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties. *Confiscation Cases* (*United States v. Clarke*) 20 Wall. 92, 109, 22 L. ed. 320, 323; *Wilcox v. Jackson*, 13 Pet. 498, 10 L. ed. 264. And see *United States v. Eliason*, 16 Pet. 291, 10 L. ed. 968; *United States v. Farden*, 99 U. S. 10, 12, 25 L. ed. 267; *Wolsey v. Chapman*, 101 U. S. 755, 769, 25 L. ed. 915, 920; *Runkle v. United States*, 122 U. S. 543, 557, 30 L. ed. 1167, 1171, 7 Sup. Ct. Rep. 1141. And as it is impossible that each head of a department should perform in person all the business of his department, the law allows him to act through subordinate agents in his department, whose legal power is included in his, just as his is included in that of the President. See 6 Ops. Atty. Gen. 583, 587.

The Supreme Court in *Williams v.*

United States, 1 How. 290, 11 L. ed. 135, declared that the President could not be required to become the administrative officer of every department, or to perform in person the numerous details incident to services which, by the Constitution and laws, he is required and expected to perform. In that case an act of Congress prohibited the advance of public money in any case whatsoever to the disbursing officers of the government, except under the special direction of the President, and the court held that this did not require the personal and ministerial performance of this duty to be exercised in every instance by the President, under his own hand, and never in any respect delegated. A contrary construction of the law, it was said, would be so fraught with mischief to the public service that it could not be entertained.

The intention of Congress in enacting the National Defense Act and the allied acts was in part to enable the President, acting through the heads of departments, to place compulsory orders for war supplies and materials, and to give to orders so placed priority over civil contracts. No doubt it was desirable, in placing all such orders, to have done so in a writing which expressly stated that the orders were issued under authority of the National Defense Act, and that they were to have priority over all civil contracts. But as no particular form or method was prescribed by the acts, beyond declaring that they should be placed by the President through the heads of departments, and as the heads of departments may ordinarily act through their subordinates, the majority of the court hold that they were entitled so to act in the giving of orders under these acts.

The majority of the court are not inclined to regard the word "order," in the National Defense Act, in the provision which authorizes the placing of orders which are to have priority over civil contracts, as necessarily exclusive of orders which the

government has placed and put into a writing which appears to be contractual, because a price to be paid is stated therein and signed by both parties. The Century Dictionary defines the verb "order" as meaning: "To command to be made, done, issued, etc.; give a commission for; require to be supplied or furnished; as to order goods through an agent."

Contract—breach
—interference
by government
—effect of form
of contract.

The same authority defines the noun as: "Authoritative direction; injunction; mandate; command, whether oral or written; instruction, as, to receive orders to march; to disobey orders."

And when a manufacturer is given to understand that he is required to supply certain goods to the government of the United States, and is told that he has no option to decline to comply, we are satisfied that as to those goods an "order" has been placed or received, within the spirit and intent and the letter of the statute, whether the authoritative direction is written or oral, and notwithstanding the fact that the parties actually come to an agreement in what has the form of a contract. Substance is not to be sacrificed in such cases to form.

The fundamental rule and "pole star of statutory construction" is to ascertain and give effect to the intention of the legislature. In pursuance of that purpose, the courts have established the rule that a statute must be construed with reference to the object intended to be accomplished by it (*United States v. Musgrave* (D. C.) 160 Fed. 700, *St. Louis & S. F. R. Co. v. Delk*, 89 C. C. A. 169, 162 Fed. 145); that the spirit or reason of the law will prevail over its letter (*Church of the Holy Trinity v. United States*, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511; *Wilkinson v. Leland*, 2 Pet. 627, 7 L. ed. 542); that words in common use are to be construed in their natural, plain, and ordinary signification (*Lake County v. Rollins*, 130 U. S. 662, 32 L. ed. 1060, 9 Sup. Ct. Rep.

651); that if a legislative intent can unmistakably be gathered from title, text, context, and the background of common knowledge, it is as much a part of the act, as said by the circuit court of appeals for the seventh circuit, as if it were all written out in the clearest words (Ross v. Schooley, 168 C. C. A. 374, 257 Fed. 290).

The majority of the court is also satisfied that the officials of the United States gave the plaintiff to understand that it was required to manufacture the supplies demanded

of it, that it had no right to refuse to comply, and that with this understanding the supplies were furnished. That being so, effect should be given to the intent of the Congress that civil contracts should be postponed to orders compulsorily placed.

Sale—effect of commandeering seller's product by government for war purposes.

Judgment affirmed in both cases.

Writ of certiorari denied by the Supreme Court of the United States, June 7, 1920, 253 U. S. 498, 64 L. ed. 1031, 40 Sup. Ct. Rep. 588.

ANNOTATION.

Rights of parties to contracts the performance of which is interfered with, or prevented, by war conditions, or acts of government in prosecution of war.

I. Introduction, 1429.

II. In general:

- a. Where subject-matter of contract or means of performance has been requisitioned, or put under governmental control, 1429.
- b. Effect of requisition of chartered vessel, 1430.
- c. Where performance involves doing of illegal act, 1430.
- d. Change in conditions due to war as destroying basis of contract, 1431.

III. Effect of provision in contract suspending or excusing performance in certain contingencies:

- b. As covering situation occasioned by war:
 1. In charter parties or bills of lading, 1432.
 2. In contracts of sale, 1432.

I. Introduction.

The earlier cases discussing the above question are collected in the annotation in 3 A.L.R. 21, and the supplementary annotation in 9 A.L.R. 1509.

II. In general.

- a. Where subject-matter of contract or means of performance has been requisitioned, or put under governmental control.

(Supplementing annotations in 3 A.L.R. 22, and 9 A.L.R. 1510.)

It will be observed that in the reported case (ROXFORD KNITTING CO. v. MOORE & TIERNEY, ante, 1415) the court decided that a vendee of knitted goods could not recover damages from a manufacturer of such goods, for delay in delivery under its contract, where the government under statutory authority placed orders with the manufacturer for immediate delivery, and compliance with these orders prevented the fulfilment of the manufacturer's contract with the vendee.

And it has been held a defense to an action for breach of a contract to have a certain number of empty cars for plaintiff's use at a specified time, that no cars were obtainable at the time fixed, or until the date on which they were furnished, because the railroads were in the hands of the United States government, primarily for the supply of its needs in the war, and because of the governmental war needs, and the imperative duty to give precedence to the shipments of the government. Underwood v. Hines (1920) — Mo. App. —, 222 S. W. 1087.

(For the general subject of car shortage as affecting liability of carrier for failure to furnish cars, see annotation in 10 A.L.R. 342.)

In Kneeland-Bigelow Co. v. Michigan C. R. Co. (1919) 207 Mich. 546, 174 N. W. 605, where, after a contract

was entered into with a carrier, it was ousted from possession and control of its system by the Federal government in the exercise of war-time power, it was held that a bill for specific performance could not be maintained against the carrier, it appearing that the government was fulfilling the contract, except as to rates, and that none of the carrier's officials imposed the conditions complained of. The court stated that a decree against the carrier, which had been ousted and was incapable of performance, would be a vain thing, and further said: "For disposition of the issue directly involved, we deem it sufficient to find and hold that, by a war-measure interposition of the sovereign governmental power, this contract was rendered unenforceable, for the time being at least, and so long as such interposition is maintained by vis major."

In *Primos Chemical Co. v. Fulton Steel Corp.* (1920) 266 Fed. 945, a vendor of a crane, to be manufactured under a contract calling for delivery at a specified time, and providing that the vendor did not assume liability from loss from any cause beyond its control, was held not entitled to recover for the crane, which was not delivered at the time agreed, although the delay might have been due to orders before contracted for, as to which priority certificates had been issued by the government. The court recognized, however, that such a cause would constitute a defense to an action by the vendee for damage due to the delay.

In *Bernhardt Lumber Co. v. Metzloff* (1920) 184 N. Y. Supp. 289, it was stated that the rule is that, when a party by his own contract creates a duty or charge upon himself, he is bound to make it good notwithstanding accident or delay by inevitable necessity, because he might have provided against it by his contract, and it was held that, assuming that the vendor of shooks had proved its allegation that it had not been able to fulfil its contract because of a railroad embargo on cars, caused by the war, and labor troubles, that this would have been no defense for the failure to perform.

b. Effect of requisition of chartered vessel.

(Supplementing annotations in 3 A.L.R. 24, and 9 A.L.R. 1510.)

In *Prescott & Co. v. J. B. Powles & Co.* (1920) — Wash. —, 193 Pac. 680, where a vendor of 300 crates of onions sought to recover from the vendee for damage resulting from a refusal to accept 240 crates, which were shipped, it was held that the vendor was not excused from making full delivery because the United States government, as a war measure, commandeered the only available shipping space for its necessities. The court stated that, had the vendor been sued for damages for failure to ship the full order, the government's act might have afforded a defense, but that, having sued on the contract, it was essential to a recovery that a full performance be shown, and that no excuse not provided for in the contract would justify a recovery where the performance was partial only, save an act of the vendee rendering performance impossible, or a waiver by it.

c. Where performance involves doing of illegal act.

(Supplementing annotations in 3 A.L.R. 26, and 9 A.L.R. 1513.)

In *Jersey City Cream Co. v. Banner Cone Co.* (1920) — Ala. —, 86 So. 382, where, after a contract for a quantity of ice cream cones was made and partly carried out, the government placed war restrictions upon the use of the main ingredients entering into the manufacture of cones, it was held that the full performance of the contract was excused, it appearing that as many cones had been manufactured and shipped as were allowed under the government restrictions.

And in *Standard Chemicals & M. Corp. v. Waugh Chemical Corp.* (1920) 185 N. Y. Supp. 207, it was held that the order of the President, acting pursuant to the Lever Act, fixing the maximum price of oleum, and making it effective on a certain date, and declaring it unlawful to sell and deal in oleum for more than the price fixed, applied to contracts existing before the issuance of the order, and that such order rendered further perform-

ance of a contract, made before the issuance of the order, for the delivery of oleum after the date on which the order became effective, at a greater price than the maximum named in the order, wholly illegal and unenforceable at the reduced price fixed by the order. In reaching its conclusion, the court called attention to the fact that the parties must be presumed to have known the provisions of the Lever Act, which was enacted prior to the making of the contract, and, in deciding that the price-fixing agreement affected contracts made before its issuance, attention was called to a provision of the act authorizing the President specifically to fix the price of coal and coke, and exempting contracts previously entered into for those commodities.

The proclamation, however, of the existence of a state of war between the United States and Germany, has been held not to release a domestic steamship company from the obligation of its contract entered into with another domestic corporation, and providing for the transportation of nitrate from a neutral country of South America to a port in the United States, since the outbreak of war with Germany did not make such contract illegal of performance as a matter of fact. *Luckenbach S. S. Co. v. W. R. Grace & Co.* (1920) — C. C. A. —, 267 Fed. 676, writ of certiorari denied in (U. S. Adv. Ops. 1920-21, p. 48) — U. S. —, 65 L. ed. —, 41 Sup. Ct. Rep. 14.

d. Change in conditions due to war as destroying basis of contract.

(Supplementing annotations in 3 A.L.R. 32, and 9 A.L.R. 1515.)

In *Cooper v. Neilson & Maxwell* [1918] Vict. L. R. 583, where the defendants contracted to sell a quantity of continental mild steel bars, which expression the evidence showed had no trade meaning, although the bulk of such steel had been manufactured in Germany, it was held that they were not excused from carrying out their contract on the theory that performance had become illegal by reason of the outbreak of war between Great Britain and Germany, or that the con-

tract was entered into on the basis that it should be performed by the defendant procuring the steel from Germany or Belgium, and by "shipment" from points in those countries. In reaching the decision it was held that the words, "the works," in a condition relieving the defendants from liability for breach in case of strikes, etc., at "the works," should be read as a condition protecting the vendor in the event of being compelled, or choosing, to have the goods manufactured, and the word "shipment," as used in the contract, was held not to limit the defendants to shipments from ports of Germany or Belgium. The court said: "The result of the authorities up to the present time appears to me to be as follows: Impossibility does not excuse performance, unless it is either so expressed, or unless it can be implied from the circumstances in which the contract was made that the parties agreed that impossibility arising from some particular cause should excuse performance. An alteration of circumstances, such as might, had it been contemplated at the time of the contract, have prevented the contract being entered into, to the knowledge of both parties, would not of itself be sufficient; for if that alone were sufficient, then every unexpected condition of things rendering performance impossible would excuse performance."

And in *Coal Dist. Power Co. v. Katy Coal Co.* (1919) 141 Ark. 337, 217 S. W. 449, where a contract was made to furnish electric power for a given purpose in a coal mine, and provided for a minimum consumption of current by the mine, it was held that the power company was not excused from liability for damage resulting from interruption in the service because of the breaking of certain insulators, on the ground that it was impossible to get the style of insulators required as some of the ingredients in the compound used in them were made in Germany, and on account of the World War could not be obtained, the court holding that the contract imposed an absolute duty on the power company to furnish current.

III. Effect of provision in contract suspending or excusing performance in certain contingencies.

b. As covering situation occasioned by war.

1. In charter parties or bills of lading.

(Supplementing annotations in 3 A.L.R. 43, and 9 A.L.R. 1521.)

In *Compagnie de Trefileries v. France & C. S. S. Co.* (1920) 192 App. Div. 709, 183 N. Y. Supp. 169, where the defendant, which owned and privately operated one British and six American vessels, which it was forbidden to take into the Mediterranean, made a contract to transport a specified amount of copper to Genoa, and a war clause, applicable to American vessels only, provided that, if at any time in the judgment of the company war hostilities were such as to make it unsafe or imprudent for its vessels to sail, the sailing might be postponed or canceled, and that in that event it might cancel the contract, and another war clause referring to vessels of all nationalities, so long as war existed, gave the company a right to abandon voyages in whole or in part, before or after commencement, and provided that the shipper or consignee should have no claim against the owners for loss caused by the abandonment, it was held that the defendant was relieved of any liability by reason of failure to furnish transportation, it appearing that during the war with Germany it had had some of its vessels torpedoed, and had determined in good faith that conditions of war hostilities rendered it unsafe and imprudent for its vessels to sail to Genoa, and abandoned its voyages there, except those undertaken by two ships, on both of which the plaintiffs were given an opportunity to ship; and it appearing further that the defendant offered to ship the copper to France.

The allegations of the existence of war with Germany, and that ships laden with nitrate from South America were liable to capture or destruction by German ships and submarines, which were suspected and rumored to be in the neighborhood of the trade routes to South America, were held

not sufficient to relieve the defendant from its obligation to carry nitrate, under a provision of the contract that enemies and "restraint of princes," rulers, and people were mutually excepted, no "restraint of princes" being shown by such allegations. *Luckenbach S. S. Co. v. W. R. Grace & Co.* (1920) 267 Fed. 676, writ of certiorari denied in (U. S. Adv. Ops. 1920-21, p. 48) — U. S. —, 65 L. ed. —, 41 Sup. Ct. Rep. 14.

2. In contracts of sale.

(Supplementing annotations in 3 A.L.R. 48, and 9 A.L.R. 1522.)

In *Lawrenceburg Roller Mills Co. v. Chas. A. Jones & Co.* (1920) — Ala. —, 85 So. 719, where the contract was made subject to government regulations, it was held unimportant whether Congress had power to give a war-time regulation retroactive effect; that the purpose of the provision of the contract was to give it prospective operation, and execution of the contract was held to have been rendered impossible of performance, where the delivery of the quantity of flour called for by the contract would have been in excess of that permitted to defendant under an act of Congress, and orders thereunder for his business requirements during a reasonable time.

In *Schoelkopf v. Moerkbach Brewing Co.* (1920) 184 N. Y. Supp. 267, the defendant, a brewing company, was held liable to pay the full amount agreed under an assignment of food and fuel privileges, which excused final payment if performance became unlawful, although a temporary suspension of the food restrictions was made by the government, so that for a time the food privilege was not needed, although the other privileges were.

In *Schmidt v. Wilson & Canham* (1920) 48 Ont. L. Rep. 257, where the defendants, who had contracted to sell a quantity of pelts to plaintiff, neglected, while an embargo was in force on pelts, to repudiate their contract under a provision thereof, reading "all contracts made contingent upon causes beyond our control," it was held that they could not repudiate it because of the embargo, after it had been lifted as to pelts. J. T. W.

CITY OF HAYS, Appt.,
v.
ALEX SCHUELER, JR.

Kansas Supreme Court — November 6, 1920.

(107 Kan. 635, 193 Pac. 311.)

Municipal corporations — requiring lights on automobiles — innocent omission.

A city ordinance regulating operation of motor vehicles on streets of the city, and requiring a red rear light to be displayed between certain hours, may impose a penalty for its violation without making a specific intent or guilty mind an essential element of the misdemeanor.

[See note on this question beginning on page 1434.]

Headnote by BURCH, J.

APPEAL by the city from a judgment of the District Court for Ellis County (Purcell, J.) quashing a complaint charging defendant with violating a city ordinance. *Reversed.*

The facts are stated in the opinion of the court.

Mr. C. M. Holmquist, for appellant:

The complaint is sufficient and describes the offense substantially in the language of the ordinance.

Lincoln Center v. Linker, 7 Kan. App. 282, 53 Pac. 787; State v. Furney, 41 Kan. 115, 13 Am. St. Rep. 262, 21 Pac. 213, 8 Am. Neg. Rep. 131.

The ordinance in question is not bad and unconstitutional.

4 Am. & Eng. Enc. Law, 681; Bishop, Crim. Proc. § 521; State v. Bush, 45 Kan. 139, 25 Pac. 614; Emporia v. Becker, 76 Kan. 181, 12 L.R.A. (N.S.) 946, 90 Pac. 798; Reg. v. Tolson, L. R. 23 Q. B. Div. 168, 58 L. J. Mag. Cas. N. S. 97, 60 L. T. N. S. 899, 37 Week. Rep. 716, 16 Cox, C. C. 629, 54 J. P. 4, 8 Eng. Rul. Cas. 16, 8 Am. Crim. Rep. 59; State v. Myette, 30 R. I. 556, 76 Atl. 664; People v. Roby, 52 Mich. 577, 50 Am. Rep. 270, 18 N. W. 365; State v. Nicolls, 61 Wash. 142, 112 Pac. 269, Ann. Cas. 1912B, 1088.

Mr. E. A. Rea for appellee.

Burch, J., delivered the opinion of the court:

The defendant was convicted in police court of violating a city ordinance, and appealed to the district court. The district court quashed the complaint, on the ground the ordinance was void. The city appeals.

The ordinance regulated operation of motor vehicles on streets of the city, and required a rear red light to be displayed between certain hours after sunset and before sunrise. The motion to quash asserted the ordinance was bad because wilfulness or wrongful intent was not made an element of the offense, and stated argumentatively that a light might go out without wilfulness or intentional fault, and in spite of the utmost care.

If it were necessary to validity of an ordinance that conditions of the character indicated in the motion to quash should be inserted, the full protection which the regulation is designed to afford could not be secured, and evasion would be so easy the regulation would practically, if not utterly, fail. The regulation falls, therefore, within the numerous class in which diligence, actual knowledge, and bad motives are immaterial, and the fact of noncompliance entails penalty. Instances of such regulations are noted in the case of Wagstaff v. Schippel, 27 Kan. 450, at page 458;

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sale of adulterated milk; sale of liquor to minors; forfeiture of ship having smuggled goods on board, although owner and officers may be innocently ignorant; and other fiscal and police regulations.

In the case of *State v. Bush*, 45 Kan. 138, 25 Pac. 614, the statute involved penalized any city clerk who registered voters who did not personally appear and apply for registration. There was no reference to any specific intent. It was held that none was necessary except intent to commit the interdicted act, and that intention would be inferred from commission of the act. In the cases of *State v. Moulton*, 52 Kan. 69, 34 Pac. 412, and *State v. Rennaker*, 75 Kan. 685, 90 Pac. 245, it was held that ignorance of the intoxicating character of a beverage sold would not exempt the seller from prosecution for selling intoxicating liquor. In the case of *Emporia v. Becker*, 76 Kan. 181, 12 L.R.A.(N.S.) 946, 90 Pac. 798, an agent in charge of a store was fined for conducting business without payment of a license tax. The agent did not know his

principal, the owner of the store, had not paid the tax. In the opinion it was said: "Breach of the ordinance is made a misdemeanor, and a specific intent or guilty mind is not an essential element. Ordinances and statutes similar to the one in question may impose penalties irrespective of any intent to violate them. It is immaterial that the appellant may not have intended to break the ordinance, as he became a lawbreaker and subject to punishment when he did the things prohibited by the ordinance." 76 Kan. 184.

The distinction between offenses of this character and those involving conduct *malum in se*, and so necessarily requiring an intent to do wrong, is illustrated in the case of *State v. Eastman*, 60 Kan. 557, 57 Pac. 109, 11 Am. Crim. Rep. 386. See also *State v. Brown*, 38 Kan. 390, 16 Pac. 259, 8 Am. Crim. Rep. 165.

The judgment of the District Court is reversed, and the cause is remanded; with direction to deny the motion to quash.

ANNOTATION.

Validity and construction of statutes or ordinances which make noncompliance with motor vehicle regulations a penal offense without reference to intent, fault, or knowledge.

The general principles which apply to the specific question under consideration have been declared in their broader aspects as follows: "As there is an undoubted competency in the lawmaker to declare an act criminal irrespective of the knowledge or motive of the doer of such act, there can be of necessity no judicial authority having the power to require in the enforcement of the law such knowledge or motive to be shown. In such instances the entire function of the court is to find out the intention of the legislature and to enforce the law in absolute conformity to such intention. And in looking over the decided cases on the subject it will be found that in the considered adjudications this inquiry has been the judicial

guide." *Halstead v. State* (1879) 41 N. J. L. 552, 32 Am. Rep. 247.

So, although *prima facie* and as a general rule there must be a mind at fault before there can be a crime, it is not an inflexible rule, and a statute may relate to such a subject-matter and may be so framed as to make an act criminal whether there has been any intention to break the law or otherwise to do wrong or not. *Reg. v. Tolson*, L. R. 23 Q. B. Div. 168, 16 Cox. C. C. 629, 54 J. P. 4, 58 L. J. Mag. Cas. N. S. 97, 60 L. T. N. S. 899, 37 Week. Rep. 716, 8 Eng. Rul. Cas. 16, 8 Am. Crim. Rep. 59.

And in 8 R. C. L. 62, it is said: "Whether a criminal intent or guilty knowledge is a necessary element of a statutory offense is a matter of con-

struction, to be determined from the language of the statute in view of its manifest purpose and design. There are many instances in recent times where the legislature in the exercise of the police power has prohibited under penalty the performance of a specific act. The doing of the inhibited act constitutes the crime, and the moral turpitude or purity of the motive by which it was prompted, and knowledge or ignorance of its criminal character, are immaterial circumstances on the question of guilt. The only facts to be determined in these cases is whether the defendant did the act. In the interest of the public the burden is placed upon the actor of ascertaining at his peril whether his deed is within the prohibition of any criminal statute."

In accord with the above principles, a statute making possession of a motor vehicle with the manufacturer's serial numbers removed a penal offense, was held in *People v. Johnson* (1919) 288 Ill. 442, 4 A.L.R. 1535, 123 N. E. 543, to be a valid exercise of the police power, as against the contention that one might be guilty under this act by having a car in his possession from which the numbers had been removed without his knowledge. The court stated that the Constitution does not require that scienter be a necessary element of any law where an offense is *malum prohibitum*, and that one may violate the law without any intent on his part to do so.

Nor is such a statutory provision an illegal deprivation of liberty or property or a denial of equal protection of the laws because of the fact that it creates a crime without guilty knowledge or intent, since the manufacturer's serial number or distinguishing marks may have been changed without the knowledge of the person having possession of the motor vehicle, and may have been changed before the law went into effect. *People v. Fernow* (1919) 286 Ill. 627, 122 N. E. 155.

And in *People v. Schoepflin* (1912) 78 Misc. 62, 137 N. Y. Supp. 675, one who drove a motor vehicle upon a public highway without having a distinc-

tive number corresponding to a proper certificate of registration conspicuously displayed both on the front and on the rear of such vehicle, in violation of the highway law, was held to have been properly convicted without regard to any criminal intent. The court stated that it could not see any distinction between the case at bar and adulterated milk cases or cases involving the selling of intoxicating liquors to minors, which have been held to be an exercise of police power; that is, that the acts prohibited were a menace to the public health or morals and to be classified as *mala prohibita*. And the court added: "I appreciate that the purpose of the legislature to dispense with the necessity of providing specific criminal intent, either expressly or impliedly, in any case, should be clear. Furthermore, it is true, as counsel argues, that to hold this statute as not requiring proof of specific criminal intent would often seem to work oppression. However, the same argument would apply in the adulterated milk cases and similar cases. It may be true that the likelihood of harm being caused by the doing of acts here involved may not be so great as in the case of selling adulterated milk; but as to this, I feel that it is merely a matter of difference in degree, and not one of classification as between *mala prohibita* and *mala in se*. Therefore, since the legislature did not state in this statute that the prohibited acts must be done with specific criminal intent, since no such words as 'maliciously,' 'wilfully,' 'voluntarily,' or 'knowingly,' so often found in statutes defining crimes, is here used, and since the general situation involved strikes me as one warranting legislative action in the exercise of the police power for the purpose of protecting the public from physical injuries and of promoting the public safety thereby, I must affirm the judgment." It does not appear from the report of the case whether the claim of lack of criminal intent was predicated upon ignorance of fact that the car did not bear a distinctive number corresponding to

the license, or to ignorance of the requirement of the law itself.

Also a motor vehicle law which limits the rate of speed in the business portions of a city is not invalid as unreasonable or as violating the due-process clause of the Constitution in that there may be difficulty in determining in any case whether territory at a particular point is a business district of the city. *People v. Dow* (1908) 155 Mich. 115, 118 N. W. 745.

These cases, it will be seen, support the decision in the reported case (*HAYS v. SCHUELER*, ante, 1433), upholding a municipal ordinance penalizing the failure to display a rear light on an automobile, without making intent an element of the offense. It is clear from the opinion that it is no objection to the ordinance that it may penalize one whose light is out without knowledge or fault on his part.

So, too, in construing motor vehicle regulations, it has been held that one who drives an automobile at a rate of speed prohibited by statute is guilty of a violation of the statute without regard to his intent. *Goodwin v. State* (1911) 63 Tex. Crim. Rep. 140, 138 S. W. 399.

And in *People v. Thexton* (1914) 188 Ill. App. 2, it was held that one who violates a state law is liable to a penalty for such violation although he may have had no intent to violate the law.

And that lack of intent does not excuse the infraction of a police regulation was the basis of the decision in *State v. Ferry Line Auto Bus Co.* (1917) 99 Wash. 64, 168 Pac. 893, which held that an employee of an auto stage company was guilty of violating the statute prohibiting the operation of auto stages without a license, although he had no knowledge of the fact that the company did not have an auto stage license.

So, also, in *People v. Harrison* (1918) 183 App. Div. 812, 170 N. Y. Supp. 876, a prosecution for violation of an ordinance which provided that no person shall "cause or permit" a motor vehicle to be operated in a careless or negligent manner, and which

further provided that a certain rate of speed should constitute prima facie evidence of a violation of the ordinance, it was held that knowledge or intention formed no element of the offense, since the offense described was *malum prohibitum*. And see *People v. Morosini*, N. Y. L. J. April 18, 1918, cited in *Huddy on Automobiles*, p. 954, to same effect.

The court in the *Harrison* Case stated that the prohibition was "unqualified by any words like "wilfully" or "knowingly" or "intentionally," or the like. And, the court added, "the sole defense is the owner's statement that, although he was in his vehicle, 'I didn't know whether we were going fast or not—I was talking to my wife in the car.' If this were a defense, then the owner of the vehicle could always escape the obligation of the law by the plea of his disregard of his obligation, in that he was voluntarily occupied in some social function, or even that he was asleep or woolgathering. Thus, the owner would be careful to shut his eyes for immunity, lest with them open he might be convicted."

And in *Rex v. Labbe* (1910) 17 Can. Crim. Cas. 417, it was held that under the section of the Quebec Motor Vehicle Act which provided that "the owner of a motor vehicle for which a certificate is issued under this section shall be held responsible for any violation thereof or of any regulation provided thereunder by order of the lieutenant governor and council; and shall be responsible for all accidents or damages caused by his motor vehicle upon a highway or public square,"—the owner of an automobile could be held liable for violation of speed regulations by a repair man at the auto garage where the machine had been taken for repairs, who had taken the machine out without the knowledge of the owner. The court stated that under the statute the owner is made responsible without any regard to guilty intent or *mens rea*.

In *People v. Fodera* (1917) 33 Cal. App. 8, 164 Pac. 22, a prosecution for violation of statute requiring drivers of automobiles colliding with other

vehicles to stop and render assistance to the occupants of the vehicle collided with, and who may have been injured by such collision, it was contended that the statute under which the prosecution was had was unconstitutional for the reason that it did not expressly embody in its phraseology words limiting its application to those persons who knowingly caused their vehicles to collide with those occupied by others. But the court in upholding the constitutionality of the statute said: "Our reading of the section in question convinces us that the element of knowledge of the fact of a collision is necessarily to be implied from the requirement of the act, to the effect that drivers of such vehicles must stop and render aid to those who may possibly have been injured in the collision. Moreover, § 20 of the Penal Code, which is to be read together with and into the section under review, provides that 'in every crime or public offense there must exist a union or joint operation of acts and intent or criminal negligence.' We are of the opinion that the act is not unconstitutional."

However, in a prosecution under a statute declaring that one operating a motor vehicle who, "knowing" that an injury has been caused to a person or property due to his culpability or to accident, leaves without giving his name, residence, and operator's license number, or reporting the same to the nearest police station or office, shall be guilty of felony,—it was said in *People v. Curtis* (1916) 217 N. Y. 304, 112 N. E. 54, Ann. Cas. 1917E, 586, apparently as a matter of construction of the terms of the statute, that it was essential to a conviction in a case of a collision due to the skidding of defendant's car that the jury should be satisfied beyond a reasonable doubt that defendant knew that an injury had been caused. It was so declared, notwithstanding that it was apparently admitted that the defendant knew of the fact of the colli-

sion. There was, however, evidence that defendant was assured by a companion that there had been no injury as the result thereof; and it does not seem probable that the court, as the statement might seem to imply, meant that defendant's ignorance of the fact of injury would be a defense, even though he made no effort to learn the facts in that regard.

But the knowledge of injury to personal property within the meaning of the statute requiring the operator of a motor vehicle to stop it did not mean an absolute, positive knowledge; if injury is inflicted under such circumstances as would ordinarily superinduce the belief in a reasonable person that injury would flow, or had flowed, from the accident or collision, then it is the duty of the motor operator to stop his vehicle. *Woods v. State* (1916) 15 Ala. App. 251, 73 So. 129.

In *Com. v. Horsfall* (1913) 213 Mass. 232, 100 N. E. 362, Ann. Cas. 1914A, 682, under a statute making it an offense for one operating an automobile to "knowingly" go away without stopping and making himself known after causing an injury, it was held that if one delegates the duty of revealing his identity to an agent, and honestly and in good faith supposes that the delegated duty has been performed, he cannot be said "knowingly" to have failed to do what the statute required, even if his agent did not discharge his duty. The court observed that there are many statutes which prohibit the performance of a certain act without regard to the intent of the actor or his knowledge that elements are present which constitute the crime; and that it would have been simple for the legislature to have made the act of going away by the driver of an automobile without making himself known, after injuring person or property, a crime, and this would have been accomplished by omitting the word "knowingly" from the statute.

J. H. B.

A. H. BRYSON, Admr., etc., of Walter C. Bryson, Deceased, Plff. in Err.,
v.

WALKER D. HINES, Director General of Railroads, et al.

EMMA C. SWANN, Admr., etc., of Philetus C. Swann, Deceased, Plff. in Err.,
v.

SAME.

United States Circuit Court of Appeals, Fourth Circuit — July 12, 1920.

(— C. C. A. —, 268 Fed. 290.)

War — injury of soldier through negligence of government — liability.

1. No recovery can be had for the death of a soldier in a railroad accident, due to the negligence of the War Department of the government in failing to put and keep railroad tracks located in a military reservation in proper condition.

[See note on this question beginning on page 1443.]

Negligence — unsafe railroad track — acceptance by government — liability of contractor.

2. One constructing a railroad track in a military reservation in such a defective manner as to render it a menace to the life of everyone transported over it cannot escape liability for the death of a soldier, due to such condition, on the ground that the track had been accepted and operated by the government.

State — right of negligent contractor to share governmental exemption from suit.

3. One who constructs an unsafe railroad track which is turned over to the government for use as part of a military reservation is not exempted from liability for injury caused by its unsafe condition, by the fact that the government is exempt from suit.

Evidence — assumption by court — requirements of government.

4. The court will not assume as matter of law that the government required construction of a railroad track in a military reservation in such manner as to imperil the life of every soldier who passed over it.

Trial — jury — negligence in operation of trains.

5. The jury must determine whether or not the running of a train 8 or 10 miles an hour over a track, with respect to which evidence shows that it should not have been above 4 to 6 miles per hour, is negligence.

[See 4 R. C. L. 1209.]

Constitutional law — destruction of vested right — right of action.

6. A vested right of action against a railroad company for negligent killing of a soldier cannot be taken away by a government circular, requiring such claims to be settled by the Bureau of War Risk Insurance.

State — withdrawal of right to sue.

7. Governmental permission to sue for injuries caused by negligence of government officers may be withdrawn at any time before judgment.

[See 25 R. C. L. 416.]

— retroactive effect of withdrawal of right.

8. The withdrawal by the government of the right to sue for injuries caused by operation of roads under government control will not be construed to apply to existing rights of action, unless that intention is expressed or plainly implied.

War — liability for injury due to negligence of Army officers.

9. Neither a railroad company constructing an unsafe track for a government military reservation, nor the Director General of Railroads operating trains over it, is liable for injury caused by negligence of Army officers in placing light wooden cars between heavy steel ones in trains operated over the track, where the officers had entire control over the arrangement of cars.

ERROR to the District Court of the United States for the Western District of North Carolina (Boyd, Dist. J.) to review a judgment in favor of defendants in consolidated actions brought to recover damages for the death of plaintiffs' intestates, alleged to have been caused by defendants' negligence. *Reversed.*

The facts are stated in the opinion of the court.

Argued before Pritchard and Woods, Circuit Judges, and Rose, District Judge.

Messrs. James J. Britt, Zeb F. Curtis, Harkins & Van Winkle, and D. W. Robinson, for plaintiffs in error:

A railroad company cannot relieve itself from liability for negligence by its act or agreement in placing its train or employees under the control or direction of another.

Wabash, St. L. & P. R. Co. v. Peyton, 106 Ill. 534, 46 Am. Rep. 706; Wisconsin C. R. Co. v. Ross, 142 Ill. 9, 34 Am. St. Rep. 52, 31 N. E. 412; Chesapeake & O. R. Co. v. Osborne, 97 Ky. 112, 53 Am. St. Rep. 408, 30 S. W. 21; White v. Norfolk & S. R. Co. 115 N. C. 634, 44 Am. St. Rep. 490, 20 S. E. 169; Piedmont Mfg. Co. v. Columbia & G. R. Co. 19 S. C. 368; Oliver v. Columbia, N. & L. R. Co. 65 S. C. 30, 43 S. E. 307; Ogdensburg & L. C. R. Co. v. Pratt, 22 Wall. 123, 133, 22 L. ed. 827, 831; Kirkland v. Charleston & W. C. R. Co. 79 S. C. 276, 15 L.R.A. (N.S.) 425, 128 Am. St. Rep. 848, 60 S. E. 668; Reed v. Southern R. Co. Carolina Div. 75 S. C. 170, 55 S. E. 218; New York C. R. Co. v. Lockwood, 17 Wall. 357, 21 L. ed. 627, 10 Am. Neg. Cas. 624; Clark v. Geer, 32 C. C. A. 301, 57 U. S. App. 473, 86 Fed. 447; 5 R. C. L. § 698, p. 59; 20 R. C. L. § 89, pp. 102, 103; Belamy v. Conway Coast & W. R. Co. 85 S. C. 454, 67 S. E. 545; Cole v. German Sav. & L. Soc. 63 L.R.A. 416, 59 C. C. A. 596, 124 Fed. 113, 14 Am. Neg. Rep. 676; 20 R. C. L. 102, § 89; Whitnack v. Chicago, B. & Q. R. Co. 82 Neb. 464, 19 L.R.A. (N.S.) 101, 130 Am. St. Rep. 692, 118 N. W. 67; Carson v. Southern R. Co. 68 S. C. 64, 46 S. E. 525, 194 U. S. 139, 48 L. ed. 910, 24 Sup. Ct. Rep. 609; Illinois C. R. Co. v. Siler, 229 Ill. 390, 15 L.R.A. (N.S.) 823, 82 N. E. 362; 11 Ann. Cas. 368; McAllister v. Chesapeake & O. R. Co. 243 U. S. 810, 61 L. ed. 741, 37 Sup. Ct. Rep. 274; Mayfield v. Atlanta & C. Air Line R. Co. 79 S. C. 563, 61 S. E. 106; Rookard v. Atlanta & C. Air Line R. Co. 84 S. C. 191, 27 L.R.A. (N.S.) 435, 137 Am. St. Rep. 839, 65 S. E. 1047; Logan v. Atlanta & C. Air Line R. Co. 82 S. C. 527, 64 S. E. 515;

Jackson v. Southern R. Co. 77 S. C. 553, 58 S. E. 605; Case v. Atlanta & C. Air Line R. Co. 225 Fed. 866; Jenkins v. Atlantic Coast Line R. Co. 89 S. C. 412, 71 S. E. 1010; Carlton v. Southern R. Co. 93 S. C. 354, 76 S. E. 984.

Where a passenger is injured or killed by some agency or instrumentality of a carrier, the law raises a presumption of negligence, and the carrier must prove absence of negligence.

Broom v. Atlantic Coast Line R. Co. 96 S. C. 375, 80 S. E. 618; Gleason v. Virginia Midland R. Co. 140 U. S. 435, 35 L. ed. 463, 11 Sup. Ct. Rep. 859; Shelton v. Southern R. Co. 86 S. C. 105, 67 S. E. 899; Williford v. Southern R. Co. 85 S. C. 303, 67 S. E. 302; McKittrick v. Greenville Traction Co. 88 S. C. 97, 70 S. E. 414; Stembridge v. Southern R. Co. 65 S. C. 447, 43 S. E. 968; Ritter v. Atlantic Coast Line R. Co. 83 S. C. 213, 65 S. E. 175; Thompson v. Atlantic Coast Line R. Co. 113 S. C. 261, 102 S. E. 12; Charleston & W. C. R. Co. v. Alwang, 169 C. C. A. 313, 258 Fed. 299.

A right of action to recover damages for an injury is property.

Re Mayo, 60 S. C. 413, 54 L.R.A. 660, 38 S. E. 634; McLendon v. Columbia, 101 S. C. 56, 5 A.L.R. 990, 85 S. E. 234; Bennett v. Spartanburg R. Gas & E. Co. 97 S. C. 29, 81 S. E. 189; Watson v. Southern R. Co. 66 S. C. 51, 44 S. E. 375; Rish v. Seaboard Air Line R. Co. 106 S. C. 144, 90 S. E. 704; Angle v. Chicago, St. P. M. & O. R. Co. 151 U. S. 19, 38 L. ed. 65, 14 Sup. Ct. Rep. 240; Bultman v. Atlantic Coast Line R. Co. 103 S. C. 516, 88 S. E. 279; Lynchburg v. Mitchell, 114 Va. 229, 76 S. E. 286; Williamsport Hardwood Lumber Co. v. Baltimore & O. R. Co. 71 W. Va. 741, 77 S. E. 334.

Circular No. 4 is retroactive.

Cooley, Const. Lim. 7th ed. p. 255; Jensen v. Lehigh Valley R. Co. 255 Fed. 796.

If construed as retroactive, it is void, and deprives the plaintiffs of their property without due process of law.

Ochoa v. Hernandez y Morales, 230 U. S. 160, 57 L. ed. 1437, 33 Sup. Ct. Rep. 1033; Benjamin Moore & Co. v. Atchison, T. & S. F. R. Co. 106 Misc.

58, 174 N. Y. Supp. 60; *West v. New York, N. H. & H. R. Co.* 233 Mass. 162, 123 N. E. 621.

It is not merely a change of remedy, but a destruction of a right.

McGregor v. Great Northern R. Co. — N. D. —, 4 A.L.R. 1641, 172 N. W. 841; *Friesen v. Chicago, R. I. & P. R. Co.* 254 Fed. 875; *El Paso & S. W. R. Co. v. Lovick*, — Tex. Civ. App. —, 210 S. W. 283; *Barry v. Port Jervis*, 64 App. Div. 268, 72 N. Y. Supp. 104, 10 Am. Neg. Rep. 539; *Angle v. Chicago, St. P. M. & O. R. Co.* 151 U. S. 19, 38 L. ed. 64, 14 Sup. Ct. Rep. 240.

Persons belonging to the military service are not, by reason of their military character, relieved of their duties and liabilities, or deprived of their rights as citizens.

20 Am. & Eng. Enc. Law, 2d ed. 661; 5 C. J. 364; *Charleston & W. C. R. Co. v. Alwang*, 169 C. C. A. 313, 258 Fed. 299.

Messrs. P. A. Willcox, A. L. Hardee, Thomas S. Rollins, Charles F. Patterson, and Martin, Rollins, & Wright for defendants in error.

Woods, Circuit Judge, delivered the opinion of the court:

On May 10, 1918, Walter C. Bryson and Philetus C. Swann, soldiers of Company A, 321st Regiment of Infantry, were killed in Camp Jackson Military Reservation by derailment of a train on which they were being transported under military orders. In separate actions for damages, tried together by consent, their administrators charge that the proximate cause of the derailment was negligence of the Atlantic Coast Line Railroad Company and the Director General of Railroads.

There was abundant evidence of acts of negligence alleged in the complaints, but the district court directed a verdict for the defendants, one of the grounds being that the right of recovery against the railroad company and the Director General for the injury or death of a soldier had been supplanted and taken away by the following circular:

United States Railroad Administration, Division of Law.

Washington, October 25, 1918.

Circular No. 4.

Attention is directed to the act of

Congress entitled "An Act to Amend an Act Entitled 'An Act to Authorize the Establishment of a Bureau War Risk Insurance in the Treasury Department,' " approved September 2, 1914, and for other purposes, approved October 6, 1917, Public Document No. 90, Sixty-fifth Congress (H. R. 5723).

This act establishes a system for compensating officers and enlisted men and women nurses of the Army and Navy Nurse Corps, when employed in active service under the War or Navy Departments of the government.

In case of railroad accidents, in order to avoid confusion and to effectuate a proper and uniform handling of the compensation claims of such injured and disabled persons who are entitled to receive compensation under the War Risk Act, upon the happening of any accident causing death, disablement, or injury to any officer, enlisted man, or member of the Army or Navy Nurse Corps (female) occurring on any line of railroad under Federal control, the General Solicitor will immediately notify J. H. Howard, Manager, Claims and Property Protection Section, Division of Law, Southern Railroad Building, Washington, D. C., giving the name and emergency address of the dead or injured person, his or her number, rank, and routing, and in the case of injured persons, his or her present address.

Such injured officers and enlisted men and members of the Army and Navy Nurse Corps (female) will be remitted to their claim for compensation through the War Risk Bureau and will not receive any payment through the Railroad Administration.

No claim for damages for injuries occasioning death or disablement of such persons should be recognized or entertained. The circumstances surrounding accidents should be investigated as heretofore and report filed.

The General Solicitor will notify general claim agents of this circular,

who will in turn notify all claim agents.

John Barton Payne, General Counsel.

Approved: W. G. McAdoo, Director General of Railroads.

We first give attention to the effort of defendants' counsel to sustain the instruction that no negligence was proved which can be imputed to either of the defendants.

Atlantic Coast Line Railroad Company constructed the road from Simm's station on its line into Camp Jackson. The sole purpose of construction was the transportation of troops and supplies and munitions for the construction and maintenance of the camp. The Southern and Seaboard Railroads paid part of the cost, under bills rendered by the Coast Line. This construction was completed before the Director General took charge of railroads under the President's proclamation of December 26, 1917. The portion of road which was inside the limits of Camp Jackson, on which the accident occurred, was acquired by the government, either by purchase from the Atlantic Coast Line Railroad Company, or under a contract with that railroad company for its construction as a part of the reservation. On demand for cars by the military authorities, they were carried into the reservation and brought out by an engine of the Coast Line, in charge of one of its engineers. Within the reservation the arrangement of the cars on the track and the entrainment of troops were under exclusive control of the military officers in charge. The maintenance and repair of the track was in exclusive control of the War Department.

The evidence tended strongly to show that the accident was due chiefly to the negligent construction by the Coast Line of a grossly and obviously unsafe track, and the negligence of the government in accepting the track, and in failing to make it safe after acquiring it. Colonel Frank, quartermaster, testifying to the cause of the accident, said: "I attribute it to the light class of rail

11 A.L.R.—91.

that was put in there and accepted by the quartermaster whom I relieved. I never would have accepted the track if I had been the quartermaster when it was constructed. After the accident, I examined the track and found it badly torn up—a rail broken, a few angle bars broken, a few spikes cut off. From my examination as to the cause of the accident, I would say poor construction. I know a little bit about engineering, and I think it is about the poorest piece of railroad construction I ever saw in my life. The trestle was built on a grade with an acute curve. That is why I asked for heavier rails, trying to make it safe. I also needed tie plates, angle bars, and angle braces. About six weeks before the accident, I had removed practically all of the ties at that place, one at a time, by the railroad crew, and put them back in, putting as many as five or six spikes in each tie, trying to hold it down until I could get heavier equipment, trying to prevent an accident, which I felt sure would happen some day. I had the railroad crew go over the track after every three passenger trains went out. They were light angle bars used on 35-pound rail."

Other witnesses gave like testimony as to the unsafe construction and bad condition of the track, and the consequent frequent derailments. Colonel Frank also testified that he wrote in vain several times to the Quartermaster Corps in Washington, stating the dangerous condition of the track, warning of impending accident, and asking that the road be made safe.

For this negligence of the War Department, of course, there can be no recovery. The defendants maintain that, although the road as constructed may have been an obvious menace to the life of every person transported over it, there is no liability on the builder for loss of life due to its negligence in that respect, for the reason that it was accepted and operated by the

War—injury of soldier through negligence of government—liability.

government, and that from the time of acceptance the government alone was responsible. For this defendants rely on the general rule that one injured by a dangerous or defective instrumentality in the hands of another person cannot recover against a third person who sold or furnished it, because of lack of privity of contract. *National Sav. Bank v. Ward*, 100 U. S. 195, 25 L. ed. 621. Cases citing this case and applying the rule are collated in *Rose's Notes*, 25 L. ed. 871.

But the opposite rule applies where the person selling or furnishing the article or instrumentality knows it to be dangerous, and also

Negligence—unsafe railroad track—acceptance by government—liability of contractor.

knows it will be used by other persons not aware of the danger; and this rule holds, even if the person to

whom the article was sold knows the danger. *Waters-Pierce Oil Co. v. Deselms*, 212 U. S. 159, 179, 53 L. ed. 453, 463, 29 Sup. Ct. Rep. 270; *O'Brien v. American Bridge Co.* 110 Minn. 364, 32 L.R.A.(N.S.) 980, 136 Am. St. Rep. 503, 125 N. W. 1012, and numerous authorities cited; *Huset v. J. I. Case Threshing Mach. Co.* 61 L.R.A. 303, 57 C. C. A. 237, 120 Fed. 865. In such case the additional tort of the buyer in concealing the danger does not cancel that of the seller; the person injured has his remedy against two wrongdoers, instead of one.

According to the testimony the Atlantic Coast Line Railroad Company constructed and turned over to the government a track which it could not fail to know was exceedingly dangerous, and which it certainly knew was to be used to transport thousands of soldiers. There is not a particle of evidence that the soldiers killed knew of the dangerous nature of the track. But it would make no difference if they had known, because the builder of the road knew their knowledge would avail nothing; for it knew the controlling fact that the soldiers who were to be transported had no

power to reject the track, or to have it repaired or reconstructed, or to refuse to travel over it. Does not the argument come clearly to this? The railroad company, in breach of its duty, constructed and delivered to the government an unsafe track, which it knew would endanger the lives of soldiers forced to travel upon it, yet this breach of duty was canceled by the breach of duty of officers of the government in using the track in an unsafe condition. This amounts to saying that an original wrongdoer is released when another takes up and continues the wrong. The statement of the argument carries its own refutation, and it is disposed of by the Supreme Court in *Waters-Pierce Oil Co. v. Deselms*, supra, and other authorities cited.

The exemption of the government from suit does not affect the liability of the railroad company. It follows that, if the negligent construction described in the

State—right of negligent contractor to share governmental exemption from suit.

testimony was a proximate cause of the accident, the plaintiffs had a vested right of action against the railroad when it occurred on May 10, 1918. It is admitted that if there was such a vested right of action it was not affected by Circular No. 4. This conclusion would result in a reversal of the judgment.

It was earnestly pressed at the argument that the Atlantic Coast Line was not responsible for negligent construction, because of the haste required of it by the government. This defense is without support, either in the allegation of the answer or the testimony. We cannot assume as a matter of law that the government required of the Coast Line the construction of a track which imperiled the life of every soldier who passed over it.

Evidence—assumption by court—requirements of government.

We think there was also evidence of actionable negligence in the

operation of the train by the Director General. According to the evidence the train was running at a speed of from 8 to 10 miles an hour, and this was the usual speed. There was evidence to the effect that the track was in such bad condition that two or three cars were derailed on it every day. One witness of long experience on railroads testified that

**Trial—jury—
negligence in
operation of
trains.**

on such a track the speed should not have been over 4 to 6 miles an hour. It

was therefore for the jury to say whether the speed of the train was high enough to be negligent.

As already observed, Circular No. 4 could not take away any cause of action for the negligence of the Atlantic Coast Line Railroad Com-

**Constitutional
law—destruc-
tion of vested
right—right of
action.**

pany, for it existed and was a vested right before that circular was issued.

The right of action

had also accrued against the Director General under the Federal statutes and proclamations of the President, if the train was negligently run. As the Director General was an officer of the government, the right of action was in effect against the government, and

**State—with-
drawal of
right to sue.**

was dependent upon the permission and grant of the govern-

ment found in these statutes and proclamations. This permission and grant could, of course, be withdrawn at any time before the judgment. We do not discuss the question whether Circular No. 4, issued by the Director General, had the force of an act of Congress withdrawing the grant or permission to sue him, for the reason that, if the Director General had such power

and exercised it, we do not think he expressed in the circular the intention that it should have the retroactive effect of destroying rights of actions which had already accrued. Statutes are never construed to act retrospectively, unless the legislative effect is clearly expressed or necessarily implied.

**—retroactive
effect of with-
drawal of right.**

When retrospective operation of the statute would result in injustice, the presumption against such a legislative intent is still stronger. *United States v. Burr*, 159 U. S. 78, 40 L. ed. 82, 15 Sup. Ct. Rep. 1002; *Osborn v. Nicholson*, 13 Wall. 654, 662, 20 L. ed. 689, 695; *United States v. American Sugar Ref. Co.* 202 U. S. 563, 577, 59 L. ed. 1149, 1152, 26 Sup. Ct. Rep. 717; 36 Cyc. 1205. There is nothing in the circular to indicate that it was intended to apply to injuries and deaths of soldiers which already had been inflicted, and it would have been a manifest hardship to take away the right of action from soldiers who, at the time of boarding the train and incurring the risk, had the statutory assurance of the protection of liability of the Director General for death or injuries due to the negligent operation of the train.

We think there can be no recovery for negligence in putting light wooden cars between heavy steel cars, in consequence of which the wooden cars were crushed by the derailment. The officers of the Army had entire control of the arrangement of the cars, and for their negligence in this respect there was no right of action against either of the defendants.

**War—liability
for injury due to
negligence of
Army officers.**

Reversed.

ANNOTATION.

Liability for death of, or injury to, soldier in service of government, by negligently constructed, maintained, or operated railroad.

Generally, as to Federal control of public utilities, see annotations in 4 A.L.R. 1680, 8 A.L.R. 969; 10 A.L.R.

956; and post, 1450, this volume. As to suit against railroad owned by, or in which interest is

held by, United States or state, see annotation in 8 A.L.R. 995.

There would seem to be, as is inferable from the decision in the reported case (*BRYSON v. HINES*, ante, 1438), no question that a soldier in service cannot recover from the Federal government for injuries resulting from its negligence in constructing, maintaining, or operating a railroad, apart from such permission as that granted in respect of the liability of the Director General of Railroads. On the other hand, however, it has been held that a private carrier cannot avoid liability for its negligence in operating a train on which a soldier in service is being transported.

Thus, in *Truex v. Erie R. Co.* (1870) 4 Lans. (N. Y.) 198, where a soldier posted as a guard on the platform of a car carrying prisoners of war was injured as the result of a collision, it was held that the common carrier which was transporting the prisoners and their guards, under orders from the War Department, could not avoid liability to the soldier guard on the theory that it was an agent of the government, the court saying: "The defendant was employed at the request of an officer of the government to furnish transportation for a certain number of passengers, in the same manner as if employed by an individual to convey him on its road; and a compliance with the request made did not exonerate it from the ordinary responsibility assumed in such a business. It was a common carrier, the same as it would be to any individual who chose to avail himself of its facilities for travel or transportation. It was liable for injuries to the plaintiff, the same as if he had traveled alone and without being associated with those who accompanied him upon the train. If it is claimed that the plaintiff and the defendant were in the employ of the government (which I think is not the actual state of the case), the plaintiff would not be precluded, for that reason, from a recovery; for the rule invoked applies only where the common employer is made a party to the suit, and not where one servant sues another." It was also

held in the *Truex* Case that the carrier could not avoid liability on the ground that there could be no recovery if the plaintiff was injured in consequence of being on the platform of the car by order of his superior officer, the court maintaining that the contract for the transportation of the prisoners of war contemplated that they should be properly guarded from escape, and that the carrier must have understood that guards would, of necessity, be posted on the platforms, so as to impose upon it a corresponding degree of care. Moreover, the court remarked that there was nothing in the case to show that the guard's location on the platform was the cause of or contributed to his injury. And in holding that there was no error in refusing to charge that the carrier was not bound to the same degree of care in carrying the plaintiff as it would have been in carrying him if he had paid his fare, Presiding Justice Miller, in delivering the opinion of the court, said that the plaintiff's fare was paid by the government, and "the defendant was equally liable as it would have been had plaintiff paid his own fare," and that "the defendant was under the same implied contract to carry the plaintiff, and under the same obligations, as to any other passenger who had personally paid his own fare."

And again, in *Galveston, H. & S. A. R. Co. v. Parsley* (1894) 6 Tex. Civ. App. 150, 25 S. W. 64, where a soldier riding on a special train, operated under a contract to furnish the government motive power and a train crew, was injured in a collision, it was held that his right of recovery from the railroad company was not affected by the fact that he was a soldier, or that at the time of the accident he was riding in the baggage car, as ordered by his commanding officer, the court saying: "The second assignment of error is that the court erred in refusing to allow appellant to prove that the train on which Parsley was killed was not a passenger train, but was a special train of United States soldiers that had been transferred to appellant's road at San Antonio from another railroad, and that appellant was trans-

porting said train under a special contract to furnish the government the motive power and crew to operate the train, and was in no wise responsible for the condition of said cars or their appliances; it having been shown that Richard Parsley was a soldier, and being transported by defendant under contract with the United States government. . . . Richard Parsley was lawfully on the train as a passenger, and was entitled to all the care which the law requires of the passenger carrier, and none of the antecedent circumstances or accidents of his situation could affect the right of his wife and children to recover damages for his death; and, independent of any contract, appellant was under obligation to transport deceased safely. *Hutchinson*, Carr. § 566. The fact that deceased was in the baggage car when killed, and that, the baggage car being nearest to the engine, he was in a more dangerous position than if he had been in the passenger coaches, cannot affect appellant's liability. This was his station, and he was obeying the commands of his officers in remaining in the baggage car. He was there, too, with the knowledge and consent of the employees who were in charge of the train, and, being a passenger, it was their duty to have warned him as to the danger of his position, and to have cautioned him against such imprudent conduct. *Id.* § 637. Even if the duty of warning him did not rest on the appellant, he was in the baggage car with the knowledge and consent of appellant, and was there because required by his duty to be there. To all intents and purposes he occupied the same position towards appellant that a mail agent does under a contract with the government."

And the reported case (*BRYSON v. HINES*, ante, 1438) is authority for the proposition that a corporation which contracts to and builds a railroad on a military reservation, and turns the same over to the government knowing that it is so poorly constructed as to be dangerous, and that it is to be used for the transportation of soldiers, is liable for injuries to soldiers resulting

from such poor construction, notwithstanding the government had accepted the road and was operating the train on which the soldiers were riding when injured. This decision, it will be remembered, was an application of the exception to the general rule denying, for lack of privity of contract, recovery against one who has furnished another with a defective instrumentality with which the latter injures the plaintiff, which exception permits recovery where the person furnishing the instrumentality knows its dangerous character. And it was further declared by the court that it could make no difference whether or not the injured soldiers knew of the dangerous nature of the track, since they had no right to refuse to travel over the same. Also that the negligence of the War Department in accepting the road did not relieve the builder from liability.

In *Walker v. Atlantic Coast Line R. Co.* (1920) 113 S. C. 448, 102 S. E. 513, it was held that Circular No. 4 of the Director General of Railroads appointed under the Federal Control Act of 1916, which in effect provided that Army officers and enlisted men injured or killed in railroad accidents must look to the War Risk Bureau, and cannot obtain any compensation through the Railroad Administration, applied only to soldiers actually traveling on trains under orders, or while engaged in actual military duty; and therefore that it did not apply to a soldier killed in a collision between an automobile in which he was riding on a private mission, and a train. *Watts, J.*, said: "Circular No. 4 was never intended to apply to a case such as the one at bar, but was intended to be effective where men in uniform were killed or injured while actually traveling on railroad trains under orders of government, or while engaged in actual military duty, such as being transported from one camp to another. It does not apply to any soldier, where he was traveling as a member of the general public. It is inconceivable that it should be attributed to the patriotic distinguished Director General that by his circular he intended such a glaring injustice

to a soldier not traveling actually in railroad trains under orders of the government, or while engaged in actual military duty. Such a decision would stigmatize the Director General as having made an arbitrary and unjust discrimination against a soldier, a man in uniform, as compared to a citizen. To relegate him to insurance which he carried and paid for would be a glaring and outrageous injustice, and neither the spirit nor word of the circulars, relied on as being issued by the Director General, warrants any such unjust and preposterous inference."

And in the reported case (*BRYSON v. HINES*) it was held that the United States Railroad Administration could not, by Circular No. 4, deplete any right of action which had accrued prior to the publication of such circular. In other words, that a vested right of action against a railroad company for the injuring or killing of a soldier could not be taken away by a govern-

ment circular, requiring such claims to be settled by the Bureau of War Risk Insurance.

In *Gainer v. Hines* (1920) 194 App. Div. 121, 184 N. Y. Supp. 768, an action against the Director General, brought by a soldier of the United States for injuries caused by falling from the open door of a box car in a troop train on which he was being transported, it was held that, so far at least as a motion to dismiss the complaint was concerned, the status of plaintiff and defendant could be regarded as that of passenger and common carrier respectively, since the President, perforce of the Act of Congress of August 29, 1916, assumed management and control of the transportation systems of the country, and the Federal Control Act of March 21, 1918, merely provided that carriers while under Federal control should be subject to all laws and liabilities of common carriers, except as inconsistent with the Enabling Acts. G. J. C.

COMMONWEALTH OF KENTUCKY, Appt.,
v.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Kentucky Court of Appeals — October 15, 1920.

(189 Ky. 309, 224 S. W. 847.)

Railroad — Federal control — violation of state statute — indictment.

A railroad under Federal control is not subject to indictment for violation of a state statute relating to the maintenance of waiting rooms, where the violation occurred during the continuance of such control.

[See note on this question beginning on page 1450.]

APPEAL by the Commonwealth from a judgment of the Circuit Court for Ohio County sustaining a demurrer to an indictment charging defendant with violating a state statute relating to the maintenance of waiting rooms. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. Charles I. Dawson, Attorney General, T. B. McGregor, Assistant Attorney General, and C. E. Smith, for the Commonwealth:

The indictment is not duplicitous, and the court erred in requiring an election.

Illinois C. R. Co. v. Com. 179 Ky.

28, 200 S. W. 17; Louisville & N. R. Co. v. Com. 144 Ky. 525, 139 S. W. 756; Illinois C. R. Co. v. Com. 28 Ky. L. Rep. 802, 90 S. W. 602; Illinois C. R. Co. v. Com. 21 Ky. L. Rep. 569, 52 S. W. 818.

The statute under which the indictment is drawn was enacted in the ex-

ercise of police powers of the state, and the Federal Control Act of March 21, 1918, specifically excludes from its operation all penal laws enacted in the exercise of police power.

Com. v. Payne Medicine Co. 138 Ky. 167, 127 S. W. 760; *Com. v. Reinecke Coal Min. Co.* 117 Ky. 894, 79 S. W. 287; *Com. v. Smith*, 163 Ky. 227, L.R.A.1915D, 172, 173 S. W. 340; *Nash v. Southern P. Co.* 260 Fed. 280; *Federal Control Act*, § 15.

Messrs. Benjamin D. Warfield and Thomas E. Sandidge, for appellee:

Defendant, the owner of the railroad, cannot be made liable, either criminally or civilly, for the misdemeanors or negligence of the Director General of Railroads, his agents and servants, during Federal control, and the demurrer was properly sustained on that ground.

State v. Julow, 129 Mo. 163, 29 L.R.A. 257, 50 Am. St. Rep. 443, 31 S. W. 781; *Adair v. United States*, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764; *Citizens' Sav. & L. Asso. v. Topeka*, 20 Wall. 655, 22 L. ed. 455; *Mitchell v. Cumberland Teleph. & Teleg. Co.* 188 Ky. 263, 10 A.L.R. 946, 221 S. W. 547; *Dakota Cent. Teleph. Co. v. South Dakota*, 250 U. S. 163, 63 L. ed. 910, 4 A.L.R. 1623, P.U.R.1919D, 717, 39 Sup. Ct. Rep. 507; *Northern P. R. Co. v. North Dakota*, 250 U. S. 135, 63 L. ed. 897, P.U.R.1919D, 705, 39 Sup. Ct. Rep. 502; *Mardis v. Hines*, 258 Fed. 945; *Nash v. Southern P. Co.* 260 Fed. 280; *Haubert v. Baltimore & O. R. Co.* 259 Fed. 361.

Section 772, Kentucky Statutes, shows on its face that it does not apply to defendant as to anything that occurred in the operation of the railroad during Federal control.

Southern Cotton Oil Co. v. Atlantic Coast Line R. Co. 257 Fed. 138.

The trial court correctly ruled that the indictment was bad for duplicity.

Ellis v. Com. 78 Ky. 130; *Messer v. Com.* 26 Ky. L. Rep. 40, 80 S. W. 489; *Com. v. Bradley*, 132 Ky. 512, 116 S. W. 761; *Louisville & N. R. Co. v. Com.* 137 Ky. 802, 127 S. W. 152.

Quin, J., delivered the opinion of the court:

Is a railroad company whose property is under Federal control, and while so operated, subject to indictment for an alleged violation of the Kentucky statutes relating to the

maintenance of waiting rooms? This, the question for our decision, must be answered in the negative.

The present appeal is from a judgment sustaining a demurrer to an indictment charging appellee with the violation of § 772, Kentucky Statutes, in regard to the proper maintenance of a convenient and suitable waiting room at its depot in Centertown, Kentucky. The demurrer was sustained:

(1) Because the indictment was bad for duplicity, in that it charged offenses under §§ 772 and 784 of the Statutes. This defense, however, has been disposed of by the decision in *Illinois C. R. Co. v. Com.* 179 Ky. 28, 200 S. W. 17, where an objection to an indictment couched in practically the identical language as the one under consideration was held to be without merit.

(2) Because at the time of the alleged acts charged in the indictment appellee was not operating its line of railroad, same having passed under Federal control at a date prior to the commission of the acts complained of.

Pursuant to the power invested in him by Congress in certain resolutions and statutes passed in August, 1916, the President on December 26, 1917, proclaimed that on December 28, 1917, he would take possession and assume control of each and every system of transportation in the United States. This included all equipment and appurtenances used in the operation of the lines. Effective on said last-named date, the railroads of this country passed into the possession and under the control and operation of the Director General of Railroads, who was appointed by the proclamation aforesaid. On March 21, 1918, Congress passed what is commonly known as the Federal Control Act (Comp. Stat. §§ 3115½a-3115½p, Fed. Stat. Anno. Supp. 1918, pp. 757-766), which, among other things, authorized the President to agree upon a just compensation with the owners of railroads while the roads were under Federal control.

It is conceded by the commonwealth that, if the court's decision on this second proposition is a correct exposition of the law, the indictment is not good, and cannot be made so. But it is contended that the acts of Congress do not apply to violations of the penal laws. The Director General of Railroads on October 28 promulgated what is known as General Order No. 50, providing in part as follows: "It is therefore ordered, that actions at law, suits in equity, and proceedings in admiralty hereafter brought in any court based on contract, binding upon the Director General of Railroads, claim for death or injury to person, or for loss and damage to property, arising since December 31, 1917, and growing out of the possession, use, control, or operation of any railroad system of transportation by the Director General of Railroads, which action, suit or proceeding but for Federal control might have been brought against the carrier company, shall be brought against William G. McAdoo, Director General of Railroads, and not otherwise: Provided however, that this order shall not apply to actions, suits, or proceedings for the recovery of fines, penalties, and forfeitures."

The constitutionality of this order has been attacked in a number of cases, and different courts have expressed contrary views in regard thereto, but we do not find it necessary in the present case to pass upon this question.

In § 10 of the Act of March 21, 1918 (40 Stat. at L. 456, chap. 25, Comp. Stat. § 3115½j, Fed. Stat. Anno. Supp. 1918, p. 762), it is provided in part as follows: "Carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may

be brought by and against such carriers and judgments rendered as now provided by law."

Section 12 of the act (Comp. Stat. § 3115½l), among other things, provides that "moneys and other property derived from the operation of the carriers during Federal control are hereby declared to be the property of the United States."

In *Northern P. R. Co. v. North Dakota*, 250 U. S. 135, 63 L. ed. 897, P.U.R.1919D, 705, 39 Sup. Ct. Rep. 502, it was held that under the Federal Control Act the railroads were in the full possession and control of the Federal government, and through the President and the Interstate Commerce Commission that government was empowered to fix rates on intrastate traffic, superseding the state power over that subject, and that the Federal Control Act was conclusive and complete as to the government ownership and control of the railroads and the operation thereof. As said by the Supreme Court in the case *supra*, the act contemplated one control, one administration, one power for the accomplishment of the one purpose, the complete possession by governmental authority to replace for the period provided the private ownership theretofore existing.

A similar conclusion as to the effect of governmental control has been reached in many suits for personal injuries; among others, the following: *Rutherford v. Union P. R. Co.* (D. C.) 254 Fed. 880; *Dahn v. McAdoo* (D. C.) 256 Fed. 549; *Mardis v. Hines* (D. C.) 258 Fed. 945; *Nash v. Southern P. Co.* (D. C.) 260 Fed. 280; *Erie R. Co. v. Caldwell*, — C. C. A. —, 264 Fed. 949; *Blevins v. Hines* (D. C.) 264 Fed. 1005; *Castle v. Southern R. Co.* 112 S. C. 407, 8 A.L.R. 959, 99 S. E. 846. In this same connection, see *McGregor v. Great Northern R. Co.* — N. D. —, 4 A.L.R. 1635, 172 N. W. 841, and especially the annotation in 4 A.L.R. 1635, 1680.

In *Mobile & O. R. Co. v. Jobe*, — Miss. —, 84 So. 910, the court holds

that General Order No. 50 is in conflict with the Federal Control Act, and the latter must prevail. However, the validity or invalidity of said order is not involved here, since in neither event could appellee be indicted for an offense that was not and in the nature of things could not have been, committed by it, as the government, and not appellee, was operating the railroad at the time. Furthermore, said decision is not in harmony with the views expressed by this court in *Mitchell v. Cumberland Teleph. & Teleg. Co.* 188 Ky. 263, 10 A.L.R. 946, 221 S. W. 547. There appellant was denied the right to maintain an action against the telephone company, because Congress, in the resolutions under which the telephone lines were passed to the control of the Postmaster General, failed to provide a means by which said suit could be maintained. We take the following excerpt from the opinion of the court: "As said in the cases *supra*, if suits of this kind could be maintained under the circumstances, then indeed could property be taken without any process of law, since the only pretended claim to it would be that the defendant owned the property which was being operated at the time of the happening of the injury sued for, although it was then entirely out of his control and was taken without his consent. The fact that the plaintiff might be remediless because there is no provision for any suit against the United States (although regrettable) cannot strengthen his case."

We are clearly of the opinion that appellee cannot be held under the indictment because the acts charged

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arose out of transactions over which it had nothing whatsoever to do, and over which it had no

control. In this connection it is well to call attention to the fact that § 772 of the Kentucky Statutes is directed to the one operating a railroad, and it is not, and cannot be, maintained that, at the time of the

acts complained of in the present proceeding, appellee had any management or control whatsoever over the operation of its railroad, nor of any of its depots or other equipment or appurtenances incident to or necessary in the operation of same.

The reference in § 10 of the Federal Control Act, *supra*, "to such carriers," is to the carrier while under Federal control, because, as said in *Rutherford v. Union P. R. Co.* *supra*: "It would have been an anomaly to have given the actual control of the railroads to the Director General, and to have provided that suits arising out of his acts should be brought against the corporations who had been divested of authority over those acts."

This is made plain by this further provision of § 10: "And in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal government."

It necessarily means that the carrier who is subject to suit is the agent of the government who is operating the railroad, since the corporation or persons who had lost or surrendered control or possession of the railroad would have no occasion to assert the defense that they were instrumentalities or agents of the government as to acts which occurred after their control had terminated. The language of § 10, *supra*, created liability on the part of the United States for every act and omission for which liability had formerly attached to the owners in their position as common carriers.

"The power of control," says the court in *Brady v. Chicago & G. W. R. Co.* 57 L.R.A. 712, 52 C. C. A. 55, 114 Fed. 100, 11 Am. Neg. Rep. 546, "is the test of liability, under the maxim 'respondeat superior.' If the master cannot command the alleged servant, then the acts of the latter are not his, and he is not responsible for them. If the principal cannot control and direct the alleged agent, then he is not his agent, and the principal is not liable for his acts

or his omissions. In such case the maxim 'respondeat superior' has no application, because there is no superior to respond. In an action against the alleged master or principal for the act of his alleged servant or agent under the maxim 'respondeat superior,' there can be no recovery in the absence of the right and power in the former to command or direct the latter in the performance of the act charged, because in such a case there is no superior to answer."

From and after the taking of possession of the railroads by the President, the corporations or persons who had previously controlled them ceased the functions and obligations as carriers; the carriage was thereafter conducted by the Director General. Though retaining their positions and details of operation, the

acts of the former officials and employees were the acts not of the railroads, but of the Director General. The persons who had been officers and employees of the owning companies ceased in general to be such, and became agents and employees of the Director General. Service of process upon them no longer bound their former employers.

Since, therefore, appellee was not operating its line of railroad at the time referred to in the indictment, and had no control of management in its operation, the exclusive and complete control thereof having been taken over by the Federal government, it could not be held liable for an alleged violation of the statutes referred to, and the court properly sustained the demurrer to the indictment.

The judgment is affirmed.

ANNOTATION.

Federal control of public utilities.

- I. Introductory, 1450.
- II. Validity and construction of measures for Federal control:
 - a. Acts of Congress:
 - 1. Federal Control Act, 1451.
 - 2. Transportation Act:
 - (a) Substitution of presidential agent in pending cases, 1451.
 - (b) Rates and fares, 1452.
 - b. Orders of Director General of Railroads:
 - 1. Orders Nos. 18 and 18a, 1453.
 - 2. Orders Nos. 50 and 50a, 1453.
- III. Extent of Federal control and liability:

I. Introductory.

This note, discussing the Federal control of public utilities, is supplementary to those in 4 A.L.R. 1680; 8 A.L.R. 969; and 10 A.L.R. 956. Not only have many cases accumulated since the writing of the original note, but the litigation on the subject has passed through several phases, and

III.—continued.

- a. Right of action by or against Director General, 1453.
- b. Judgment against carrier, 1453.
- c. Effect on status of carrier as employer, 1453.
- d. Effect of state or Federal statute, 1454.
- e. Liability of Director General for injury to soldier, 1454.
- IV. Jurisdiction of action by or against public utility, 1455.
- V. Service of process, 1455.
- VI. Effect of return of public utility to private ownership, 1455.
- VII. Index to points covered in A.L.R. annotation on "Federal control of public utilities," 1455.

questions but little considered at the outset have come into prominence with the progress of events and the enactment of supplementary legislation. In view of this circumstance, it has seemed advisable to append to the present note an alphabetical index of matters covered by all these annotations.

II. *Validity and construction of measures for Federal control.*

a. *Acts of Congress.*

1. *Federal Control Act.*

The validity of the Federal Control Act (Act March 21, 1918, Fed. Stat. Anno. Supp. 1918, p. 757) was upheld in *Public Service Commission v. New York C. R. Co.* (1920) 230 N. Y. 129, 129 N. E. 455, as a legitimate exercise of the war power. See also the cases cited in subdivision II. a, of the earlier notes of this series.

2. *Transportation Act.*

(a) *Substitution of presidential agent in pending cases.*

In *Hines v. Collins* (1921) — Tex. Civ. App. —, 227 S. W. 332, the court did not pass directly on the necessity of serving process anew, in pending cases, on the agent appointed under the Act of February 28, 1920, but said: "The further question then arises as to whether, since the titular defendant would be the same before and after the substitution, it would be necessary to go through the form of substitution, including the service of process on such defendant. We confess that we have not arrived at a conclusion as to this question entirely satisfactory to ourselves. On the one hand, it appears reasonable to conclude that it was probably the purpose of the President, in appointing said Walker D. Hines as agent to conduct such litigation, to provide for the continuance of the suits then pending without a break, it being perhaps contemplated that the said agent would use the same agencies as he had theretofore employed in the defense of such litigation, and proceed with the same without delay. On the other hand, a substitution of parties ordinarily requires a service of process on the party substituted, in case he does not voluntarily appear. *White v. Johnson*, 50 Am. St. Rep. 741, note. It is also true that, where the same person is sued in a different capacity, service upon him in his new capacity is required before the suit may proceed. *Henderson v. Kissam* (1852) 8 Tex. 46; 20 Enc. Pl. & Pr. 967. We may assume

that the Director General had no personal knowledge as to the many suits that were pending at the time of the termination of Federal control, and that upon his appointment as agent to conduct this litigation he could have employed different agents than those who had been theretofore representing him in his other capacity; and it may be that, in the absence of the voluntary appearance by his duly constituted agents acting for him in his new capacity, he had the right to rely upon formal substitution being made, and service had in the regular way upon such agents as he might appoint to represent him, in accordance with the provisions of § 206 of the act. We reverse the case on other grounds, but suggest that it would be the safest policy, under the circumstances, to require a formal substitution of the present agent representing the government in the conduct of this litigation." See also, on this point, the following cases, cited in an earlier note in this series: *Keene v. Hines* (1920) 111 Misc. 399, 183 N. Y. Supp. 520; *Goldstein v. Hines* (1920) 183 N. Y. Supp. 518, set forth in 10 A.L.R. 959, 960.

In *Gunlach v. Chicago & N. W. R. Co.* (1920) — Wis. —, 179 N. W. 985, wherein judgment had been entered against both the carrier and the Director General, the court, in substituting the agent designated by the President under the Transportation Act, said: "The recovery in this case was for injuries the plaintiff suffered while the railway company was under Federal control, under the act of Congress providing for the operation of transportation systems, and hence the judgment claim is one to be settled and paid pursuant to the provisions of the Transportation Act of 1920. The plaintiff insists that any right he has against the defendant railway company for satisfaction and payment of this judgment shall be preserved to him. We do not regard that this motion necessarily demands determination of his rights in this respect, and therefore decline to pass judgment on his right of satisfaction of this judgment against the Chicago & Northwestern Railway Company. It is

manifest that the judgment is a proper claim to be paid and settled out of the funds appropriated under the provisions of the Transportation Act of 1920. It therefore seems appropriate that 'John Barton Payne, agent for the United States Railroad Administration,' be substituted as the defendant in place of the above-named defendants and respondents, and that the mandate heretofore entered in this court be amended."

Where suit is brought against the railroad company without joining the Director General, and at the time a demurrer comes on for hearing the railroad has been turned back to private ownership, the agent appointed under the Transportation Act may be added as a party by amendment. *Payne v. Hayes* (1920) — Ga. App. —, 104 S. E. 917.

Judgment in an action for personal injuries inflicted during Federal control should be against the agent appointed under the Act of February 28, 1920, and not against the railroad company. *Panhandle & S. F. R. Co. v. Haywood* (1920) — Tex. Civ. App. —, 227 S. W. 347.

See also, in connection with the foregoing decision, cases set forth in subdivision III. b, *infra*.

(b) *Rates and fares.*

The Transportation Act (§ 208a) provides in effect that all rates, fares, and charges in effect at the time of its passage shall continue in effect "until thereafter changed by state or Federal authority respectively, or pursuant to authority of law;" but that no reduction shall be made prior to September 1, 1920. It has been held that the fixing of rates by the Federal authorities was justified as an exercise of the war power, and on the cessation of the necessity from which the power arose, and the return of the railroads to private ownership, it was lawful to provide that the rates so fixed should continue until changed by state or Federal authority, and should in no event be reduced until the expiration of six months. *Public Service Commission v. New York C. R. Co.* (1920) 230 N. Y. 149, 129 N. E. 455, modifying

(1920) 193 App. Div. 615, 185 N. Y. Supp. 267, and reversing (1920) 112 Misc. 617, 183 N. Y. Supp. 799, set out in 10 A.L.R. 960, wherein the court said: "Obviously, the purpose of this clause, so far as the states were concerned, was to maintain fares until September 1st and thereafter, until, in view of possible new conditions, affirmative action was taken by the state authorities. The thought was that in many instances local rates had been fixed by local commissions with a view to costs and earnings as they existed prior to 1917. Let them act if they desired to restore the old rates. It is equally obvious when such action was taken is immaterial, if the actual reduction did not take effect until September 1st. In a case like that of the defendant, where the rate is a condition of the charter, or in a case where the rate is fixed by statute, there would seem to be less purpose in such a provision. Possibly it seemed wise in all cases to give the roads formal warning of reversion to the old state of affairs, and an opportunity to make and file the necessary tariff schedules. In any event, Congress made no exception to the general rule." It was further held in that case that the order of a public service commission, reducing rates after the expiration of the six months' period, was none the less valid because it was a mere restoration of the rate obtaining before Federal control, and was made under laws previously existing. See to the same effect, *New York C. R. Co. v. Public Service Commission* (1920) 268 Fed. 559.

On the other hand, it was held in *Texas Teleph. Co. v. Mart* (1920) — Tex. Civ. App. —, 226 S. W. 497, that the proviso in the act for the return of telephone lines to private ownership that the rates fixed by the Postmaster General should continue in force for four months, unless sooner modified by local authorities, kept the rates so fixed in force for that period, though they were higher than previously established franchise rates.

As to the power of the Director General to fix rates and fares, see sub-

division III. of the earlier notes of this series.

b. Orders of Director General of Railroads.

1. Orders Nos. 18 and 18a.

(Supplementing subdivision II. d, 1, in the annotations in 4 A.L.R. 1689, and 8 A.L.R. 971, and subdivision II. c, 1, in the annotation in 10 A.L.R. 963.)

In two jurisdictions General Orders Nos. 18 and 18a of the Director General, relating to the venue of suits, have been held in recent cases to be invalid. *Hill v. Seaboard Air Line R. Co.* (1920) — N. C. —, 105 S. E. 19; *Pullman Co. v. Uribe* (1920) — Tex. Civ. App. —, 225 S. W. 189; *St. Louis Southwestern R. Co. v. Turner* (1920) — Tex. Civ. App. —, 225 S. W. 383.

In *Hines v. Avant* (1920) — Tex. Civ. App. —, 226 S. W. 821, without discussing the validity of the order, it was said that under General Order 18a suit against the Director General, not joining the railroad company, could be brought in the county of the plaintiff's residence, though the railroad company had no agent there.

2. Orders Nos. 50 and 50a.

(Supplementing subdivision II. d, 3, in 4 A.L.R., at page 1695; subdivision II. d, 3, in 8 A.L.R., at page 973; and subdivision II. c, 2, in 10 A.L.R., at page 964.

In this connection subdivision V. of the annotation in 4 A.L.R., at page 1710, and subdivision IV. of the annotation in 8 A.L.R., at page 983, should also be consulted.

In one jurisdiction it has been held recently that General Orders Nos. 50 and 50a of the Director General, requiring suits to be brought against him, are invalid, and in that jurisdiction the carrier may be joined. *Hines v. Mauldin* (1920) — Ark. —, 225 S. W. 639; *Kansas City Southern R. Co. v. Rogers* (1920) — Ark. —, 225 S. W. 640.

So, in North Carolina, it has been held not to be necessary to make the Director General a party formally. Suit against the carrier imposes on him the duty to defend. *Lanier v.*

Pullman Co. (1920) — N. C. —, 105 S. E. 21.

Where the validity of the orders under consideration is recognized, the railroad company need not be joined in an action arising under Federal control. *Hines v. Parry* (1920) — Tex. Civ. App. —, 227 S. W. 339.

But the joinder of the company is an immaterial error. *Hines v. Collins* (1920) — Tex. Civ. App. —, 227 S. W. 332.

III. Extent of Federal control and liability.

(Supplementing subdivision III. of the annotation in 4 A.L.R. at page 1702, in 8 A.L.R., at page 978, and 10 A.L.R., at page 969.)

a. Right of action by or against Director General.

The liability of the relief department of a railroad under Federal control may be prosecuted to judgment against the Director General. *Rose v. Hines* (1920) — Ga. App. —, 104 S. E. 784.

During the period of Federal control an action for freight was properly brought in the name of the Director General. *Clemons v. Payne* (1921) — Ga. App. —, 105 S. E. 623.

b. Judgment against carrier.

See also, in this connection, *Panhandle & S. F. R. Co. v. Haywood* (1921) — Tex. Civ. App. —, 227 S. W. 347, set forth in subdivision II. a, 2 (a), *supra*.

A judgment may be entered against the carrier for an injury occurring during Federal control, the only inhibition of the statute being against a levy on the carrier's property. *Hines v. Patterson* (1920) — Ark. —, 225 S. W. 642.

A provision in a judgment against the Director General that execution thereon may issue against the property of the carrier when it is returned to private ownership is without force, and does not constitute prejudicial error. *Hines v. Robey* (1920) — Tex. Civ. App. —, 225 S. W. 201.

c. Effect on status of carrier as employer.

Federal control did not deprive the

carrier of its status as the employer of the workmen on the railroad, so as to exempt it from liability for a personal injury. *Hite v. St. Joseph & G. I. R. Co.* (1920) — Mo. —, 225 S. W. 916.

Compare *Houston & T. C. R. Co. v. Long* (1920) — Tex. Civ. App. —, 219 S. W. 212, set out in 8 A.L.R., at page 981; *Fish v. Rutland R. Co.* (1919) 189 App. Div. 352, 178 N. Y. Supp. 439; and *Bryant v. Pullman Co.* (1919) 188 App. Div. 311, 177 N. Y. Supp. 488, affirmed without opinion in (1920) 228 N. Y. 579, 127 N. E. 909, set out in 8 A.L.R., at page 985.

d. Effect of state or Federal statute.

The regulatory powers of the states over intrastate traffic were suspended during Federal control. *Public Service Commission v. New York C. R. Co.* (1920) 230 N. Y. 149, — A.L.R. —, 129 N. E. 455.

The Director General is liable to a penalty imposed by a state statute on the killing of animals by a railroad. *Kansas City Southern R. C. v. Rogers* (1920) — Ark. —, 225 S. W. 640.

See to the same effect, *Hines v. Easterly* (1920) — Tex. Civ. App. —, 224 S. W. 943, set out in 10 A.L.R. at page 972.

Federal control did not supersede the Hours of Service Act (8 Fed. Stat. Anno. 2d ed. 1383). *United States v. Geer* (1920) 268 Fed. 385, wherein it was said: "Keeping in view the purpose, and only purpose, of the legislation, it would be very anomalous if the existing acts of Congress, such as the Safety Appliance Acts, the Hours of Service Acts, and others passed solely for the purpose of protecting the public, should be held to be suspended or repealed, and that the nation could not thus exercise the extraordinary powers of government for national preservation without temporarily invalidating the existing legislation passed for the protection of the traveling public."

The Director General was within the Workmen's Compensation Act of a state as the employer of the workmen in a railroad shop, unless he elected not to operate under its provisions.

Gimple v. Hines (1920) 108 Kan. 118, 193 Pac. 1072, wherein the court said: "During his stewardship the Director General had full, free, and independent control of the Union Pacific Railroad. He changed, as seemed best to him, the policies, dealings, and relations with the railroad company's patrons and with its employees. There can be no doubt the Director General had the power to say whether he would operate the Union Pacific Railroad property in Kansas under the provision of the Kansas Compensation Act, with its limited and modest, but certain, allowances of compensation to his injured workmen, or whether he would take his chances under the old law, with its possibly larger judgment liabilities, but also with its often successfully invoked defenses of contributory negligence and assumption of risk. We say the Director General had power to choose; moreover, he was bound to choose. He was bound to conform to the state law. That law placed him under the Compensation Act, unless he chose to operate the railroad property outside its provisions."

As to the liability of a carrier under Federal control, under a statute relating to depot waiting rooms, see the reported case (*COM. v. LOUISVILLE & N. R. Co.* ante, 1446).

e. Liability of Director General for injury to soldier.

Carriers, while under Federal control, being subject to all the liabilities of common carriers except as otherwise provided in the Federal Control Act, soldiers transported in box cars have the status of passengers. *Gainer v. Hines* (1920) 194 App. Div. 21, 184 N. Y. Supp. 768.

Whatever might have been the effect in the future of the circular of October 25, 1918, issued by the Director General, calling attention to the War Risk Insurance Act and disclaiming any liability for injury to persons in the military service, it did not affect a liability which accrued before the circular was issued. *Bryson v. Hines* (1920) — A.L.R. —, 268 Fed. 290.

IV. Jurisdiction of action by or against public utility.

(Supplementing annotations in 4 A.L.R., at page 1714, in 8 A.L.R., at page 987, and in 10 A.L.R., at page 974.)

Suits may be brought for injuries occurring during Federal control, and the injured person is not relegated to the court of claims. *Chambers v. Hines* (1920) — Tex. Civ. App. —, 225 S. W. 200.

As to whether a railroad under Federal control may or must be joined in an action against the Director General, see *supra*, subdivision II. d, 2, "General Orders 50 and 50a," in this note, and the corresponding subdivision in each of the earlier notes of this series.

V. Service of process.

(Supplementing annotations in 4 A.L.R., at page 1715, in 8 A.L.R., at page 987, and in 10 A.L.R., at page 975.)

Service on an agent of the carrier was sufficient to give jurisdiction over the Director General. *Lanier v. Pullman Co.* (1920) — N. C. —, 105 S. E. 21.

As to the service of process on the agent appointed by the President under the Transportation Act, as a substitute for the Director General in a pending action, see *supra* this note, subdivision II. a, 2 (a).

VI. Effect of return of public utility to private ownership.

(Supplementing annotations in 8 A.L.R., at page 990, and in 10 A.L.R., at page 976.)

For decisions arising under the Transportation Act, see II. a, 2, *supra*, in the present note.

A telegraph company, by receiving back its property, did not impliedly assume liabilities arising during the period of Federal control. *Western U. Teleg. Co. v. Robinson* (1920) — Tex. Civ. App. —, 225 S. W. 877.

VII. Index to points covered in A.L.R. annotations on "Federal control of public utilities."**Action.**

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Right of, against public utility during Federal control, 4 A.L.R. 1710-1714.

Against carrier companies during Federal control, 4 A.L.R. 1695-1701; 8 A.L.R. 973-978; 10 A.L.R. 964-968.

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Suit against public utility under Federal control as a suit against the United States, 4 A.L.R. 1713, 1714; 10 A.L.R. 967.

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See Hours of Service Act.

Act of August 29, 1916.

Validity, 4 A.L.R. 1680.

Does not make government liable for claim against railroad accruing prior to Federal control, 10 A.L.R. 967.

Act of March 21, 1918.

See Federal Control Act.

Act of July 11, 1919.

Restoration of telegraph and telephone lines to private ownership, 11 A.L.R. 1452.

Act of February 28, 1920.

See Transportation Act.

Adjustment Board.

Effect of Transportation Act on powers of, 10 A.L.R. 960.

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Proceeding in, against public utility while under Federal control, 10 A.L.R. 956, 957.

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Of vessel under Federal control, 10 A.L.R. 957.

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Liability of Director General under state statute permitting recovery of, 8 A.L.R. 978; 10 A.L.R. 972.

Automobiles.

Liability of telephone company for negligent operation of motor truck during Federal control, 10 A.L.R. 962, 963.

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Limitation by Director General of liability for, 10 A.L.R. 974.

Bribery.

Of railway porter as violation of Federal Criminal Code, § 39, 8 A.L.R. 983.

Bridge.

Mandamus to compel railroad under Federal control to repair overhead crossing, 4 A.L.R. 1719.

Cables.

Validity of Joint Resolution authorizing taking over of, 4 A.L.R. 1684, 1685.

Of assumption of control by Proclamation of November 2, 1918, 4 A.L.R. 1687-1689.

Carriers.

Liability to suit during Federal control, see Express Company; Telegraph Company; Telephone Company; Railroad Company.

Relation to government during Federal control, 4 A.L.R. 1681-1684, 1702-1704; 8 A.L.R. 978-983; 10 A.L.R. 969-974.

Cars.

Liability for delay in furnishing, 10 A.L.R. 974.

Claim.

Liability of Director General to statutory penalty for failure to pay, 10 A.L.R. 965.

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W. A. S.

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Heavy italic type is used for annotations; roman type for cases.

